

Resolutions with Reports to the House of Delegates



AMERICAN **BAR** ASSOCIATION™

2022 ANNUAL MEETING • August 8-9, 2022

American Bar Association
321 North Clark Street
Chicago, IL 60654-7598
312/988-5000
<http://www.americanbar.org>

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



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2022 ANNUAL MEETING • AUGUST 8-9, 2022

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RESOLUTIONS WITH REPORTS TO THE HOUSE OF DELEGATES

ANNUAL MEETING

AUGUST 8-9, 2022

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Resolutions with Reports numbered 10A and 10B, 300 through 803, can be found in this book. Proposals to amend the Association's Constitution, Bylaws and House Rules of Procedure are numbered 11-1 through 11-4 and can be found in this book. Any additional Resolutions with Reports submitted by state or local bar associations will be numbered in the "400" series. Late Resolutions with Reports will be numbered in the "800" series. These reports will be posted to the House of Delegates webpage prior to 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/2022-annual-meeting/ (click on *Informational Reports*).

*The Treasurer's Report will be sent electronically prior to the opening session of the House of Delegates meeting.

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

ANNUAL MEETING

AUGUST 8-9, 2022**

All sessions of the House of Delegates meeting will be held on Monday, August 8 and Tuesday, August 9, 2022. The first session of the House meeting will begin at 9:00 a.m. CDT on Monday morning and adjourn at 12:00 p.m. CDT. The second session will take place on Monday afternoon from 2:00 p.m. until 5:00 p.m. CDT. On Tuesday morning, the meeting will reconvene at 9:00 a.m. CDT and will adjourn no later than 1:00 p.m. CDT, or when the House has completed its agenda.

The Final Calendar of the House of Delegates meeting will be posted on the ABA's website no later than Sunday evening, August 7. Sections, committees, delegates, affiliated organizations and bar associations, which have submitted Resolutions with Reports, oral information or late reports authorized by the Committee on Rules and Calendar, will be calendared.

The index, which appears at the end of this book, will assist House members in locating reports received by the May 4 filing deadline. Resolutions with Reports numbered 10A and 10B, 300 through 803 appear in this book. Proposals to amend the Association's Constitution, Bylaws and House Rules of Procedure are numbered 11-1 through 11-4 and also appear in this book. Informational Reports can be found on the ABA's website at https://www.americanbar.org/groups/leadership/house_of_delegates/2022-annual-meeting/ (click on *Informational Reports*).

Any late Resolutions with Reports, those received after May 4, 2022, will be considered by the House if the Committee on Rules and Calendar recommends a waiver of the time requirement and the resolution is approved by a two-thirds vote of the delegates voting. Late Resolutions with Reports will be posted to the House webpage prior to the opening session of the House, along with any additional Resolutions with Reports submitted by state or local bar associations.

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

**The Chair of the House of Delegates,
Barbara J. Howard, Presiding**

1. Report of the Committee on Credentials and Admissions
Hon. Lee Smalley Edmon, California
Approval of the Roster
2. Report of the Committee on Rules and Calendar
Sharon Stern Gerstman, New York
Approval of the Final Calendar
3. Report of the Secretary
Pauline A. Weaver, California
Approval of the Summary of Action
4. Statement by the Chair of the House of Delegates
Barbara J. Howard, Ohio
5. Statement by the President
Reginald M. Turner, Jr., Michigan
6. Statement by the Treasurer
Kevin L. Shepherd, Maryland
7. Statement by the Executive Director
Jack L. Rives, Illinois
8. Presentation of Resolutions with Reports which any State or Local Bar Association Wishes to Bring Before the House of Delegates
9. Presentation of Proposals to Amend the Association's Constitution and Bylaws
11-1 through 11-4
10. Presentation of Resolutions with Reports of Sections, Committees and Other Entities
300-700 Resolutions with Reports on Archiving
800 Resolutions with Reports
Late Resolutions with Reports

ADJOURNMENT

AMERICAN BAR ASSOCIATION
2021-2022
BOARD OF GOVERNORS

OFFICERS

President	Reginald M. Turner, Jr., Detroit, MI
President-Elect	Deborah Enix-Ross, New York, NY
Chair, House of Delegates	Barbara J. Howard, Cincinnati, OH
Secretary	Pauline A. Weaver, Fremont, CA
Treasurer	Kevin L. Shepherd, Baltimore, MD
Immediate Past President	Patricia Lee Refo, Phoenix, AZ
Executive Director	Jack L. Rives, Chicago, IL

BOARD OF GOVERNORS

President		Reginald M. Turner, Jr., Detroit, MI
President-Elect		Deborah Enix-Ross, New York, NY
Chair, House of Delegates		Barbara J. Howard, Cincinnati, OH
Secretary		Pauline A. Weaver, Fremont, CA
Treasurer		Kevin L. Shepherd, Baltimore, MD
Immediate Past President		Patricia Lee Refo, Phoenix, AZ
First District	2023	Russell F. Hilliard, Concord, NH
Second District	2023	Mary K. Ryan, Boston, MA
Third District	2024	Thomas G. Wilkinson, Jr., Philadelphia, PA
Fourth District	2023	John C. Cruden, Washington, DC
Fifth District	2025	Jennifer M. "Ginger" Busby, Birmingham, AL
Sixth District	2023	Hon. Pamila J. Brown, Ellicott City, MD
Seventh District	2024	William K. Weisenberg, Westerville, OH
Eighth District	2022	Laura Bellegie Sharp, Austin, TX
Ninth District	2024	Grant C. Killoran, Milwaukee, WI
Tenth District	2022	Patrick Goetzinger, Rapid City, SD
Eleventh District	2022	Beverly J. Quail, Denver, CO
Twelfth District	2023	Linda S. Parks, Wichita, KS
Thirteenth District	2022	Charles John Vigil, Albuquerque, NM
Fourteenth District	2024	Elizabeth Kelly Meyers, Irvine, CA
Fifteenth District	2024	Seymour W. James, Jr., New York, NY
Sixteenth District	2024	Hon. John Preston Bailey, Wheeling, WV
Seventeenth District	2022	Hon. Michael J. Oths, Boise, ID
Eighteenth District	2022	Christine H. Hickey, Indianapolis, IN
Nineteenth District	2023	Andrew M. Schpak, Portland, OR

Goal III LGBT Member-at-Large	2022	James J.S. Holmes, Los Angeles, CA
Goal III Minority Members-at-Large	2024	Amy Lin Meyerson, Weston, CT
	2023	Marvin S C Dang, Honolulu, HI
Goal III Women Members-at-Large	2022	Lynn M. Allingham, Anchorage, AK
	2023	Vickie Yates Brown Glisson, Louisville, KY
Judicial Member-at-Large	2024	Hon. James E. Lockemy, Dillon, SC
Law Student Member-at-Large	2022	Neeharika Thuravil, Ringoes, NJ
Section Members-at-Large	2024	Maureen A. O'Rourke, Boston, MA
	2024	Richard M. Lipton, Dallas, TX
	2024	Leonard H. Gilbert, Tampa, FL
	2022	Michael W. Drumke, Chicago, IL
	2022	James M. Durant III, Plainfield, IL
	2022	Bonnie E. Fought, Hillsborough, CA
	2023	Lucian E. Dervan, Nashville, TN
	2023	Koji F. Fukumura, San Diego, CA
	2023	Sheila Slocum Hollis, Washington, DC
Young Lawyer Members-at-Large	2024	Jamie Delores-Ann Davis, Kansas City, KS
	2023	Shayda Le, Portland, OR

BOARD OF GOVERNORS (cont.)

Goal III LGBT Member-at-Large	2022	James J.S. Holmes, Los Angeles, CA
Goal III Minority Members-at-Large	2024	Amy Lin Meyerson
	2023	Marvin S C Dang, Honolulu, HI
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	2024	Richard M. Lipton
	2024	Leonard H. Gilbert
	2022	Michael W. Drumke, Chicago, IL
	2022	James M. Durant III, Plainfield, IL
	2022	Bonnie E. Fought, Hillsborough, CA
	2023	Lucian E. Dervan, Nashville, TN
	2023	Koji F. Fukumura, San Diego, CA
	2023	Sheila Slocum Hollis, Washington, DC
Young Lawyer Members-at-Large	2024	Jamie Delores-Ann Davis
	2023	Shayda Le, Portland, OR

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Abraham Charles Reich, Philadelphia, PA
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Lori Higuera, Phoenix, AZ
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Rene Morency, St. Louis, MO
Natasha Shishov, New York, NY

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

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

**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 sent electronically prior to the opening session of the Annual Meeting of the House of Delegates.

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

This report highlights American Bar Association activities
from December 2, 2021 to June 1, 2022

Introduction

Promoting the “right product, at the right price, with the right promotion, to the right person” is an adage that has long driven marketing and product development. The “Four Ps” are more than simply catchy alliteration. They highlight a simple and common-sense strategy: to be successful, you must create compelling and affordable products for consumers who genuinely need and desire them.

Over the last several years, the ABA has worked meticulously to improve the member experience and ensure our marketing and other outreach efforts are in alignment. We have very carefully reviewed our product mix -- refining, expanding, and trimming where necessary -- so we can better serve our current and potential members. Our efforts to enhance the member experience permeate the Association. As examples, I’ll examine two areas that are critical to our success: the law student-to-lawyer pipeline and our strategy to better leverage the ABA’s digital content.

Developing an Early Career Strategy

For new and potential members, the ABA can seem overwhelming and difficult to navigate. Extensive market research is clear that many students and new attorneys do not join the Association or drop membership after just a year because they find it difficult to identify and extract membership value.

A few years ago, we made a significant change to help us address this challenge: we merged the staffing (but not governance) of our Law Student and Young Lawyers Divisions to help ensure we could work strategically to enhance the student-to-lawyer pipeline. This new department, called Early Career Strategy (ECS) works collaboratively across the Association to help demystify and simplify the ABA experience for young members.

Two recent projects highlight the collaborative efforts. Both are examples of active partnerships between ECS and our Sections, Divisions, and Forums (SDFs). We know membership in a paid section results in almost a 20 percent improvement in retention for our newest members, so driving entity membership is essential.

To help new lawyers discover the depth and variety of subject matter expertise offered by our SDFs, ECS staff has worked collaboratively with entities to create a series of [New Lawyer Practice Area Resource landing pages](#). Each member group has been asked to create a site where

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they can house their best substantive, practice area-specific resources and content for new lawyers. All of the pages link back to a “hub,” located on the Young Lawyers site that allows new attorneys to quickly and easily explore ABA entities and their specific resources. The working version of the New Lawyer Practice Area Resource Library is now publicly available, and it will continue to evolve and improve over time.

Entities across the ABA produce a great number of valuable programs and offerings targeted at students and young lawyers, but those offerings can be difficult to locate. To simplify this user experience, another ECS initiative is a web page-based library housing all of the various competitions, contests, scholarships, fellowships, and more that are offered to young lawyers and law students from ABA member groups. More than 120 programs and opportunities are currently listed, along with their requirements and deadline, all in one place.

Leveraging Our Digital Content

When the ABA set out to reimagine its member experience and business model in 2018 following years of declining membership numbers, we positioned content as a core asset, at the center of the value proposition. The Board of Governors specifically approved a strategy to deliver a more personalized, curated content experience to members and potential members. The Board recognized the fact that the ABA has a vast inventory of valuable content, and it challenged the organization to make strides to deliver that content to users in more effective ways.

We have made substantial progress. The ABA established a Digital Content team composed of media experts, analysts, editors, web content specialists, and social media practitioners who have developed strategies and tactics to increase the reach and impact of ABA content across a variety of channels including email, web, podcasts, and social media. As an organization, we have tapped into the collective power of the entities and ABA departments including IT, membership, marketing, publishing, design, and others to connect the dots and deliver a coherent content experience to our members -- wherever, however, and whenever they choose to engage with us.

Here are some highlights of our Digital Content efforts:

- Implementation of an enhanced paywall system on americanbar.org that has driven more than \$1 million in revenue and over 33,000 paid and free ABA and Section memberships since the end of April 2021;
- Launch of a weekly curated content email that now drives a substantial portion of our email referrals to americanbar.org and has generated more than \$100,000 in revenue in less than two years;
- Development of a coordinated campaign system that allows us to draw attention to the good works of the ABA, such as our efforts on mental health, law practice in the age of COVID-19, and ongoing diversity, equity and inclusion initiatives.
- These tactics are all powered by the ABA’s vast inventory of substantive legal content, which is produced by entities across the organization. Staff and member-

leaders can assist by continuing to pursue important content creation efforts throughout the organization. By delivering substantive, valuable, informative legal content to our members and potential members, we can increase the reach and impact of the ABA’s work throughout our nation and around the world.

Membership and Marketing

Membership Overview

Below is a snapshot of the fiscal year to date membership information as of April 30, 2022:

INTERIM DATA FOR FY22 and FY21 YTD*					
	FY21 Year-End Results*	FY22 YTD	FY21 YTD	Change from LYTD	% Change from LYTD
ABA Dues Paying Member Count					
Group	65,000	66,100	64,900	1,100	1.8%
Indiv Lawyer	90,800	84,100	86,700	-2,600	-3.0%
Indiv Associate	9,700	9,900	8,800	1,000	11.6%
TOTAL	165,500	160,100	160,500	-400	-0.3%
ABA Dues Revenue (in millions)					
Group	\$14.9	\$14.9	\$14.9	-\$0.1	-0.4%
Indiv Lawyer	\$19.8	\$18.8	\$19.5	-\$0.8	-3.9%
Indiv Associate/Clio	\$1.0	\$1.0	\$1.0	\$0.1	5.4%
Finance Adjustment	\$0.1				
TOTAL	\$35.8	\$34.7	\$35.4	-\$0.8	-2.2%

Some key membership takeaways:

- ABA’s total dues-paying member count is trending similar to last year and is anticipated to land at or slightly above FY 2021 results, which was 166,000.
- ABA total dues revenue is trending behind last year to date by about 2 percent. It is expected to end the year at around \$35 million, which is \$3.7 million short of

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our aggressive FY 2022 budget and \$800,000 short of the prior year, reflecting more members paying at lower dues rates this year.

- ABA’s overall dues-paying members’ retention rate (covering a rolling 12 months) is 84 percent, an increase of three percentage points from the previous 12 months.
- Retention of the ABA’s newest individual members (those who joined from May 2020 through April 2021) is at 50 percent. Improving retention among this group is a key area of emphasis. Studies show that improving engagement will drive retention. Our efforts in that regard through the remainder of FY 2022 and beyond will be very robust; those initiatives are discussed later in this Report.

Group and Full Firm

Group and Full Firm dues revenue and dues-paying member counts through April 30:

- Overall Group-billed memberships have accounted for \$14.85 million in ABA dues revenue and 66,080 dues-paying members in FY 2022, up .1 percent and 1.8 percent respectively year over year.
- Full Firm membership stands at 126, a net increase of six compared to the same period last year. Full Firm participation has produced \$5.5 million in dues revenue thus far in FY 2022, a 6.9 percent increase from last year. Full Firms account for 29,991 dues-paying members in FY 2022, a 9.7 percent increase from the same time in FY 2021.

Membership staff met with a group of member leaders from several current Full Firms to discuss ideas related to engagement and growth of our full firm membership program. One result will be more active marketing of [ABA Leverage](#) to promote our hotel and meeting planning services to our Full Firms.

Section Efforts

Our Membership and Marketing team leads a number of efforts to recruit and retain members for the ABA and its entities. A new automated Section Welcome Letter for recently joined members is trending above industry standards in terms of click-through rates, and one result is more CLE registrations and entity purchases. A Section-member [testimonial library](#) showcases members’ thoughts about how ABA/entity membership helps their professional success. Sharing positive ABA experiences has proven effective in growing Section LinkedIn followers, which have increased 17 percent since September 2021. The ABA has also deployed rotating media ads focused on the benefits of joining an ABA member group. These messages have increased Section landing visits from paid media ads by 8.5 percent since they were initiated in February 2022.

Supporting ABA Sections to recruit and retain members is a vital part of our growth strategy. In December, the Association’s Marketing and Email teams added personalized messaging to e-renewal statements that suggest specific SDFs to individuals who do not currently belong to a paid entity. They include testimonials from existing members on how their entity

makes a difference. As we have discussed, research shows that joining at least one paid entity results in better retention.

ABA Website and Information Technology

This spring, the IT web team released several new features and bug fixes to the website. A February update enhanced the Membership Directory, allowing for additional information, such as contact numbers and addresses; Section participation; and type of membership. The team also made improvements to the website's search functionality, simplified members' profile creation process, and updated password requirements to strengthen the security of member accounts.

ABACLE

As of April 25, 2022, the ABA on-demand course library featured 2,025 titles, including 686 programs in the ABA Member Benefit Library. Also in April, the MCLE Department accepted 74 ABA programs for processing and 10,150 attendance report requests for ABA attendees. In addition, the MCLE department processed 22 programs for ABA MCLE Accreditation Service clients and 1,248 attendance report requests for those clients.

After the revised ABA CLE Diversity rule was passed by the Board of Governors, ABACLE updated its website and guidance to staff on the revision's effect on existing and upcoming ABA programs. MCLE immediately began applying for credits for Florida attorneys and offered a range of on-demand courses in the Member Benefit Library that had not been available due to the April 2021 Florida Supreme Court Order.

ABA Journal

Paywall

Almost a year to the day that the paywall was launched on www.americanbar.org, a new paywall was introduced to the ABA Journal site on www.abajournal.com the week of April 25. Now, non-member visitors to the ABA Journal site will find a message promoting ABA membership on every page.

Implementation of the paywall came after years of discussions, due to complexities with the separate Journal site, it required more than six months of work by Journal staff, ABA IT, key members of the ABA Digital Content team, an outside vendor, and other Association staff members. Non-members are still able to access some Journal content on the site, but when they exceed their allotted number of pieces of original content, they are prompted to sign in or join the ABA. The main goal of the paywall project is to reinforce the Journal as a benefit for members of the ABA.

The Journal paywall already has resulted in many member conversions for the ABA. In its first week, with a limited rollout, the paywall generated more than 100 ABA and Section

memberships and nearly \$1,400 in revenue. While those initial numbers are modest, they hint at the potential benefits to the ABA once the full paywall structure has been in place for an extended period of time.

In April, the Journal's website attracted more than 187,000 users, more than 263,000 sessions (visits to the website), and more than 465,000 pageviews. For the year, the Journal has seen some 643,000 users, more than 1 million sessions, and nearly 1.7 million pageviews.

The Journal ended April – the last month for which final numbers are available – with total expenses that beat budget estimates by 13.6 percent, a difference of nearly \$322,000. Year-to-date revenues were slightly behind target, but Journal staff continues to work with all of its advertising partners to bring in new ad placements on abajournal.com, explore additional print advertising opportunities, and maximize its programmatic advertising efforts to help boost non-dues revenue.

ABA Journal staff contributed a number of pieces related to the Russian invasion of Ukraine and its impact on the legal community in Europe and beyond. Some examples: The Journal interviewed [two Ukrainian bar leaders](#) about the impact of the invasion on the ground in their homeland, told the story of two law students who traveled to Poland [to help Ukrainian refugees](#), profiled a legal tech company providing [immigration relief for displaced Ukrainians](#), and explained how law firms were [adapting to the evolving sanctions against Russia](#).

Diversity, Equity, and Inclusion (DEI)

On April 29, the Diversity and Inclusion Advisory Council Meeting held its annual business meeting. More than 30 representatives from ABA entities and National Affinity Bar Associations attended. The meeting covered several important DEI (DEI) items, including the Association's revised DEI CLE Policy and new CLE Implementation Committee; upcoming 21-Day Equity Habit Building Challenges, and new methods to collect entities' member diversity data.

Facebook signed the Commission on Disability Rights' [Pledge for Disability Diversity in the Legal Profession](#), which encourages legal employers (law firms, corporations, bar associations, law schools, and judiciaries) to commit to the recruitment, hiring, retention, and advancement of lawyers with disabilities in the legal profession. Facebook joins Accenture, Ernst & Young, Microsoft, and Prudential as some of its corporate signatories.

On March 16, the Diversity Center joined with the Office of the President to host ABA President-Elect Deborah Enix-Ross' meeting with Presidents-elect from major National Affinity Bar Associations. This annual meeting provides an opportunity for the ABA and the Affinity Bars to strengthen their mutual relationships, learn about each other's priorities, speak about pressing legal issues, and identify potential collaborative opportunities. The Affinity Bars also heard from ABA staff leaders providing an overview of ABA Operations and makeup; Policy and Governance; Presidential Operations; Diversity, Equity, and Inclusion work, advocacy, and

resources; resources and services for Bar Associations; and Governmental and Legislative Advocacy.

Throughout March, the Diversity Center celebrated Women’s History Month by promoting its Celebrating Women’s History Month webpage with several resources, a slide deck of legal trailblazers; new programming e.g., “Ending Gender-Based Violence and Harassment in the World of Work” produced by the Section of Civil Rights and Civil Justice; and the Commission on Women in the Profession’s 21-Day Grit & Growth Mindset Challenge -- a syllabus of short daily activities designed to help participants build their knowledge of these concepts and acquire tools to develop grit and a growth mindset-orientation. Each day, the Diversity Center also promoted women legal trailblazers via its Twitter, LinkedIn, Facebook, and Instagram social media channels.

In February, the Diversity and Inclusion Center promoted its Celebrating Black History Month webpage with several resources, such as a slide deck of legal trailblazers; past webinars and new programs produced by the Coalition on Racial and Ethnic Justice and the Section of Civil Rights and Civil Justice; Black Lawyers in America Webinar Series & Toolkit; and 21-Day Racial Equity Habit Building Challenge -- a syllabus of articles, videos etc. designed to educate participants on the historic and current challenges impacting the African American/Black Community. Each day, the Diversity Center also promoted African American/Black legal trailblazers and daily assignments from its 21-Day Challenge via its Twitter, LinkedIn, Facebook, and Instagram social media channels.

On December 17, the Commission on Disability Rights hosted a free webinar entitled “Activate Diversity: Access to Healthcare in Minority and Disabled Communities.” The webinar addressed the disparity of healthcare due to lack of resources in disadvantaged communities

On December 6, the Commission on Women in the Profession published a report, “How Unappealing: An Empirical Analysis of the Gender Gap among Appellate Attorneys,” revealing gender disparity among lawyers who argue before federal appellate courts. The report analyzed the number of men and women attorneys who appeared before the U.S. Court of Appeals for the Seventh Circuit, along with who the women lawyers were, what kinds of cases they worked on, their clients, and where they worked. It also includes a roadmap for law schools, law firms, clients, and courts by recommending suggestions for increasing the number of women lawyers who argue at the appellate level.

The Virtual 2021 National Meeting of State Access to Justice Commission Chairs took place on December 2-3, 2021 and included both CLE programming and a non-CLE roundtable discussion sessions. The keynote speaker was Maggie Goodlander, Counsel to U.S. Attorney General Merrick B. Garland. There were 231 total registrants for the conference.

In April, the Diversity Center published its 5 Ways the ABA Is Advancing DEI in the Profession webpage article as part of an ABA digital marketing campaign showcasing the ABA’s impact in various areas of the law and society. Its goal is to recruit more public interest lawyer members.

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From February 10-12, the Council for Diversity in the Educational Pipeline partnered with the Judicial Division, hosted the 2022 Virtual Judicial Clerkship Program (JCP). The JCP provides law students from diverse backgrounds with training, instruction, mentorship, and networking to prepare and encourage them to consider becoming judicial clerks. The 2022 JCP was a success and boasted participation from 17 law schools/institutions and close to 100 law students. This year's event opened with a virtual viewing of oral arguments before the Washington State Supreme Court followed by a Q&A session with Chief Justice Stephen C. González of the Washington State Supreme Court, and two of his law clerks. Justice Gonzalez also presented the keynote address.

On February 10, the Commission on Racial and Ethnic Diversity in the Profession hosted the 2022 Virtual Spirit of Excellence (SOE) Award Ceremony with more than 300 people in attendance. SOE honorees included Gabriel S. Galanda, Chief Justice Steven C. González, Kay H. Hodge, Justice Adrienne C. Nelson, and Honorable Carlos E. Moore who each delivered inspiring remarks. You can view video backgrounds on each honoree [here](#).

On February 11, Commission on Sexual Orientation and Gender Identity (SOGI) hosted its Virtual Stonewall Awards Ceremony and Reception, which attracted approximately 100 attendees. Honorees included Jordan Blisk, Assistant Director of Chapters, American Constitutional Society; Shannon Minter, Legal Director, National Center for Lesbian Rights; and Hon. G. Helen Whitener, Justice, Washington State Supreme Court. The annual event celebrates lawyers who have considerably advanced lesbian, gay, bisexual, and transgender individuals in the legal profession and successfully championed LGBTQ+ legal causes. You can view the Stonewall Ceremony [here](#).

On February 4, the Commission on Women in the Profession sent the [February Issue of the Perspectives E-Publication](#) to about 55,000 ABA members. The issue had the highest open rate of issues over the last few years at 37 percent, and contained an [exceptional feature](#) on U.S. women judges' efforts to evacuate their Afghan counterparts who have become the target of threats and violence in the Taliban takeover.

The Council for Diversity in the Educational Pipeline has published its online [Community College Toolkit](#). The toolkit is designed to help community colleges develop and enhance programs to create an effective pipeline from community college to law school. The toolkit is a "living tool" that will continue to be updated as the Pipeline Council gathers new information and data on how to build an effective pathway to law through community college.

Center for Public Interest Law

The Center collaborated with Media Relations and Civil Rights and Social Justice Section to produce a short [video](#) to promote membership. Envisioned as the first in a series of short videos highlighting public interest lawyers who leverage their ABA membership to make a particular impact, the video will be shown prior to webinars, circulated alongside related content, utilized in email and social media, and posted on various entity websites.

Center on Children and the Law

The Center hosted two major conferences in April: the ABA National Conference on Access to Justice for Children and Families (April 5-6) and the ABA National Conference on Parent Representation (April 7-8). The Access to Justice Conference included two tracks: “Past, Present, and Future: The Impact and Implications of COVID-19 for Children and Families,” and “Racial Equity in Child Welfare Cases.” The National Conference on Parent Representation included a special emphasis on practice skills and interdisciplinary legal representation.

On March 10, the Center participated in an invitation-only virtual engagement with the White House’s Offices on National Drug Control Policy (ONDCP) and Office of Public Engagement. One of the Biden Administration’s first-year drug policy priorities centers on identifying barriers and establishing policy to help pregnant people with substance use disorder obtain prenatal care and addiction treatment without fear of child removal. The Center was invited to help frame the issue and share ideas for improvement in this area. As a follow up to the meeting, the ONDCP requested copies of the ABA case law analysis and slides for further consideration.

Death Penalty Representation Project

On April 4, the ABA filed an amicus brief with the U.S. Supreme Court in support of Ohio death row prisoner Raymond Twyford in *Shoop v. Twyford*. The case raises important questions about whether death-sentenced prisoners should be required to demonstrate the merits of their habeas claims before federal courts can issue orders facilitating defense counsel’s investigation of those claims. The ABA argued that such a rule would be contrary to prevailing norms of practice as set forth in the ABA’s capital defense guidelines, which require a thorough investigation prior to deciding which claims to present to the Court.

ABA South Texas Pro Bono Asylum Representation Project (ProBAR)

In April, ProBAR returned to full in-person services at its youth shelters following two years of providing mostly virtual help at the 19 youth shelters it serves in South Texas. It provided legal services to more than 25,000 children in 2021, a 25 percent increase over 2019, which had been the previous all-time high. 2021 also saw Guatemala edge past Honduras as the country of origin of the largest group of children. Those two countries, along with El Salvador, accounted for 93 percent of the children who entered government shelters in the Rio Grande Valley last year. Because of the large number of children, the ProBAR legal team increased the caseload of the attorneys and assigned 908 children’s cases during case-acceptance meetings in 2021.

ProBAR enlisted the support of 200 volunteers in 2021 who contributed 5,450 total hours of service; 75 attorneys provided 2,000 hours of the service, while approximately 40 law students and 85 non-attorneys provided the remaining 3,450 hours.

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ProBAR began providing daily Immigration Court Help Desk services at the newly re-opened tent court complex at the Brownsville, Texas Port of Entry. When migrants who have been waiting in Mexico for their court hearing under the Migrant Protection Protocols are brought to the tent, they receive ProBAR's orientation. Although representing clients is not the task of the Help Desk, ProBAR provides pro se assistance in some cases.

Children's Immigration Law Academy (CILA)

The [CILA 2021 Annual Report](#) features 2021 highlights and how CILA supported advocates working with youth in immigration matters over the last year.

CILA is expanding its technical assistance services nationwide. The Department of Health and Human Services approved a grant proposal submitted by the Vera Institute of Justice to provide legal services to unaccompanied children for a one-year base period and four option year periods. CILA will expand its team by four staff members and is currently undergoing an organizational restructure to include management positions to accommodate the upcoming growth.

CILA's [Pro Bono Matters for Children Facing Deportation](#) platform currently has a record 71 case opportunities available for pro bono representation. The platform is posted on 10 partner websites, including the [ABA Pro Bono at the Commission on Immigration](#) and [ABA Civil Rights Connection State Directory](#) webpages. Eighteen legal service providers throughout the country, including CILA, post cases in need of a pro bono attorney. In recognition of the high need for pro bono counsel, CILA published a blog: "[The Time is Right for Pro Bono in Children's Cases.](#)"

Commission on Homelessness & Poverty

The Commission has continued to develop [resources](#) for its grant-funded homeless court project with the California Judicial Council. On March 23, Commission staff and Special Advisor Steve Binder presented the project to 50 judges and court personnel across the state of California, fielding questions and soliciting feedback regarding state-wide outreach and plans for technical assistance.

On February 3, the Commission met with January Contreras, Assistant Secretary for Children and Families in the Department of Health and Human Services. The Assistant Secretary has been connected with the Commission's Homeless Youth Legal Network (HYLN) from her time leading its Model Program Arizona Legal Women and Youth Services initiative. During the meeting, Commission staff shared recent HYLN successes, opportunities, and current projects.

On December 21, Commission staff participated in the U.S. Department of Housing and Urban Development's year-end stakeholder briefing along with Deputy Secretary Adrienne Todman and Senior White House Domestic Policy Council officials.

Advocacy

ABA Day

The 25th annual [ABA Day](#) was held April 5-6 to call for congressional action on issues impacting the rule of law, social justice, and legal profession. The annual program, organized by the ABA's [Governmental Affairs Office \(GAO\)](#), is the Association's largest lobbying event of the

year. It brings together ABA staff, state and local bar leaders, and members from across the country to advocate for congressional action on key concerns.

GAO lobbied on behalf of three primary advocacy issues this year: increased funding for the Legal Services Corporation (LSC); passage of the Effective Assistance of Counsel in the Digital Era Act; and adoption of measures to provide student loan debt relief. On April 6, the second day of ABA Day, the White House announced that it would further extend the student loan payment pause through August 31, 2022. Three additional issues -- enhancing judicial security, creation of Article 1 immigration courts, and funding for the recently reauthorized Violence Against Women Act -- were featured for online grassroots lobbying.

As was the case last year, 2022's ABA Day was an all-virtual effort due to the lingering pandemic and increased security concerns, both of which restricted the ability to meet in-person. On the positive side, the online format allows for greater participation than in-person meetings. This year, 684 individuals registered for the event, compared to 522 last year and the 300 - 350 people who typically register for past in-person events. ABA Day 2022 also featured 47 state bars utilizing the ABA's online advocacy tools. During the event this year, 1,200 messages were sent to Congress, and we saw more than 21,000 social media interactions including tweets, shares, and likes.

General Advocacy Efforts

On April 29, GAO published the Washington Letter for the month, which featured articles on ABA Day, Law Day, the student debt moratorium extension, new rules to address the prevalence of ghost guns, and the role of the ABA Standing Committee on the Federal Judiciary in evaluating the professional qualifications of Judge Ketanji Brown Jackson to be an associate justice of the Supreme Court. If you do not currently receive the monthly legislative updates of the Washington Letter and to view past editions, you may enroll by clicking here.

On April 28, ABA President Reginald M. Turner submitted a written statement to the House Appropriations Subcommittee on Commerce, Justice, Science & Related Agencies in support of significantly increased Fiscal Year 2023 funding for the LSC.

On April 20, ABA President Turner submitted a comment letter to the Financial Action Task Force that urged it not to adopt any new international anti-money laundering guidance that would require lawyers representing clients in real estate transactions to disclose information protected by the attorney-client privilege or the lawyer's ethical duty of confidentiality. The letter explained in detail the ABA's concerns over the new proposed guidance and emphasized the importance of preserving lawyer-client confidentiality as a major component of the rule of law and a primary line of defense against money laundering and other illicit activities.

On March 2, President Turner sent a letter to the U.S. Secretaries of State and Homeland Security urging them to designate Ukraine for Temporary Protected Status (TPS) pursuant to

Section 244 of the Immigration and Nationality Act and grant all eligible nationals or residents of Ukraine in the United States TPS for a period of 18 months, with extensions as necessary.

On March 30, President Turner sent a [letter](#) urging the end of the use of section 265 of Title 42 of the U.S. Code (Title 42) by the Departments of Health and Human Services and Homeland Security to block asylum seekers from applying for protection at the U.S. border and to expel them from this country without any adjudication of their claims. The letter explained that both domestic and international law compel the U.S. to protect persons fleeing persecution or torture. The current Title 42 policy prevents the United States from meeting its obligations while affording no meaningful public health benefits.

On February 7, President Turner submitted a *comment letter* to the Treasury Department's Financial Crimes Enforcement Network (FinCEN) in response to its Advance Notice of Proposed Rulemaking on Anti-Money Laundering Regulations for Real Estate Transactions. The letter urged FinCEN not to adopt any new rule requiring lawyers representing clients in real estate transactions to disclose confidential client information or subjecting them to other anti-money laundering requirements of the Bank Secrecy Act. It also expressed concerns that such a rule would undermine lawyer-client confidentiality and the legal profession's unique ability to prevent money laundering. The ABA letter was prepared by GAO in close consultation with numerous ABA Sections, Committees, Centers, and other entities with expertise on anti-money laundering and lawyer regulation issues.

GAO and ABA President's Office collaborated with President-elect Deborah Enix-Ross on remarks to the International Bar Association's December 8 [seminar](#) on "The Role of Lawyers in an Era of Evolving Ethical Expectations: Ways Forward Within a Democratic Society." In her remarks, President-elect Enix-Ross explained what the ABA has been doing to combat money laundering, terrorist financing, and other illicit financial activities that undermine the rule of law. (President-elect Enix-Ross' remarks begin at 04:52, 40:48, and 1:00:22 of the [program](#).)

Media Relations and Strategic Communications

Major Media Projects 2022

As part of Law Day events, the Media Relations Division (MR) released the [2022 ABA Survey of Civic Literacy](#) during an April 29 online panel discussion centered on the report's public opinion poll on civic awareness and legal knowledge. As shared with news reporters nationwide in an April 21 [news advisory](#), President Turner introduced this year's results and Yamiche Alcindor of NBC News and PBS' "Washington Week" moderated.

Since 2019, MR has conducted the nationwide poll to assess the public's knowledge of the law, justice system, Constitution, and other civics-related topics. The responses inform the results of the Survey; this year, it specifically gauged public opinion on issues involving racial justice, voting rights, and ballot access. The Survey always provides a wealth of interesting information,

and its exclusive findings are increasingly cited in the media. You can also find a civic literacy quiz and past Survey reports [here](#).

Another major MR project is the [ABA Profile of the Legal Profession](#), which captures attorney-related statistics and demographics such as lawyer race and gender. While the Division prepares for the 2022 release of the Profile at the upcoming ABA Annual Meeting, the edition issued last August remains an increasingly important core resource for reporters. This spring, statistics from Profile informed stories published by Law.com, Law360, [The Famuan](#), [The Independent Florida Alligator](#), [Tampa Free Press](#), and [Reuters](#).

February was Black History Month, and several news outlets used the diversity statistics available in the 2021 Profile to inform its coverage of legal topics related to black lawyers, significantly adding to the usual number of monthly citations. During the month, data from the 2021 edition was cited in [Elle](#), [The National Memo](#), [Akron Beacon Journal](#), [Public News Service](#), [Spectrum News](#), [Minot Daily News](#), [Diverse: Issues in Higher Education](#), [Indianapolis Business Journal](#), [Orlando.com](#), [Mediaite](#), [Bangor \(Maine\) Daily News](#), and [Daily Kos](#).

Midyear Meeting Media Coverage

The MR Division highlighted more than a dozen events at the ABA Virtual Midyear Meeting. Its media outreach included promotion of newsworthy programs and high-profile speakers that reached nearly 1,250 reporters at more than 850 news outlets nationwide through personalized pitches, 16 targeted press releases, 23 staff-produced stories, and 16 video clips.

Throughout the weeklong series of meetings, the Division posted its daily content online to the [ABA news webpage](#) and on its [Twitter feed](#) (49,000-plus followers). Afterward, MR showcased highlights of its news coverage in two Midyear Meeting editions of YourABA ([February 15](#) and [February 21](#)), each received by about 120,000 ABA members via email. The three most popular articles were ones on [House of Delegates policy](#), the [ABA President-Elect Nominee](#), and the [Spirit of Excellence Awards](#). A full archive of the Division's coverage is available [here](#).

The Associated Press, Reuters, USA Today, National Law Journal, and Law360 were among nearly a dozen news outlets that registered for official media credentials. Several others covered the meeting by following the Division's live coverage of the House of Delegates on Media Relations' [resolution results webpage](#) and on [ABAEsq](#), which now has more than 110,000 followers and featured MR staff's live posts throughout the day.

The House of Delegates agenda led media interest with several reporters covering new ABA policy following the nationwide distribution of the Division's summary [news release](#) on February 14. A House resolution to change ABA law school accreditation standards to include mandatory diversity training was covered by Reuters (February 4, 15), and [National Review](#). ABA policy to ensure accommodations during the bar exam for lactating mothers was shared in [Above the Law](#) and by [Reuters](#). Passage of ABA resolutions related to voting rights were reported by

Australasian Lawyer and Brooklyn Eagle, while Newsweek published a story on ABA support for a gun ban at U.S. polling places. Finally, Law360 covered ABA policy to overhaul outdated foreign lobbying registration rules and the report by the ABA Treasurer.

General MR Efforts and Successes

The confirmation of U.S. Supreme Court Justice Ketanji Brown Jackson dominated much of the news media in April, as MR staff managed several dozen reporter inquiries on the related work of the Standing Committee on the Federal Judiciary. In addition to ABA news coverage in March from national outlets such as CNN, USA Today, The Christian Science Monitor, NPR, National Law Journal, The Baltimore Sun, and The Atlanta Journal-Constitution, the Committee's "Well Qualified" rating and its congressional testimony generated even further reporter interest in April as a result of the Division's ongoing outreach.

In regular communication with media -- beginning with a February 25 media statement on the ABA rating process and concluding with a March 24 news advisory on testimony for that rating before the Senate Judiciary Committee -- MR informed a broad array of news stories and commentary this spring, including those from national outlets such as the Chicago Sun-Times, The Week, and News Tribune; broadcasters like ABC News and PBS NewsHour; industry publications such as Forbes and Roll Call; legal media The National Law Review; as well as a host of regional newspapers like The Salt Lake Tribune, Denver Gazette, and Wyoming Tribune Eagle, among others.

On a related note, MR also handled major reporter inquiries regarding the Standing Committee of the Federal Judiciary's rating of another federal jurist, which followed the judge's April ruling that struck down the nation's mask mandate for airlines and other modes of transportation. News coverage of the ABA's "Not Qualified" rating was published by a wide variety of outlets across the country, including Newsweek, MSNBC, Washington Monthly, NPR, The Daily Beast, NBC News, Vanity Fair, and The Atlantic, among dozens of additional ones.

On March 23, the Division published its latest entry of ABA Legal Fact Check. Highlighting matters related to the Russian conflict in Ukraine, the new post examines the legal authority of the federal government to freeze the U.S. assets of Russian oligarchs and restrict their travel and use of property. A full catalog of site entries is also available on journalist Dan Abrams' Law & Crime news site.

ABA President Turner released a March 2 statement condemning the actions of Russian President Vladimir Putin in Ukraine, which noted, "The invasion violates the United Nations Charter on the principles of national sovereignty, rule of law, due process, and universal human rights." The statement was picked up by the Italian news outlet Il Dubbio.

In addition to President Turner's March 2 statement denouncing the Russian government's actions, the ABA President also issued statements on transgender rights (March 4), in which he deplored "government attempts to discriminate against transgender and non-binary people based

on gender identity,” and opposed “creating barriers to obtaining or providing medical care to affirm an individual’s gender identity.” In a March 18 statement on [National Public Defender Day](#), Turner said, “When public defenders lack the necessary staff and resources to assure that quality legal representation is available to all eligible people, the promise of equal protection under the law cannot be met.” The President also issued statements on [International Women’s Day](#) (March 8) and the [International Day of Women Judges](#) (March 10).

Immigration also continues to be a hot-button issue. On March 31, [BuzzFeed](#) published a story about letters it received from ProBAR and the Vera Institute of Justice written to the U.S. government about conditions in shelters for immigrants near the U.S. border.

On December 3, the Association and two former ABA presidents received the Medal of Honor from the World Jurist Association for work that promotes the rule of law around the world. As announced worldwide in a MR-prepared [news advisory](#), Patricia Lee Refo and Hilarie Bass received the recognition in person at the World Law Congress in Barranquilla, Colombia, while President Turner gave video remarks in acceptance for the Association’s efforts. Notable coverage included feature stories in several Spanish-language outlets, such as La Razón, El Mundo Financiero, and El Heraldo, among others in Latin America.

Media Coverage: Promoting Our Entities

A priority of our MR Division is to promote our entities’ activities and major issues. Several meetings sponsored by ABA Sections, Divisions, and Forums attracted noteworthy media attention in April following MR’s reporter outreach. Among them, the Antitrust Law Section Spring Meeting in D.C. April 6-8 attracted more than 2,800 attendees from 54 countries and 51 media representatives interested in the lineup of federal officials and industry insiders announced in a March 21 [news advisory](#). News coverage from the three-day conference included stories from [MLex](#), [The National Law Review](#) ([April 7](#), [12](#)), [FTC Watch](#), [Global Competition Review](#), [Antitrust Alert](#), and [Law360](#).

The Section of Taxation’s Midyear Meeting registered almost a dozen reporters interested in the lineup of federal officials announced in a January 20 [news advisory](#). Both Bloomberg and Law360 published comprehensive coverage with multiple feature stories throughout the conference on remarks by federal government officials. In addition, the Criminal Justice Section’s 37th National Institute on White Collar Crime -- which featured a keynote by U.S. Attorney General Merrick Garland on March 3 -- registered 14 news reporters who were informed by the Division’s February 21 [press advisory](#).

On the legal education front, MR alerted news reporters in an April 18 [press release](#) about employment data for the graduating class of 2021, as submitted by ABA-approved law schools to the Section of Legal Education and Admissions to the Bar. Informed by the Association’s data, news outlets that covered the hiring report to date include Reuters, Law.com, and The Recorder.

In late March and April, the MR Division promoted more than 20 other newsworthy entity meetings. They included the Intellectual Property Law Section’s Annual Meeting ([March 22](#)); Young Lawyer Division’s Leadership Academy ([March 22](#)); Section of Environment, Energy and Resources’ 51st Spring Conference ([March 29](#)); Criminal Justice Section Spring Meeting ([April 1](#)); Commission on Domestic and Sexual Violence’s VAWA reauthorization webinar ([April 4](#)); Family Law Section Spring CLE Conference ([April 13](#)); Section of Real Property, Trust and Estate Law’s 34th Annual RPTE National CLE Conference ([April 15](#)); and the International Law Section’s Annual Conference ([April 18](#)) among them.

As the Standing Committee on Ethics and Professional Responsibility released guidance that clarified prior rules on “live person” marketing efforts and client solicitation, MR distributed an April 13 press release on the new opinion. Media outlets reporting on Formal Opinion 501 include Law.com, Law360, The Legal Intelligencer, [The Indiana Lawyer](#), Bloomberg, [BigTimeDaily](#), and [New Jersey Law Journal](#).

In February, three recent reports issued by ABA member entities attracted media attention. Two of them were published by the Standing Committee on Legal Aid and Indigent Defense, which released the findings of its comprehensive analysis of the workloads of state public defense attorneys in two western U.S. states, finding troublesome systemic deficiencies in both areas of study. A January 21 [news release](#) that summarized the Association’s results in Oregon continued to resonate with media, as the ABA report helped to spur additional funding for public defenders in the state after its release. In February, reporting news outlets in Oregon included [NBC-TV](#), [CBS-TV](#), [Oregon Public Broadcasting](#), [The Corvallis Advocate](#), [Source Weekly](#), [Digital Journal](#), [BendSource](#), and [BizJournals](#), adding to news clips shared in last month’s report. A third report focusing on public defenders in New Mexico also generated further coverage after the Division’s outreach. Informed by Media Relations’ January 14 [press release](#), [Albuquerque Journal](#) and [Santa Fe New Mexican](#) published articles based on the ABA’s findings.

In December, MR promoted 13 specific newsworthy developments from member entities. A sample of those highlighted initiatives includes the Antitrust Law and International Law Sections’ [joint comments](#) on the draft amendment to the Antimonopoly Law of China (December 8); Young Lawyers Division’s “2022 On the Rise: Top 40 Young Lawyers” [nominations](#) (December 6); [Summit for Democracy](#) organized by the Center for Human Rights and Rule of Law Initiative (December 6); Coalition on Racial and Ethnic Justice’s “A Social Justice Policy Summit: A New Administration” [virtual program](#) (December 2); and Section of Civil Rights and Social Justice’s “Policy Update: Where Are We on Immigration?” [webinar](#) (December 2).

Member Practice Groups

Planning and Promotional Support for Member Entities

The ABA collaborates very closely with our SDFs to help them prepare for and promote their activities. On December 22, GAO organized and hosted a Zoom meeting highlighting ABA’s advocacy on anti-money laundering and other related regulatory proposals. It featured a discussion

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on the ABA's possible response to two new proposed Treasury Department AML rules. Meeting participants included representatives of the ABA Gatekeeper Task Force recently sunset by the Board; the Sections of Business Law, International Law, Criminal Justice, Taxation, and Real Property, Trust & Estate Law; ABA Global Programs; and the Standing Committees on Professional Regulation and Ethics and Professional Responsibility. The deadline to file comments on both proposed Treasury Department rules is February 7, 2022.

Antitrust Law Section

The Section's new website initiative remains a key objective. The ABA Information Technology and Digital Content teams continue to work diligently with the Section's officers and other leaders, marketing consultant, and staff on the great variety of tasks to get to launch, which is expected in June.

On April 6-8, the Section convened its first in-person Spring Meeting since 2019. The meeting included 60-plus sessions across several programming tracks emphasizing timely antitrust, consumer protection, and data privacy topics. Popular events included the "Chair's Showcase: Can Antitrust Repair the World? Should It?," the "Enforcers Roundtable," and the Annual Lunch and Dinners.

Civil Rights and Social Justice Section

In March, the Section held two well-attended webinars. The first, on March 8, commemorated International Women's Day by exploring gender-based violence and harassment in the workplace. This panel had 561 total registrants, with 340 attending live. The second webinar led a powerful discussion on natural hair, discrimination, and the CROWN Act. This panel had 793 total registrants, with 555 attending live.

The Section also held a major conference in April highlighted the humanitarian disaster in Ukraine: Ukraine's Refugee Crisis: The Faces of War. It addressed issues such as resettlement, migration, and offered testimonials from experts watching the crisis, including the Ukrainian Bar Association's President Anna Ogrenchuk and CEO Inna Liniova.

In December, the Section co-hosted the second Annual Social Justice Policy Summit with the Coalition on Racial and Ethnic Justice. The Summit had six sessions designed to advance racial equity and social justice principles. Over the course of two days, the interdisciplinary conference explored interpersonal, structural, and institutionalized discrimination to create enhanced awareness around these issues. The Summit culminated in policy recommendations to achieve positive social, political, and legal reform.

Business Law Section

The Section presented its first ever Hybrid Meeting in Atlanta and online, March 31-April 2. The meeting included 51 CLE programs and 184 committee and subcommittee meetings that

were all live-streamed so virtual participants could participate in all the learning opportunities. Registrants represented all 50 states and 46 different countries. Whether virtual or in-person, the meetings were free for Business Law Section members as a benefit of Section membership. All CLE programs were recorded and will be available for on-demand credit as an additional benefit for members.

Criminal Justice Section

On March 2-4, the Section returned to the in-person format for “[The National Institute on White Collar Crime](#)” in San Francisco. U.S. Attorney General Merrick Garland delivered the keynote address. Some 1,060 registrants attended the Institute.

The Section’s White Collar Crime Committee hosted the first Annual Anti-Corruption Day of Learning 2021 on December 9. The conference included five separate sessions on issues such as cross-border investigations, anti-corruption enforcement, and anti-bribery audits. Speakers included an array of leading experts in the field, including representatives from the U.S. Department of Justice and Securities and Exchange Commission.

Dispute Resolution Fellowship Committee

On December 22, the Dispute Resolution Fellowship Committee met to review 2022-2023 applicants for its annual fellowship program. Over 30 applications were received and vetted resulting in the placement of 19 qualified individuals to 12 substantive legal committees. The program provides Fellows with opportunities to gain experience with the Section and is aimed at mentoring the next generation of leadership, while at the same time helping the Fellows to advance their careers and grow their personal network within the field of Dispute Resolution.

Forum on Construction Law

The Forum’s Annual Meeting, “The In-House Counsel Summit: Shining a Light on the Construction Issues Keeping In-House Counsel Up at Night,” was held in New York City on May 4-7. Registration exceeded the typical Annual Meeting pre-pandemic average of 500. The Forum’s Midwinter meeting was also slightly over the pre-pandemic average 350 registrations.

Intellectual Property Law Section

The Section hosted the 23rd Annual Conference on Emerging Issues in Healthcare Law Conference, April 27-30, in Miami, Florida. The Conference attracted 270 attendees and featured a keynote address from Donna Shalala the former Secretary of the U.S. Department of Health and Human Services and served in the U.S. House of Representatives from 2019-2021.

The Section sent a letter to the U.S. Patent and Trademark Office regarding the [USPTO Deferred Subject Matter Eligibility Response Pilot Program](#). Generally, the Section noted it supported the use of limited pilot programs as an information-gathering resource for determining

potential future changes in patent examination procedures and provided several recommendations concerning the program criteria.

International Law Section

The Section has concentrated on the war in Ukraine. The Section provided comments on a second Presidential Statement condemning the actions of Russian President Vladimir Putin, as the invasion violates the UN Charter on the principles of national sovereignty, rule of law, due process, and universal human rights. The Section quickly organized two webinars: “The Russian Invasion of Ukraine -- How Can the West Respond?” and “Putin’s Folly? Stress-Testing International Law & Institutions: Russia v. Ukraine.” The latter webinar included opening remarks from ABA President Turner and John B. Bellinger III, former Legal Adviser to the U.S. Secretary of State. Section leaders also pursued a social media campaign, by posting videos highlighting their support for Ukraine and bar colleagues in Ukraine.

Judicial Division

The Judicial Division (JD) participated in its 22nd Annual Judicial Clerkship Program, a joint program with the Council for Diversity in the Educational Pipeline. More than 75 law students from underserved communities, representing 15 law schools, met virtually with over 30 judges for two and a half days. The programming introduces students to sitting judges and through structured networking and educational activities, encourages them to apply for judicial clerkships following graduation from law school.

The JD held the Inaugural Bench and Bar Academy on April 4-5 at the Georgia Bar Association building. The planning committee included Past ABA President Linda Klein, former Ambassador to Luxembourg J. Randolph Evans, and former Georgia Attorney General Thurbert Baker. The attendees were able to obtain a year's worth of CLE credits, including specialty credits required by Georgia. The first day ended with the inaugural William D. Missouri Civility Lecture, presented by the Honorable William S. Duffey, Jr. (retired) former judge with the U.S. District for the Northern District of Georgia.

JD Standing Committee on Diversity in the Judiciary

During the ABA Virtual Midyear Meeting, the Division's Standing Committee on Diversity in the Judiciary presented "Diversity Day" events on February 9. Approximately 20 Judicial Division volunteers held a virtual youth outreach program with approximately 60 students at Hector J. Garcia Early College High School in Laredo, Texas, to talk about the rule of law.

As part of its Heritage Series for Black History Month, the Standing Committee on Diversity in the Judiciary presented a non-CLE webinar, "The Importance of a Diverse Judiciary: What History Teaches Us," with approximately 30 attendees. The program was recorded and is available in JD's non-CLE program library.

Senior Lawyers Division

Due to COVID-19 concerns, the ABA Senior Lawyers' Midyear Meeting was held virtually, and the Division held five committee meetings and their council meeting online. The ABA President and President-Elect Zoomed in and commended the Division for its dedication to diversity and inclusion in their leadership being the second ABA entity to have diverse members in all leadership positions. On April 27-29, the Division's Spring Meeting took place in San Pedro, California, as an in-person event due to the subsiding pandemic and improved opportunity for members to travel safely.

The Division held one CLE and three Zoom webinars in April. The CLE, "Elder Law and the VA: How to Handle Today's Issues," had 94 registrants and 47 live participants. The Division's International Committee held a Zoom webinar, open to all Division members: "The Year of Living Dangerously: Ukraine and the Last Battle for Independence," which attracted 64 registrants.

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The third and fourth webinars in the Division’s five-part dementia series occurred in April. “Coping as a Family with the Daily Struggles of Dementia” attracted 233 registrants and had 126 live participants, while “Surviving the Final Stages of Dementia: What Do I Do When I Can’t Handle It by Myself Anymore?” had 150 registrants.

Solo, Small Firm and General Practice Division

The GPSolo Diversity Board presented Activate Diversity: The Long and Tragic History of Racism, Vigilantism, and Mob Violence in America on February 24. This program looked at current events from a historical lens, drawing comparisons to past and current events; and examined what has been done and what can be done to bring justice to the victims of these actions. About 200 individuals attended the program, which was recorded and available on the GPSolo YouTube channel.

Tort Trial and Insurance Practice Section (TIPS)

The Section returned to live conferences with the “Insurance Coverage Litigation Midyear Conference,” held in Phoenix, Arizona, from February 24-26, with 114 attendees. The programming covered cutting-edge insurance issues concerning Directors and Officers liability insurance, cyberspace-related issues, property law, COVID-related claims, and other trends.

TIPS participated in the ABA Virtual Midyear Meeting, February 9-11, with over 30 business meetings, including its Council, and a virtual Awards Presentation, where the prestigious Robert B. McKay Law Professor Award was presented to Professor David Owen, Carolina Distinguished Professor of Law Emeritus at the University of South Carolina. The Robert B. McKay Law Professor Award recognizes law professors who have shown commitment to the advancement of justice, scholarship, and the legal profession, demonstrated by outstanding contributions to the fields of tort, trial practice, or insurance law.

Young Lawyers Division

The Division has created a Leadership Academy designed to be a pipeline into ABA leadership for traditionally underrepresented attorneys. The two-year program will provide participants with hands-on training and networking opportunities. Participants will also receive travel scholarships and mentorships during the program.

Standing Committees

Standing Committee on the Federal Judiciary

On March 24, leaders of the Standing Committee testified at the Senate confirmation hearing of Judge Ketanji Jackson to be associate justice of the Supreme Court to explain its unanimous “Well Qualified” rating of her professional qualifications. In response to questions in

the widely televised hearing, Standing Committee witnesses explained that the Standing Committee uses a peer-review process to evaluate the professional qualifications of nominees and emphasized that there is a complete wall erected between the work of the Committee and all the other activities of the ABA. The Standing Committee never asks a nominee about policy positions the ABA has taken or discloses to ABA leadership or members outside of the Committee any of its substantive work. The Senate voted to confirm incoming-Justice Jackson on April 7.

Standing Committee on Law and National Security

The Standing Committee's podcast, National Security Law Today, released four new episodes in April: "Securing U.S Supply Chains," "A Look at Russia and Ukraine's Historical Tensions," and special remarks from ABA President Turner. Since its launch in September 2017, the podcast has released 221 episodes. The total number of listeners in the last four months reached 78,342.

The Standing Committee held a virtual CLE Conference in February, titled "National Security Law CLE Conference 2022: Emerging Critical Issues." The conference drew 618 registrants, and included attorneys from the majority of the national security and intelligence agencies attended, including the FBI; CIA; Departments of Defense, Justice, Homeland Security; and many more. In addition, eight co-sponsoring law schools were represented by invited faculty from their national security and cyber security law centers. The 10 panels addressed national security challenges that the country will face over the next year, from threats to cybersecurity and technology, civil-military relations, domestic threats, and economic security. [Click here](#) to see a breakdown of the panels and a list of panelists.

Standing Committee on Lawyers' Professional Liability

The Standing Committee hosted its Spring 2022 National Legal Malpractice Conference in Austin, Texas on April 6-8. The meeting addressed various topics relating to legal malpractice, professional liability, risk management and professional responsibility. The opening plenary session was presented by a panel of federal judges offering a view from the bench on civility and professionalism. The Conference hosted approximately 300 people.

Standing Committee on Legal Assistance for Military Personnel (LAMP)

On April 6, LAMP hosted a three-hour CLE webinar titled, "Special Education and the Law: A Military Perspective," and on April 20, it hosted a 3-hour CLE titled, "USERRA and SCRA: Legal Protections for Servicemembers and Veterans." Each of these CLEs were free for all military attorneys, military paralegals, and civilians employed by the military, and there was a modest fee for each CLE for other attorneys. For the April 6 live CLE, 217 individuals registered, followed by 277 registrants at the April 20 event.

Standing Committees on Professional Regulation/Ethics and Professional Responsibility

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The Standing Committees held a successful public roundtable on February 11, relating to the Discussion Draft of possible amendments to the Model Rules of Professional Conduct for client due diligence. Over 100 attendees registered, and the Committees heard diverse viewpoints from about a dozen speakers. The Committees will review all comments received and their joint subcommittee will commence work on next steps. The recording of the roundtable and written comments received may be viewed [here](#).

Center for Innovation

The Center for Innovation hosted a Twitters Spaces event on April 21, highlighting the work of [Paladin](#) (a justice technology company which provides pro bono legal assistance in Ukraine. Paladin partners with Ukrainian legal technology companies and non-profits to bridge the gaps in legal services for those impacted by the war. The panel discussed the legal needs of Ukrainians affected by the war and how those needs were being met through innovative legal technology solutions and partnerships. To date, the event has had over 2,163 impressions.

The Center launched its YouTube channel with the first episode of its “[Innovation and You](#)” on February 14. The animated video shows alternatives in billing models that firms can implement. The series will post new episodes on a regular basis covering a variety of topics aimed at helping lawyers expand their practices and experiment with innovation at a firm level.

Free Legal Answers (FLA)

Sponsored by the ABA Standing Committee on Pro Bono and Public Service, [ABAFreeLegalAnswers.org](#) is an online virtual legal clinic where income-eligible clients can post civil legal questions to be answered by pro bono attorneys from their jurisdiction. The [ABA Free Legal Answers 2021 Summary Report](#) highlights the impact of FLA on the tens of thousands of low income persons across the United States

Since its launch, over 10,472 attorneys have registered and responded to more than 210,142 questions that have been submitted. Currently, 40 jurisdictions are live for client access and an additional five jurisdictions have committed to participate. To mark the platform’s recent milestone of 200,000 questions submitted and 10,000 volunteer attorneys registered, the ABA Business Law Section hosted a podcast episode entitled “[Pro Bono That Works For You: ABA Free Legal Answers](#),” featuring former Committee Chair Buck Lewis and Business Law Section Liaison Judge Elizabeth Stong.

ABA Global Programs

Ukraine

When tensions began to rise with Russia in early February 2022, the ABA put security measures in place to ensure the security of the four-person staff in the country. It set up a communications plan to keep staff connected; mapped out air and land evacuation routes; and

ensured our team had copies of passports and other documents on file. After the outbreak of hostilities, we remained in close contact with our ROLI staff in the region. Thanks to the planning and precautions, our staff members are all currently safe and out of harm's way. We continue to check in as circumstances permit.

ROLI staff is actively collaborating with the State Department, National Security Council, our Ukrainian partners, and others to help document war crimes in an effort to ensure post-war accountability. ROLI established an ABA [Ukraine Working Group](#) based on the [Afghanistan Response Project](#), to help coordinate volunteer activities across the Association and beyond. The Working Group collaborates with U.S. experts and local stakeholders, including the Ukrainian Bar Association, to offer technical support as appropriate. It has direct dialogue with the Ukrainian General Prosecutor's office to discuss its needs as local judicial authorities pursue war crimes and atrocities prosecutions locally. The United States Agency for International Development (USAID) has invited ROLI to submit a proposal to help document and prosecute Ukraine war criminals.

Also active in Ukraine is the ABA's [Center for Human Rights](#) (CHR), which oversees the [Atrocity Crimes Initiative](#), consisting of some of the world's most respected international criminal law experts, to design post-war initiatives to restore the rule of law to the region. Working with the ABA's Criminal Justice Section, the Initiative seeks to prevent genocide and war crimes, and to bring the perpetrators to justice throughout the world.

Afghanistan

Easing suffering in Afghanistan continues to be a priority. In April, two ABA staff members traveled to the Humanitarian City in Abu Dhabi, United Arab Emirate (UAE). The UAE is sheltering between 12,000 and 14,000 Afghan refugees; ROLI is exploring how the Association may help develop systems and procedures to facilitate the transfer of refugees to their final emigration or asylum destinations. A primary goal is to assist former Afghan justice sector refugees, with priority given to women lawyers and judges. Since then, funding proposals to facilitate follow-up work have been submitted to the U.S. Government. Other updates on the ABA's Afghanistan Response Project's other efforts can be found [here](#). A recent [ABA Journal column](#) by three members of the Project also explains its work.

CHR

CHR's Justice Defenders Program (JDP) had earlier monitored the trial of a Cambodian rapper who was charged with and convicted of incitement for a song he had written. After the conviction, JDP engaged with the European Commission and other international organizations to advocate for his release. The rapper was released from prison in March 2022 after serving most of his sentence. Although the rapper had served most of his adjudged sentence, the release was significant. There had been a well-founded fear the government would prolong his imprisonment past the scheduled release, as Cambodian authorities have done with other human rights defenders.

JDP continued to support the sister of a prominent journalist in Bangladesh who faces judicial harassment in alleged retaliation for her brother's work. The Program raised the case with multiple international stakeholders, including the European Union, highlighting the extension of pretrial detention given the defender's health issues. After repeated delays for nearly three months, the court granted bail to the defender. She was released on March 30, 2022.

In Sub-Saharan Africa, JDP partnered with the International Commission of Jurists and the Southern African Development Community Lawyers' Association to conduct a fact-finding mission to Zimbabwe to analyze the state of the independence of the legal profession in the country. Program staff were joined by delegates including the current President of the Ugandan Law Society and the former President of the Mozambique Bar Association. The mission participants engaged in a variety of meetings with leadership from the Law Society of Zimbabwe, senior lawyers in Harare and Bulawayo, members of local civil society and human rights organizations, and government officials. The Program is drafting a comprehensive report which will explain the findings of the mission and make recommendations to ensure the independence of the legal profession and operation of the Law Society. The Program aims to publish this report in June and to engage in continued advocacy on behalf of lawyers in Zimbabwe.

In April, CHR's TrialWatch Program published a report documenting fair trial and fundamental freedoms violations against two participants in anti-police brutality demonstrations in Nigeria. Both cases show how the Nigerian authorities used criminal charges, detention, and trials to retaliate against those who peacefully participated in demonstrations against police violence.

In February, CHR issued a report and commentary examining the impact of COVID-19-related state of emergency measures on human rights. The report analyzes the impact of such emergency measures on human rights defenders and explores the response of human rights defenders through the use strategic litigation and other actions to push back against these disproportional restrictions.

In December, the JDP collaborated with ROLI to organize two events connected to the Summit for Democracy, an international meeting called by the Biden administration to promote democracy around the world. The Summit centered on three themes -- defending against authoritarianism, fighting corruption, and advancing human rights. The two ABA programs addressed issues not covered in-depth on the main agenda -- "Judicial Independence and the Rule of Law," and "Lawyers Human Rights Defenders, and the Rule of Law," featuring prominent judges and legal professionals from across the globe.

In Sub-Saharan Africa, JDP's previously-issued report detailing the persecution and prosecutions of a Zimbabwean journalist was cited during UK Parliamentary hearings covering continued restrictions of journalists and persecution of activists in Zimbabwe. Ultimately, and thanks at least in part to the work of the Justice Defenders, the charges of incitement brought against the journalist were dropped in December. Justice Defenders continues to observe proceedings related to other charges brought against this journalist.

ROLI

Under ROLI's USAID-funded program to advance human rights in Burkina Faso, ABA staff held a meeting with members of the atrocity prevention working group of the National Human Rights Commission (CNDH), set up with support from the ABA. Representatives from civil society organizations based in the four target regions of our program shared information with the CNDH about civilian abductions and allegations of extrajudicial killings in North and East regions. In response, CNDH conducted an investigation mission, with ROLI's support, to the East region to document and investigate these allegations.

In April, ROLI's Expanding Access to Justice project in Somalia supported the federal judiciary, specifically the Office of the Chief Justice, in holding its second Judges Forum. The forum offered the judiciary a platform for initiating candid internal discussions between judges so that they may identify and address challenges regarding justice services delivery. A research paper was presented on delayed court decisions and well as issues relating to correctional facilities and detention.

In collaboration with the International Commission of Jurists, Freedom House, the Media Institute of Southern Africa, and the Kenya Judiciary Academy, ROLI co-hosted a Judicial Symposium on Digitization and Internet Governance in Nairobi, Kenya, in April. The Kenyan Chief Justices in attendance reported that this was the first time that such a high number of their colleagues had attended an event together in the region, signifying the importance that they placed on the issues under discussion. The Chief Justices appreciated the training session and requested for further support in this area of the law and human rights.

Between April 21-22, ROLI and the Legal Education Board jointly organized an inaugural training session on law and gender for 50 law professors in the National Capital Region. Speakers included experts from the University of the Philippines and Paulette Brown, former President of the ABA from 2014-2015.

Also in the Philippines this year, on February 7, ROLI partnered with the Integrated Bar of the Philippines (IBP) to hold its third in-person legal aid caravan for indigenous individuals. More than 30 indigenous people from the B'laan and T'Boli tribes participated in this caravan, which was also marked the IBP's fiftieth founding anniversary. The IBP National President and ROLI staff delivered remarks at the event.

In April, ROLI trained 18 Libyan public lawyers and two judges (six men, 14 women) on best practices to address gender-based violence (GBV), engage traumatized survivors, provide legal assistance, and make referrals to service providers at the community-level. The heads of the Libyan Public Lawyers Department and the Supreme Judiciary Council attended and requested more training sessions for public lawyers. ROLI continues to coordinate with 14 CSO partners on outreach initiatives for a Libya-wide awareness campaign, "Equal; Say No to Violence."

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On March 4, ROLI organized an official launch ceremony to present advanced CLE teaching methods and techniques to judges and graduate students of the Academy of Justice under the Supreme Court of Kazakhstan. More than 60 graduate students and staff members of the Academy of Justice participated to learn more on the civil law of Kazakhstan.

On February 14, ROLI staff welcomed a study tour delegation of six representatives from the Bar Council of the Maldives (BCM) at ABA headquarters in Chicago. The primary objective for the BCM staff members, who will be directly involved in administering the upcoming inaugural Maldivian bar exam, is to observe the administration of the bar examination in Illinois and Wisconsin.

In December, ROLI supported Burkina Faso's National Human Rights Commission's investigative mission in the Poni province of a mass killing of civilians by the country's security and defense forces.

In December, Sudanese civilians continued demonstrations to protest the Prime Minister's agreement to share power with the military. ROLI completed a technical review of the Sudanese Ministry of Justice's draft law on the making of the Sudan Constitution. The review was conducted by two external constitutional experts, in addition to ROLI staff, and is based on international law; guiding principles of the United Nations; comparative examples from Kenya, Iceland, Afghanistan, and elsewhere; and Sudan's unique culture.

In Vietnam, ROLI conducted a workshop on December 21 in collaboration with the Ho Chi Minh National Academy of Politics, an influential partner in the anti-corruption and anti-money laundering space in the country. Representatives of the Asia-Pacific Group on Money Laundering; the International Gaming Institute of the University of Nevada, Las Vegas; and the Anti-Money Laundering Office of Thailand were among the institutions present who made presentations. Discussions centered on anti-money laundering and gambling reform throughout the region.

On December 2, ROLI hosted the second Philippine Pro Bono Summit under the theme "Promoting Pro Bono Lawyering in the Philippines" via Zoom and livestream on Facebook. Honorable Mary Margaret McKeown, Judge of the US Court of Appeals for the 9th Circuit and Special Advisor to ABA, delivered the opening remarks and introduced Honorable Alexander Gesmundo, Chief Justice of the Supreme Court of the Philippines, who delivered the keynote remarks.

A major ROLI success story has been its Women and Girls Empowered (WAGE) initiative, a global consortium working to strengthen the civil rights and economic opportunities of women around the world. In December, WAGE launched an Advisory Group and Network (AG&N) to enhance those objectives. The AG&N is a worldwide community of academics and experts who have substantial expertise on gender-based violence (GBV) prevention and women's economic empowerment. The group will collaborate with ROLI to research and produce materials involving GBV and women's economic rights.

Bar Services

The Division for Bar Services published the [full report](#) of the “2021 State and Local Bar Benchmarks Survey: Membership, Administration, and Finance.” The Survey is a blueprint of the membership structures and activities of state and local bar associations and provides information on membership trends, dues/fees, member benefits, and data on bar finance and administration. Information on how COVID-19 has impacted bar budgets, member renewals, and remote work is included in this report. Significantly, but not surprisingly, the survey notes the continuing downward trend in membership at voluntary associations.

Legal Education

The Section of Legal Education and Admissions to the Bar has released the [Employment Outcome Statistics](#) for 2021 graduates that incorporates outcomes based on race, ethnicity, and gender. These statistics reflect the employment status of 2021 graduates on March 15, 2022. The employment outcomes for this class were positive: 75.6 percent of the class were in bar-pass required jobs compared to 71.8 percent in the 2020 class. This occurred despite the fact the 2021 class was 3.8 percent larger than the 2020 class. The percentage of the 2021 class that was unemployed and seeking employment was 5.3 percent compared to 8.3 percent in 2020.

The Section also released national bar pass statistics. More than 91 percent of 2019 graduates have passed a bar exam within two years of graduation. Eighty percent of 2021 graduates passed the bar exam on their first attempt. For the second year, the office also released bar passage by race and ethnicity. The ultimate bar pass rate for the 2019 class improved for all major racial and ethnic groups compared to the results for the 2018 class. The passing percentage for all 2019 groups is above 80 percent. The improved statistics reflect the positive impact of the Council’s amendments to its bar pass statistics along with its enforcement actions against underperforming schools in the past few years.

The [charts](#), which are incorporated into the Section’s [Legal Education Statistics](#), include aggregate data in nine different ethnicity categories for information collected in 2021 and 2022 broken down by gender. The data was reported to the ABA by the 196 law schools accepting new students in their ABA Standard 509 questionnaire, which covers about a dozen categories including employment and bar passage outcomes among other areas.

Public Education

The Division for Public Education staff attended the Spring 2022 meeting of the [Civics Renewal Network \(CRN\)](#) on April 14. Division Director Frank Valadez, who serves on the CRN executive committee, arranged for ABA President-elect Deborah Enix-Ross to discuss upcoming ABA activities on “civics, civility, and collaboration” with the 40-plus meeting attendees. Founded in 2013, CRN is a consortium of more than 35 national nonpartisan, nonprofit organizations committed to strengthening civic life in the United States by increasing the quality

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of civics education in our nation's schools and by improving accessibility to high-quality, no-cost learning materials. CRN provides opportunities for partner organizations to learn about each other's work and develop opportunities for collaboration.

The Division for Public Education held its annual national Law Day program on Thursday, April 28, in collaboration with the Law Library of Congress. The program focused on the Law Day theme, "Toward a More Perfect Union: The Constitution in Times of Change." President Turner gave welcoming remarks, and National Law Day Chair Orlando Lucero was the virtual host for the program, which is available online for viewing.

Legal Aid

The Legal Aid and Indigent Defense Task Force on Eviction, Housing Stability, and Equity held a free webinar, “What Lawyers Can Do to Prevent Eviction” on April 7. Attendance was 345 for the program, and a recording of the event, along with accompanying materials, is now posted on the Task Force’s website.

ABA Finances (updated as of April 30)

As of April 30, 2022, the Association generated consolidated operating revenues of \$123.3 million and incurred operating expenses of \$126.5 million, which resulted in an operating deficit of \$3.2 million. The \$7.6 million operating revenue shortfall to budget is offset by a \$14.5 million favorable expense variance, leaving a \$6.9 million favorable net variance to budget.

Consolidated total change in net assets includes the operating deficit of \$3.2 million, as well as non-operating (“below the line”) results. Below the operating line, the Association had \$27.5 million of investment losses, used \$7.5 million to support operations, and had \$0.7 million of non-operating net expense. As a result of this activity, the Association’s net assets decreased by \$38.9 million through the eight months ending April 30, 2022.

The Association’s consolidated investment balance as of April 30 was \$275.5 million, down \$35.5 million since August 31, 2021. Our net asset (reserve) balance as of April 30, 2022 was \$183.7 million, down \$38.9 million since August 31, 2021.

Additional and more specific financial data can be found in the Treasurer’s Report.

Fund for Justice and Education (FJE)

The W.K. Kellogg Foundation awarded the Center on Children and the Law a grant of \$500,000 for its project to reduce the overreporting of people of color for suspected child maltreatment by medical professionals. This is the culmination of more than seven months of work by FJE.

The Bigglesworth Family Foundation awarded \$15,000 to the Immigration Justice Project in support of the Project to Ensure Access to Review and Litigation to provide free legal representation for families seeking asylum and noncitizens living with mental illnesses or disabilities who are not capable of representing themselves in appellate or federal proceedings.

NEO Philanthropy’s State Infrastructure Fund awarded \$25,000 to the Section on Civil Rights and Social Justice’s project to train lawyers to protect voters’ rights. The project is developing training and materials for legal professionals and communities to bolster their skills for engagement in voting rights, fair redistricting, and election protection, primarily within historically underrepresented communities.

Conclusion

E. Jerome McCarthy, the marketing professor and pioneer who developed the “Four Ps: Product, Price, Promotion, Person” strategy, wrote in 1960:

“Business’s role is to satisfy the consumer. Production cannot do it alone, nor can marketing. It makes little sense to think of production and marketing as separate entities. They are both sides of the same coin.”

Right product, right price, right promotion, right person -- a catchy mnemonic device that also underscores the importance of aligning marketing and membership benefits with today’s legal community. Our ECS initiatives to make the Association more welcoming to young lawyers and leveraging our digital content are two of the many efforts the ABA is pursuing to improve the member experience, enhance our product offerings, and ultimately help our members be more successful. We are pursuing substantial additional improvements to our website, a major upgrade to our continuing education and learning platform, and targeted product enhancements for solos, late career attorneys, firm leaders, and more.

If we remain agile, listen to our members and prospective members, and work to adapt to an ever-changing world and profession, we can position the ABA for success over both the near and long term.

Please let me know of any questions or concerns you may have at any time. I look forward to engaging with you at the Annual Meeting in Chicago and beyond, so that I may learn from your thoughts and suggestions.

Respectfully submitted,

Jack L. Rives
Executive Director

AMERICAN BAR ASSOCIATION**COMMITTEE ON SCOPE AND CORRELATION OF WORK****INFORMATIONAL REPORT TO THE HOUSE OF DELEGATES
2022 ANNUAL MEETING****JURISDICTION**

“The Committee on Scope and Correlation of Work shall study the structure, functions, and work of the sections, committees, and other agencies of the Association. It shall make such recommendations to the House or the Board of Governors as it considers appropriate to correlating the work of the Association as a whole and providing better use of the Association’s resources. The Committee is responsible to the House and it has no powers or duties other than those prescribed by this paragraph.”

The 2021-2022 Committee on Scope and Correlation of Work (“Scope”) is comprised of the following members: Linda L. Randell, Chair, Jose C. Feliciano, Harry S. Johnson, Judith Kaleta, and Orlando Lucero. Christine Hayes Hickey, Chair, Board of Governors Profession, Public Service and Diversity Committee, Andrew M. Schpak, Chair, Board of Governors Finance Committee, and Joseph L. Raia, Chair, Section Officers Conference, serve as ex-officio to the Scope Committee.

ACTIVITIES

The Committee on Scope and Correlation of Work met twice since its mid-year report to the House of Delegates. Scope met virtually on Saturday, February 12, 2022, and in person on Saturday, April 23, 2022. Scope will meet again virtually this summer to continue entity evaluations and will meet in person on August 6, 2022, in conjunction with the ABA’s Annual Meeting.

Scope reviews more than 70 ABA entities over the course of a generally three-year cycle of reviews. Scope devoted its April 2022 meeting to strategic planning. Scope discussed its ABA mission; the Scope committee structure and composition; Scope information and evaluation forms; Scope’s ability to assist the ABA entities it reviews; Scope operational functions; and reporting to ABA leadership, including the identification of trends and recommendations regarding correlation of work and use of the Association’s resources.

Scope has continued to fulfill its jurisdictional mandate as a Committee of the House of Delegates, and is the only one elected by the House of Delegates. Scope reviews ABA entities to determine if the structure, function, and work are consistent with the entities’ ABA jurisdiction, and if their activities coordinate and correlate with other ABA entities. Scope makes recommendations to improve the entities, as appropriate. As of July 2022, Scope has reviewed, or plans to review by August, the following entities since the Committee’s report to the House of Delegates at the American Bar Association’s 2022 Midyear Meeting:

- § Center for Human Rights
- § Center for Innovation Governing Council
- § Commission on Interest on Lawyers' Trust Accounts
- § Commission on Lawyers' Assistance Programs
- § Death Penalty Representation Project
- § Standing Committee on Disaster Response and Preparedness
- § Standing Committee on Legal Aid and Indigent Defense
- § Commission on American Jury
- § Forum on Affordable Housing and Community Development Law
- § Forum on Air and Space Law
- § Forum on Communications Law
- § Forum on Construction Law
- § Forum on Entertainment and Sports Industries
- § Forum on Franchising

TRENDS AND RECOMMENDATIONS

The Association's entities do significant work in support of members, the profession, and the public interest, consistent with their ABA jurisdiction. Scope has identified trends in its entity evaluations and provides recommendations to reviewed entities, as appropriate. Since the chairs of two Board of Governors committees sit ex officio on Scope, the Scope discussions, evaluations, and recommendations are also a means of communicating with the Board of Governors regarding Association entities. Similarly, the Chair of the House of Delegates attends and participates in Scope meetings, enabling Scope to obtain input from the Chair and to communicate with the Chair on matters relating to ABA entities.

Strategic planning continues to be a key recommendation Scope has provided in entity evaluations. The entities can benefit from setting organizational priorities, identifying, and promoting beneficial collaborations, engaging stakeholders, and adjusting organization direction, as necessary. Scope has also recommended that entities evaluate their governance practices and develop leadership pipelines.

Technology engagement is a significant area for entities as they navigate the increased need for innovative ways to engage ABA members, potential lawyer members in the profession, and the public. Scope has identified several technology-related means of communication and organization as areas that are important to many entities, and as to which there have been challenges. These include the ABA website (entities' need for technology assistance and resources, for example), hybrid meetings (more difficult and more expensive than either in-person or virtual, alone), and communication/collaboration tools (the move away from listservs and ABA Connect to ABA Communities). Improved technology and improved use of technology are important to enable entities to carry on their work.

Many ABA entities are experiencing a decrease in general revenue support year after year due to decreasing membership in the Association and related decreasing revenues.

Scope recommended increased collaboration to help the entities navigate reductions in resources and staff support. For some entities, increasing their public presence through marketing strategies was recommended to engage new membership and donor support. Many initiatives benefit from improved use of technology.

Scope has recently initiated a post-evaluation process, where Scope asks each evaluated entity to respond to the Scope evaluation within sixty days of receipt of the evaluation. This encourages entities to discuss Scope recommendations promptly, and enables Scope to remain engaged with the entities, both with the objective of avoiding a situation where an entity and Scope do not follow up until the next three-year review cycle.

If Scope finds that an entity is not fulfilling its jurisdictional duties or conducts work duplicative of other ABA entities, the Committee would identify areas of development and request follow-up information from the entity.

Consistent with Scope's jurisdiction, Scope may also make recommendations to the Board of Governors and the Chair of the House of Delegates. As discussed above, Scope benefits significantly from informal communications during and related to Scope meetings throughout the year.

CALENDAR

At its meeting associated with the ABA Annual Meeting in August 2022, the Committee on Scope and Correlation of Work will continue its strategic planning and discussion of trends identified during the past year. Now having completed its planned review of most standing committees and the forums, Scope will begin evaluating commissions at its meetings later in 2022.

Submitted by:

Linda L. Randell, Chair

José C. Feliciano, Sr.

Harry S. Johnson

Judith Kaleta

Orlando Lucero

Joseph Raia, ex-officio

Christine Hayes Hickey, ex-officio

Andrew Schpak, ex-officio

- Standing Committee on Disaster Response and Preparedness
- Standing Committee on Legal Aid and Indigent Defense
- Commission on American Jury
- Forum on Affordable Housing and Community Development Law
- Forum on Air and Space Law
- Forum on Communications Law
- Forum on Construction Law
- Forum on Entertainment and Sports Industries
- Forum on Franchising

TRENDS AND RECOMMENDATIONS

The Association's entities do significant work in support of members and the public interest, consistent with their ABA jurisdiction. Scope has identified trends in its entity evaluations and provides recommendations to reviewed entities, as appropriate.

Collaboration is a key area that Scope evaluates in the review process. Collaboration is more important than ever as the Association's staff and entities navigate reductions in resources. Scope observed that operating in silos has the effect of impeding innovation and reducing benefit to ABA members and the public. Scope has recommended that entities strategize collaborations, enhance information sharing, and improve their processes, with the goal of creating a culture that works toward eliminating silos within the Association. Collaboration can also mean that more Association members learn about, and have the opportunity to participate in or benefit from, the good work of these entities.

Reductions in ABA staff and financial resources have the potential to impact the quantity or quality of some entities' work deliverables compared to previous years. One result of reduced resources is that entities may need to rely on volunteer leadership to support work that was previously staff driven. Scope recommends that entities give greater attention, as appropriate, to the appointment process to ensure they receive the expertise and support needed to carry on their work.

Scope has also observed over the last few years that entities can benefit from strategic planning to set organizational priorities, engage leadership, encourage beneficial collaborations, and adjust organizational direction, as necessary. Scope has noted the need to devote resources to website management and maintenance of organizational documents. The Association's use of HiveBrite software, beginning this fall/winter, will provide the opportunity for entities to improve communications and facilitate productivity.

If Scope finds that an entity is not fulfilling its jurisdictional duties or conducts work

duplicative of other ABA entities, the Committee would provide recommendations to the entity leadership to identify areas of development and request follow-up information from the entity. Consistent with Scope's jurisdiction, Scope may also communicate recommendations to Association leadership, the Board of Governors and the Chair of the House of Delegates.

2022 CALENDAR

The Committee on Scope and Correlation of Work expects to review the following entities at upcoming meetings.

Summer 2022 Meeting

- Forum on Affordable Housing and Community Development Law
- Forum on Air and Space Law
- Forum on Communications Law
- Forum on Construction Law
- Forum on Entertainment and Sports Industries
- Forum on Franchising

Annual 2022 Meeting

- Standing Committee on the Law Library of Congress
- Standing Committee on Amicus Briefs
- Commission on Domestic and Sexual Violence
- Commission on Law and Aging
- Commission on Youth at Risk

Submitted by:

Linda L. Randell, Chair

José C. Feliciano, Sr.

Harry S. Johnson

Judith Kaleta

Orlando Lucero

Joseph Raia, ex-officio

Christine Hayes Hickey, ex-officio

Andrew Schpak, ex-officio

**REPORT OF THE SCOPE NOMINATING COMMITTEE
TO THE
AMERICAN BAR ASSOCIATION
HOUSE OF DELEGATES**

The Committee on Scope and Correlation of Work ("Scope") consists of five members of the Association, one of whom is elected each year by the House of Delegates to serve a full (5 years) term beginning with the adjournment of the Annual Meeting during which that person is elected.

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

The Nominating Committee had the challenging task of selecting from three (3) exceptional applicants with impressive credentials. The Nominating Committee voted to nominate Hilary Young of Austin, TX to fill the five-year vacancy to the Committee on Scope and Correlation of Work. The term will commence at the conclusion of the 2022 Annual Meeting.

It is the belief of the Nominating Committee that the breadth of Ms. Young's extensive background in bar activities and knowledge of the Association qualifies her for membership on the Committee on Scope and Correlation of Work.

Respectfully Submitted,



Barbara J. Howard, Chair
José C. Feliciano
Christine Hayes Hickey
Joseph L. Raia
Linda L. Randell

AMERICAN BAR ASSOCIATION

OFFICE OF THE SECRETARY

RESOLUTION WITH REPORT ON ARCHIVING

RESOLUTION

RESOLVED, That the Association policies set forth in Attachment 1 to Report 10A (formerly 400A), dated August 2022, are archived and no longer considered to be current policy of the American Bar Association and shall not be expressed as such; and

FURTHER RESOLVED, That policies which have been archived may be reactivated at the request of the original sponsoring entities. If the original sponsoring entities no longer exist, requests may be brought to the Secretary to be placed on a reactivation list for action by the House of Delegates. Such reactivated policies shall be considered current policy for the Association and shall be expressed as such; and

FURTHER RESOLVED, That the Board of Governors may act to reactivate policies when the House of Delegates is not in session.

REPORT

At the 1996 Annual Meeting, the House of Delegates adopted a set of Recommendations establishing a procedure to archive policies which are 10 years old or older and which are outdated, duplicative, inconsistent or no longer relevant and is to be presented to the House at the Annual Meeting. See *Report 10A attached as Appendix A*. The Resolution now before the House affects policies 10 years old or older. The Board of Governors or House of Delegates adopted these policies in 2012.

To accomplish this objective, the Policy and Planning Division compiled an index of such policies set forth primarily in either the *ABA Policy and Procedures Handbook* or the American Bar Association Legislative Issues list maintained by the Governmental Affairs Office. Some 55 policies were thus identified. Each entity, which had been the original sponsor, was sent a list of the policies it had sponsored. In cases where the original sponsoring entity was no longer in existence, the policies were sent to an appropriate successor entity. The 27 entities to which the policies were sent are listed in *Appendix B*.

Each entity was asked to identify which of the policies should be archived and which should be retained as current policy. In addition, each was requested to identify and include a recommended disposition for any other policies that had been generated which were not in the materials they received.

In adopting Recommendation 400A¹ in 1996, the House realized that there might be old and outdated policies which would not be identified through this process. The House, therefore, included a provision to deal with this issue by providing that such policies would also be archived. See *Appendix A, paragraph 6*. The second Resolved clause in this Resolution implements that provision with respect to all policies 20 years old or older.

Policies that are archived pursuant to the Resolution are not considered to be rescinded. Rather, the Association will retain them for historical purposes, however, they cannot be expressed as ABA policy. Those retained as current policy through this process will be reviewed again in 10 years. Retained policies are listed in *Appendix C*.

Respectfully submitted,

Pauline A. Weaver, Secretary
American Bar Association

August 2022

¹ Currently Resolution 10A

Attachment 1

Policies to be Archived

3. Paralegal Education Programs
Standing Committee on Paralegals
February 2012 (12M100)
39. Patient-Self Determination Act
Commission on Law and Aging
August 2012 (12A106A)
46. Paralegal Education Programs
Standing Committee on Paralegal
August 2012 (12A108)
48. Accreditation Standards for Specialty Certification Programs for Lawyers
Standing Committee on Specialization
August 2012 (12A110)

Attachment 1

Policies to be Archived

3. Paralegal Education Programs
Standing Committee on Paralegals
February 2012 (12M100)

RESOLVED, That the American Bar Association grant approval to Midstate College, Paralegal Services Program, Peoria, IL; Beckfield College, Paralegal Studies Program, Florence, KY and Tri-County, OH; Baker College of Jackson, Paralegal Program, Jackson, MI; South College, Paralegal Studies and Legal Studies Program, Asheville, NC; and Hofstra University, Paralegal Studies Certificate Program, Hempstead, NY.

FURTHER RESOLVED, That the American Bar Association reapprove the following paralegal education programs: South University Montgomery, Paralegal Studies/Legal Studies Program, Montgomery, AL; Cuyamaca College, Paralegal Studies Program, El Cajon, CA; St. Petersburg College, Legal Studies Program, Clearwater, Gibbs, Downtown, and Health Education Center Campuses, Clearwater, FL; South University Savannah, Paralegal Studies/Legal Studies Program, Savannah, GA; Maryville University, Legal Studies Program, St. Louis, MO; Bucks County Community College, Paralegal Studies Program, Newtown, PA; South University Columbia, Paralegal Studies/Legal Studies Program, Columbia, SC; and Lee College, Paralegal Studies Program, Baytown, TX.

FURTHER RESOLVED, That the American Bar Association withdraw the approval of the College of Southern Maryland, Paralegal Studies Program, La Plata, MD at the request of the institution, as of the adjournment of the 2012 Midyear Meeting of the House of Delegates.

FURTHER RESOLVED, That the American Bar Association extend the terms of approval until the August 2012 Annual Meeting of the House of Delegates for the following programs: California State University Los Angeles, Paralegal Studies Program, Los Angeles, CA; University of San Diego, Paralegal Program, San Diego, CA; West Los Angeles College, Paralegal Studies Program, Culver City, CA; Community College of Aurora, Paralegal Program, Aurora, CO; Georgetown University, Paralegal Studies Program, Washington, DC; Miami-Dade College, Paralegal Studies Program, Miami, FL; Kapiolani Community College, Paralegal Program, Honolulu, HI; Des Moines Area Community College, Legal Assistant Program, Des Moines, IA; Ball State University, Legal Assistance Studies Program, Muncie, IN; Bay Path College, Legal Studies Program, Longmeadow, MA; Northern Essex Community College, Paralegal Studies Program, Lawrence, MA; Anne Arundel Community College, Paralegal Studies Program, Arnold, MD; Macomb Community College, Legal Assistant Program, Warren, MI; Winona State University, Paralegal Program, Winona, MN; New Hampshire Technical Institute, Paralegal Studies Program, Concord, NH; Atlantic Cape Community College,

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Paralegal Studies Program, Mays Landing, NJ; Burlington County College, Paralegal Program, Pemberton, NJ; Central New Mexico Community College, Paralegal Studies Program, Albuquerque, NM; Schenectady County Community College, Paralegal Studies Program, Schenectady, NY; Westchester Community College, Paralegal Studies Program, Valhalla, NY; Chattanooga State Community College, Paralegal Studies Program, Chattanooga, TN; Southwest Tennessee Community College, Paralegal Studies Program, Memphis, TN; Center for Advanced Legal Studies, Paralegal Program, Houston, TX; Texas A & M University Commerce, Paralegal Studies Program, Commerce, TX; and Milwaukee Area Technical College, Paralegal Program, Milwaukee, WI.

39. Patient-Self Determination Act
Commission on Law and Aging
August 2012 (12A106A)

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 2012, to the ABA *Standards and Rules of Procedure for Approval of Law Schools*:

1. Standard 510. STUDENT LOAN PROGRAMS
2. Rule 3. ACCREDITATION COMMITTEE CONSIDERATION
3. Rule 5. JURISDICTION OF THE ACCREDITATION COMMITTEE
4. Rule 22. TEACH-OUT PLAN AND AGREEMENT AND LAW SCHOOL CLOSURE

46. Paralegal Education Programs
Standing Committee on Paralegal
August 2012 (12A108)

RESOLVED, That the American Bar Association grant approval to American River College, Legal Assisting Program, Sacramento, CA; and Central Georgia Technical College, Paralegal Studies Program, Macon, GA.

FURTHER RESOLVED, That the American Bar Association reapprove the following paralegal education programs: California State University Los Angeles, Paralegal Studies Program, Los Angeles, CA; Kapiolani Community College, Paralegal Program, Honolulu, HI; Kankakee Community College, Paralegal/Legal Assistant Studies Program, Kankakee, IL; Northern Essex Community College, Paralegal Studies Program, Lawrence, MA; Macomb Community College, Legal Assistant Program, Warren MI; New Hampshire Technical Institute, Paralegal Studies Program, Concord, NH; Atlantic Cape Community College, Paralegal Studies Program, Mays Landing, NJ; Central New Mexico Community College, Paralegal Studies Program, Albuquerque, NM; Lakeland Community College, Paralegal Studies Program, Kirtland, OH; Chattanooga State Community College, Paralegal Studies Program, Chattanooga, TN; Southwest Tennessee Community College, Paralegal Studies Program, Memphis, TN; Center for Advanced Legal

Studies, Paralegal Program, Houston, TX, and Texas A & M University Commerce, Paralegal Studies Program, Commerce, TX.

FURTHER RESOLVED, That the American Bar Association withdraw the approval of Washburn University, Legal Studies Program, Topeka, KS, and Northwestern Michigan College, Legal Assistant Program, Traverse City, MI, at the request of the institutions, as of the adjournment of the 2012 Annual Meeting of the House of Delegates.

FURTHER RESOLVED, That the American Bar Association extend the terms of approval until the February 2013 Midyear Meeting of the House of Delegates for the following programs: DeAnza College, Paralegal Program, Cupertino, CA; University of California Riverside, Paralegal Certificate Program, Riverside, CA; University of San Diego, Paralegal Program, San Diego, CA; West Los Angeles College, Paralegal Studies Program, Culver City, CA; Community College of Aurora, Paralegal Program, Aurora, CO; University of Hartford, Paralegal Studies Department, West Hartford, CT; Georgetown University, Paralegal Studies Program, District of Columbia; Wesley College, Legal Studies Program, Dover, DE; Miami-Dade College, Paralegal Studies Program, Miami, FL; Des Moines Area Community College, Legal Assistant Program, Des Moines, IA; Illinois Central College North Campus, Paralegal Program, East Peoria, IL; South Suburban College, Paralegal/Legal Assistant Program, South Holland, IL; Ball State University, Legal Assistance Studies Program, Muncie, IN; Louisiana State University, Paralegal Studies Program, Baton Rouge, LA; Bay Path College, Legal Studies Program, Longmeadow, MA; Anne Arundel Community College, Paralegal Studies Program, Arnold, MD; Ferris State University, Legal Studies Program, Big Rapids, MI; Lansing Community College, Paralegal Program, Lansing, MI; Hamline University, Legal Studies Program, St. Paul, MN; Inver Hills Community College; Paralegal Program, Inver Grove Heights, MN; Winona State University, Paralegal Program, Winona, MN; Meredith College, Paralegal Program, Raleigh, NC; Bergen Community College, Paralegal Program, Paramus, NJ; Burlington County College, Paralegal Program, Pemberton, NJ; Gloucester County College, Paralegal Program, Sewell, NJ; Truckee Meadows Community College, Paralegal Program, Reno, NV; 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; Westchester Community College, Paralegal Studies Program, Valhalla, NY; Peirce College, Paralegal Studies Program, Philadelphia, PA; Roger Williams University, Paralegal Studies Program, Providence, RI; Florence-Darlington Technical College, Legal Assistant/Paralegal Program, Florence, SC; Trident Technical College, Paralegal Program, Charleston, SC; Roane State Community College, Paralegal Studies Program, Harriman, TN; El Centro College, Paralegal Studies Program, Dallas, TX; Lone Star College North Harris aka North Harris College, Paralegal Program, Houston, TX; San Jacinto College North, Legal

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Assistant Program, Houston, TX; Utah Valley University, Department of Legal Studies, Orem, UT; Northern Virginia Community College, Paralegal Studies Program, Alexandria, VA; Highline Community College, Paralegal Program, Des Moines, WA; Lakeshore Technical College, Legal Assistant Program, Cleveland, WI; and Milwaukee Area Technical College, Paralegal Program, Milwaukee, WI

48. Accreditation Standards for Specialty Certification Programs for Lawyers
Standing Committee on Specialization
August 2012 (12A110)

RESOLVED, That the American Bar Association amends the *Accreditation Standards for Specialty Certification Programs for Lawyers* by the addition of the following provisions in Sections 4.06(F) and 4.08, and the addition of Section 4.10, dated August 2012.

Appendix A

Approved by the House of Delegates, August 1996

Report No. 400²

The resolution was approved as amended as follows:

RESOLVED, That the American Bar Association adopts a procedure to archive policies which are 10 years old or older and which are outdated, duplicative, inconsistent or no longer relevant. Such archived policies will be retained for historical purposes but shall not be considered current policy for the Association and shall not be expressed as such.

FURTHER RESOLVED, That the archiving shall be implemented as follows:

1. All policies adopted by the House of Delegates shall be reviewed, with the exception of uniform state laws, model codes, guidelines, standards, ABA Constitution and Bylaws, and House Rules of Procedures.
2. To phase in this process, the periodic mandated review will in the first year, 1997, address policies 20 years old or older; in the second, year policies 15 yearsold or older; and in the third year and each year thereafter, policies 10 years old or older.
3. Prior to each Annual meeting, a list of affected policies will be compiled and circulated to the original sponsoring entities and to each member of the House identifying those policies which will be placed on the archival list.
4. At each Annual Meeting, a recommendation will be submitted to archive certainpolicies and the House will vote on the recommendations.
5. Those policies which are not archived will be subject to review every ten years thereafter.
6. Any policy 10 years old or older that is not contained within the ABA Policy and Procedures Handbook (The Green Book) or any Legislative Issues list published by the ABA and that has not been subject to the review set forth in these principles is considered to be archived.
7. This archival process is not intended to affect the rights of any member of the House to propose amendments or rescission of any policies as presently permitted under House rules.

² Currently Resolution 10A

FURTHER RESOLVED, That an approved Uniform Act promulgated by the National Conference of Commissioners on Uniform State Law (NCCUSL) shall be placed on the archival list only when such an Act has been removed from the activist list of the NCCUSL.

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Appendix B

The entities below reviewed and recommended disposition of the policies contained in the report:

Sections and Divisions

Administrative Law and Regulatory and Practice
Civil Rights and Social Justice
Communication Law
Criminal Justice
General Practice, Solo and Small Firm
Individual Rights and Responsibilities
Intellectual Property Law
International Law
Legal Education and Admissions to the Bar
National Conference of Commissioners on Uniform State Laws
National Conference of State Trial Judges
State and Local Government Law
Tort Trial and Insurance Practice

Standing Committees

Gun Violence
Human Rights
Law and Aging
Legal Aid and Indigent Defense
Paralegals
Professional Regulation
Specialization

Commissions

Disability Rights
Domestic and Sexual Violence
Immigration
Youth-at-Risk

State, Local and Territorial Bar Associations

Bar Association of Puerto Rico
Massachusetts Bar Association
State Bar of South Dakota

Appendix C
Retained Policies

1. Respect Of the Organized Bar's Ability and Right to Function Independently
Bar Association of Puerto Rico
February 2012 (12M10A)
2. Consent Jurisdiction of United States Magistrate Judges
Massachusetts Bar Association
February 2012 (12M10B)
4. Black Letter ABA Criminal Justice Standards on Law Enforcement Access to Third
Party Records
Criminal Justice Section
February 2012 (12M101A)
5. Pretrial Discovery Reports for Use in Criminal Trials
Criminal Justice Section
February 2012 (12M101B)
6. Expert Scientific Testimony in Criminal and Delinquency Proceedings
Criminal Justice Section
February 2012 (12M101C)
7. Potential Jurors' Understanding of General Scientific Principles in Formulating Jury
Voor Dire Questions
Criminal Justice Section
February 2012 (12M101D)
8. Federally Subsidized Rental Housing Rules Regarding Admission, Termination,
and Additions To Households
Criminal Justice Section
February 2012 (12M101E)
9. Equal and Uniform Access to Therapeutic Courts and Problem-Solving Sentencing
Alternatives
Criminal Justice Section
February 2012 (12M101F)
10. Jury Instruction Language
Criminal Justice Section
February 2012 (12M101G)
11. Uniform Certificate of Title for Vessels Act
National Conference of Commissioners on Uniform State Law
February 2012 (12M102A)

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12. Uniform Electronic Legal Material Act
National Conference of Commissioners on Uniform State Law
February 2012 (12M102B)
13. Data Protection and Privacy Laws of Foreign Sovereigns
Section of International Law
February 2012 (12M103)
14. Model Rules for Fee Arbitration
Standing Committee on Client Protection
February 2012 (12M105)
15. ABA Standards and Rules of Procedure for Approval of Law Schools
Section of Legal Education and Admission to the Bar
February 2012 (12M106A)
16. ABA Standards and Rules of Procedure for Approval of Law Schools
Section of Legal Education and Admission to the Bar
February 2012 (12M106B)
17. Black Letter of The ABA Standards for Imposing Lawyer Sanctions
Standing Committee on Professional Discipline
February 2012 (12M107)
18. Military Spouse Attorneys
Commission on Women in the Profession
February 2012 (12M108)
19. United Nations “Protect, Respect and Remedy” Framework on Business and Human Rights
Center for Human Rights
February 2012 (12M109)
20. Patent Infringement
Section of Intellectual Property Law
February 2012 (12M110)
21. Law School Admission Test Accommodations for Disabled Test Takers
Commission on Disability Rights
February 2012 (12M111)
22. Model Time Standards for State Courts
National Conference on State Trial Judges
February 2012 (12M112)

23. ABA Standards for Language Access in Courts
Standing Committee on Legal Aid and Indigent Defendants
February 2012 (12M113)
24. Definition of Rape in the Uniform Crime Reporting Summary Reporting Program
Commission on Domestic and Sexual Violence
February 2012 (12M114)
25. Access to Justice
General Practice, Solo and Small Firm Division
February 2012 (12M115)
26. Qualified Immunity for “Private” Lawyers
Section of State and Local Government Law
February 2012 (12M302)
27. Use of Service Animals by Persons With Disabilities
Tort Trial and Insurance Practice Section
February 2012 (12M303)
28. ABA Standards and Rules of Procedure for Approval of Law Schools
Section of Legal Education and Admissions to the Bar
February 2012 (12M304)
29. Access to Justice for Residents in Rural America
State Bar of South Dakota
August 2012 (12A10B)
30. Breed-Neutral Dangerous Dog Laws
Tort, Trial and Insurance Practice Section
August 2012 (12A100)
31. ABA Civil Immigration Detention Standards
Commission on Immigration
August 2012 (12A102)
32. ABA Standards and Rules of Procedure for Approval of Law Schools
Section of Legal Education and Admissions to the Bar
August 2012 (12A103)
33. ABA Model Rules of Professional Conduct
Standing Committee on Professional Regulation (formerly Commission on Ethics 20/20)

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– Standing Committee on Ethic Professional Responsibility)
August 2012 (12A105A)

34. ABA Model Rules of Professional Conduct
Standing Committee on Professional Regulation (formerly Commission on Ethics 20/20
– Standing Committee on Ethic Professional Responsibility
August 2012 (12A105B)

35. ABA Model Rules of Professional Conduct
Standing Committee on Professional Regulation (formerly Commission on Ethics 20/20
– Standing Committee on Ethic Professional Responsibility
August 2012 (12A105C)

36. ABA Model Rules of Professional Conduct
Standing Committee on Professional Regulation (formerly Commission on Ethics 20/20
– Standing Committee on Ethic Professional Responsibility
August 2012 (12A105D)

37. ABA Model Rule for Admission by Motion
Standing Committee on Professional Regulation (formerly Commission on Ethics 20/20
– Standing Committee on Ethic Professional Responsibility
August 2012 (12A105E)

38. ABA Model Rules of Professional Conduct
Standing Committee on Professional Regulation (formerly Commission on Ethics 20/20
– Standing Committee on Ethic Professional Responsibility
August 2012, (12A105F)

40. Third National Guardianship Summit Standards and Recommendations
Commission on Law and Aging
August 2012 (12A106B)

41. Court-Focused Elder Abuse Initiatives
Commission on Law and Aging
August 2012 (12A106C)

42. Child Sexual Abuse Criminal Statutes
Criminal Justice Section
August 2012 (12A107A)

43. Prosecutorial Functions
Criminal Justice Section
August 2012 (12A107B)

44. Inter-Related Criminal, Civil and Non-Legal Problems of Clients
Criminal Justice Section

August 2012 (12A107C)

45. Claims of Ineffective Assistance of Counsel by Petitioners Under Sentence of Death

Criminal Justice Section

August 2012 (12A107D)

47. Federal Agency Regulatory Cooperation With Relevant Foreign Authorities

Section of Administrative Law and Regulatory Practice

August 2012 (12A109B)

49. Rights of Physicians and Other Health Care Providers to Question Patients With Guns

Standing Committee on Gun Violence

August 2012 (12A111)

50. Support of Postsecondary Education of Youth in Foster Care

Commission on Youth at Risk

August 2012 (12A112A)

51. Fetal Alcohol Spectrum Disorders

Commission on Youth at Risk

August 2012 (12A112B)

52. Haitian Family Reunification Parole Program

Section of International Law

August 2012 (12A113)

53. Strategic Lawsuits Against Public Participation

Forum on Communication Law

August 2012 (12A115)

54. Religious Profiling

Section of Individual Rights and Responsibilities

August 2012 (12A116)

55. Violence Against Women Act

Section of Individual Rights and Responsibilities

August 2012 (12A301)

GENERAL INFORMATION FORM

Submitting Entity: Secretary of the Association

Submitted By: Pauline A. Weaver

1. Summary of Resolution(s)

In an ongoing effort to keep the Association's policies up to date, this resolution consists of policies 10 years old or older. A policy that is archived is not rescinded. It is retained for historical purposes but cannot be expressed as current policy of the ABA. The Secretary recommends that the policies set forth in Attachment 1 of the resolution be archived.

2. Indicate which of the ABA's Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 2-Eliminate Bias and Enhance Diversity; 4-Advance the Rules of Law) and provide an explanation on how it accomplishes this.

This resolution advances the ABA's Four goals by ensuring that only those policies that are up to date remain as current, active policy of the ABA.

3. Approval by Submitting Entity:

The policies that have been placed on the archival list were reviewed by the entities that originally submitted them. In cases in which the submitting entity is now defunct, a successor entity was given the policy to review. They were originally approved by either the Board of Governors or the House of Delegates on the date they were adopted.

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

Although the Association has from time to time culled its records, the policies on the archival list have not been subject to review. They were originally approved by either the Board of Governors or the House of Delegates on the dates they were adopted.

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

The archiving of any policy would have no effect on existing policies.

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

Resolution 400, adopted August 1996, mandates the annual review of policies 10years old or older.

7. Status of Legislation.

N/A

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

The Policy and Procedures Handbook will be updated to reflect those policies that have been archived.

9. Costs to the Association. (Both direct and indirect costs)

None.

10. Disclosure of Interest:

N/A

11. Referrals.

The policies identified in the Resolution with Report have been circulated to 27 entities as noted in Appendix B and will also be sent to the Government Affairs Office.

12. 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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American Bar Association
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312/988-5169

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Shirley.Myles@americanbar.org

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

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EXECUTIVE SUMMARY1. Summary of the Resolution.

This resolution archives Association policies that are 10 years old or older. A policy that is archived is not rescinded. It is retained for historical purposes but cannot be expressed as a current position of the ABA.

2. Summary of the issue that the resolution addresses.

The archiving project, mandated by the House of Delegates in 1996, will improve the usefulness of the catalogued Association positions on issues of public policy. Many of the Association's positions were adopted decades ago and are no longer relevant or effective.

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

The archiving project will allow the Association to pursue primary objectives by focusing on current matters. It will prevent an outdated ABA policy from being cited in an attempt to refute Association witnesses testifying on more recent policy positions.

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

None at this time.

AMERICAN BAR ASSOCIATION

OFFICE OF THE SECRETARY

RESOLUTION WITH REPORT ON ARCHIVING

RESOLUTION

RESOLVED, That the Association policies adopted in 2002 which were previously considered for archiving but retained as set forth in Attachment 1 to Report 10B (formerly 400B) dated August 2022, are archived and no longer considered to be current policy of the AmericanBar Association and shall not be expressed as such;

FURTHER RESOLVED, That policies which have been archived may be reactivated at the request of the original sponsoring entities. If the original sponsoring entities no longer exist, requests may be brought to the Secretary to be placed on a reactivation listfor action by the House of Delegates. Such reactivated policies shall be considered current policy for the Association and shall be expressed as such; and

FURTHER RESOLVED, That the Board of Governors may act to reactivate policies when the House of Delegates is not in session.

REPORT

Pursuant to Report 400B¹, adopted by the House of Delegates in 1996, the Association is annually required to review policies adopted by the House of Delegates that have been in existence ten years or more. *See Report 10B attached as Appendix A.* Those policies that are outdated, duplicative, inconsistent with current policy or no longer relevant are to be archived. The review process operates from the premise that any policy on the list will be archived unless there is a request to remove it from the archival list and retain it as current policy. Once archived, it may no longer be cited as current policy. An archived policy is not considered to be rescinded, but rather is retained by the Association for historical purposes only.

Several years ago, the Resolution and Impact Review Committee reviewed the current archiving procedure and determined that it was time to revisit policies that were originally considered for archiving but retained. To date, every policy that is at least ten years old has been considered for archiving once. In the first several years after the procedure was instituted, over 1000 policies were examined. Of those, about one-third were archived. In subsequent years, policies were examined when they became 10 years old. The vast majority of policies that were passed in the last twenty years have been retained at the request of the sponsoring entity, the Office of Governmental Affairs or a member of the House.

This year, the policies adopted in 2002 which were previously considered for archiving but retained were reviewed. The process of reviewing previously retained policies began in spring of 2012 and will continue annually. To accomplish this objective, the Policy and Planning Division compiled an index of such policies set forth primarily in either the *ABA Policy and Procedures Handbook* or the American Bar Association Legislative Issues list maintained by the Governmental Affairs Office. Some 64 policies were thus identified. Each entity, which had been the original sponsor, was sent a list of the policies it had sponsored. In cases where the original sponsoring entity was no longer in existence, the policies were sent to an appropriate successor entity. The 29 entities to which the policies were sent are listed in *Appendix B*.

Each entity was asked to identify which of the policies should be archived and which should be retained as current policy. In addition, each was requested to identify and include a recommended disposition for any other policies that had been generated which were not in the materials they received. Retained policies are listed in *Appendix C*.

Respectfully submitted,
Pauline A. Weaver, Secretary
American Bar Association
August 2022

¹ Currently Resolution 10B.

10B

Attachment 1

Policies to be Archived

7. Legal Assistant Education Programs
Standing Committee Paralegals
February 2002 (02M102)
10. Uniform Limited Partnership Act
National Conference of Commissioners on Uniform State Laws
February, 2002 (02M106B)
11. Uniform Interstate Family Support Act
National Conference of Commissioners on Uniform State Laws
February, 2002 (02M106C)
12. Uniform Athlete Agent Act
National Conference of Commissioners on Uniform State Laws
February, 2002 (02M106D)
13. Uniform Commercial Code
National Conference of Commissioners on Uniform State Laws
February, 2002 (02M106E)
14. Uniform Mediation Act
National Conference of Commissioners on Uniform State Laws
February, 2002 (02M106G)
15. Uniform Consumer Leases Act
National Conference of Commissioners on Uniform State Laws
February, 2002 (02M106H)
16. Uniform Money Services Act
National Conference of Commissioners on Uniform State Laws
February, 2002 (02M106I)
21. Plant Patent Act
Section of Intellectual Property Law
February, 2002 (02M111B)

Attachment 1 Policies to be Archived

7. Legal Assistant Education Programs Standing Committee Paralegals February 2002 (02M102)

RESOLVED, That approval is granted to Cuyamaca College, Paralegal Studies Program, El Cajon, CA; San Francisco State University, Paralegal Program, San Francisco, CA; University of La Verne, Paralegal Studies Program, La Verne, CA; Daymar College, Paralegal Studies Program, Owensboro, KY; Herzing College, Paralegal Program, New Orleans, LA; RETS Tech Center, Legal Assisting/Paralegal Program, Centerville, OH; and Central Texas College, Paralegal Studies Program, Killeen, TX.

FURTHER RESOLVED, That reapproval is granted to Auburn University, Legal Assistant Program, Montgomery, AL; Santa Ana College, Paralegal Studies Program, Santa Ana, CA; Pikes Peak Community College, Legal Assistant Program, Colorado Springs, CO; Quinnipiac University, Legal Studies Program, Hamden, CT; South University, Paralegal Studies Program, West Palm Beach, FL; William Rainey Harper College, Paralegal Studies Program, Palatine, IL; University of Louisville, Paralegal Studies Program, Louisville, KY; Tulane University, Paralegal Studies Program, New Orleans, LA; Avila College, Legal Assistant Program, Kansas City, MO; Metropolitan Community College, Legal Assistant Program, Omaha, NE; Burlington County College, Paralegal Program, Pemberton, NJ; New York City Technical College, Legal Assistant Studies Program, Brooklyn, NY; Queens College, Studies Program, Flushing, NY; Sinclair Community College, Legal Assistant Program, Dayton, OH; University of Toledo, Paralegal Program, Toledo, OH; Peirce College, Paralegal Studies Program, Philadelphia, PA; Central Carolina Technical College, Legal Assistant/Paralegal Program, Sumter, SC; Midlands Technical College, Legal Assistant Program, Columbia, SC; South College, Paralegal Program, Knoxville, TN; Southwestern Professional Institute, Legal Assistant Studies Program, Houston, TX; J. Sargeant Reynolds Community College, Legal Assisting Program, Richmond, VA; Marshall University, Legal Assistant Program, Huntington, WV; and Chippewa Valley Technical College, Paralegal Program, Eau Claire, WI.

FURTHER RESOLVED, That the term of approval is extended until the August 2002 Annual Meeting of the House of Delegates for the following programs:

Cerritos Community College, Paralegal Program, Norwalk, CA; Coastline Community College, Legal Assistant Program, Fountain Valley, CA; Mount San Antonio College, Paralegal Program, Walnut, CA; Saint Mary's College, Paralegal Program, Moraga, CA; University of California San Diego, Legal Assistant Training Program, La Jolla, CA; West Valley College, Paralegal Program, Saratoga, CA; Arapahoe Community College, Legal Assistant Program, 39 Littleton, CO; Naugatuck Valley Community College, Legal Assistant Program, 40 Waterbury, CT; Norwalk Community College, Legal Assistant Program, Norwalk CT; Widener University Law Center, Paralegal Studies Program, Wilmington, DE; Georgetown University, Legal Assistant Program, Washington, DC; George Washington

Attachment 1

Policies to be Archived

University, Legal Assistant Program, Washington, DC; Broward Community College, Legal Assistant Program, Pembroke Pines, FL; Athens Area Technical Institute, Paralegal Studies Program, Athens, GA; National Center for Paralegal Training, Lawyer's Assistant Program, Atlanta, GA; South University, Paralegal Studies Program, Savannah, GA; Roosevelt University, Lawyer's Assistant Program, Chicago, IL; Southern Illinois University, Paralegal Studies Program, Carbondale, IL; Vincennes University, Paralegal Program, Vincennes, IN; Kirkwood Community College, Legal Assistant Program, Cedar Rapids, IA; Morehead State University, Paralegal Program, Morehead, KY; Eastern Michigan University, Legal Assisting Program, Ypsilanti, MI; Oakland Community College, Legal Assistant Program, Farmington Hills, MI; Oakland University, Legal Assistant Program, Rochester, MI; University of Detroit Mercy, Legal Assistant Program, Detroit, MI; Mississippi University for Women, Paralegal Program, Columbus, MS; Missouri Western State College, Legal Assistant Program, St. Joseph, MO; Montclair State University, Paralegal Studies Program, Upper Montclair, NJ; Raritan Valley Community College, Paralegal Studies Program, Somerville, NJ; Berkeley College of New York City, Paralegal Studies Program, New York, NY; Berkeley College, Paralegal Studies Program, White Plains, NY; Bronx Community College, Paralegal Studies Program, Bronx, NY; Genesee Community College, Paralegal Program, Batavia, NY; New York University, Institute of Paralegal Studies, New York, NY; Suffolk County Community College, Paralegal Program, Selden, NY; Central Piedmont Community College, Paralegal Programs, Charlotte, NC; Columbus State Community College, Legal Studies Program, Columbus, OH; University of Oklahoma Law Center, Legal Assistant Program, Norman, OK; Clarion University of Pennsylvania, Legal Business Studies Program, Oil City, PA; Marywood University, Legal Assistant Program, Scranton, PA; Greenville Technical College, Paralegal Program, Greenville, SC; Cleveland State Community College, Legal Assistant Program, Cleveland, TN; Southeastern Career College, Paralegal Program, Nashville, TN; Lee College, Legal Assistant Program, Baytown, TX; Edmonds Community College, Paralegal Program, Lynnwood, WA; and Laramie County Community College, Legal Assistant Program, Cheyenne, WY.

10. Uniform Interstate Family Support Act
National Conference of Commissioners on Uniform State Laws
February, 2002 (02M106B)

RESOLVED, That the American Bar Association approve the Uniform Limited Partnership Act, promulgated by the National Conference of Commissioners on Uniform State Laws in 2001 as an appropriate Act for those States desiring to adopt the specific substantive law suggested therein.

11. Uniform Interstate Family Support Act
National Conference of Commissioners on Uniform State Laws
February, 2002 (02M106C)

RESOLVED, That the American Bar Association approve the 2001 Amendments to the Uniform Interstate Family Support Act promulgated by the National Conference

Attachment 1

Policies to be Archived

of Commissioners on Uniform State Laws in 2001 as an appropriate Act for those States desiring to adopt the specific substantive law suggested therein

12. Uniform Athlete Agent Act
National Conference of Commissioners on Uniform State Laws
February, 2002 (02M106D)

RESOLVED, That the American Bar Association approve the Uniform Athlete Agent Act promulgated by the National Conference of Commissioners on Uniform State Laws in 2000 as an appropriate Act for those States desiring to adopt the specific substantive law suggested therein.

13. Uniform Commercial Code, Revised Article 1
National Conference of Commissioners on Uniform State Laws
February, 2002 (02M106E)

RESOLVED, That the American Bar Association approve the Uniform Commercial Code, Revised Article 1, promulgated by the National Conference of Commissioners on Uniform State Laws in 2001 as an appropriate Act for those States desiring to adopt the specific substantive law suggested therein.

14. Uniform Mediation Act
National Conference of Commissioners on Uniform State Laws
February, 2002 (02M106G)

RESOLVED, That the American Bar Association approve the Uniform Mediation Act promulgated by the National Conference of Commissioners on Uniform State Laws in 2001 as an appropriate Act for those States desiring to adopt the specific substantive law suggested therein.

15. Uniform Consumer Leases Act
National Conference of Commissioners on Uniform State Laws
February, 2002 (02M106H)

RESOLVED, That the American Bar Association approve the Uniform Consumer Leases act promulgated by the National Conference of Commissioners on Uniform State Laws in 2001 as an appropriate Act for those States desiring to adopt the specific substantive law suggested therein.

16. Uniform Money Services Act
National Conference of Commissioners on Uniform State Laws
February, 2002 (02M106I)

RESOLVED, That the American Bar Association approve the Uniform Money Services Act promulgated by the National Conference of Commissioners on Uniform State Laws in 2000 as an appropriate Act for those States desiring to adopt the specific substantive law suggested therein.

10B

Attachment 1

Policies to be Archived

21. Plant Patent Act
Section of Intellectual Property Law
February, 2002 (02M111B)

RESOLVED, That the American Bar Association favors in principle the enactment of legislation to broaden the scope of the Plant Patent Act (35 U.S.C. 161-164) by deleting language in 35 U.S.C. 161 which has denied patentability to tuber propagated plants, and by deleting the word "asexually" from 35 U.S.C. 163.

Appendix A

Approved by the House of Delegates, August 1996

Report No. 400²

The resolution was approved as amended as follows:

RESOLVED, That the American Bar Association adopts a procedure to archive policies which are 10 years old or older and which are outdated, duplicative, inconsistent or no longer relevant. Such archived policies will be retained for historical purposes but shall not be considered current policy for the Association and shall not be expressed as such.

FURTHER RESOLVED, That the archiving shall be implemented as follows:

1. All policies adopted by the House of Delegates shall be reviewed, with the exception of uniform state laws, model codes, guidelines, standards, ABA Constitution and Bylaws, and House Rules of Procedures.
2. To phase in this process, the periodic mandated review will in the first year, 1997, address policies 20 years old or older; in the second year, policies 15 years old or older; and in the third year and each year thereafter, policies 10 years old or older.
3. Prior to each Annual meeting, a list of affected policies will be compiled and circulated to the original sponsoring entities and to each member of the House identifying those policies which will be placed on the archival list.
4. At each Annual Meeting, a recommendation will be submitted to archive certain policies and the House will vote on the recommendations.
5. Those policies which are not archived will be subject to review every ten years thereafter.
6. Any policy 10 years old or older that is not contained within the ABA Policy and Procedures Handbook (The Green Book) or any Legislative Issues list published by the ABA and that has not been subject to the review set forth in these principles is considered to be archived.
7. This archival process is not intended to affect the rights of any member of the House to propose amendments or rescission of any policies as presently permitted under House rules.

FURTHER RESOLVED, That an approved Uniform Act promulgated by the National Conference of Commissioners on Uniform State Law (NCCUSL) shall be placed on the archival list only when such an Act has been removed from the active list of the NCCUSL.

² Currently Resolution 10B.

10B

Appendix B

The entities below reviewed and recommended disposition of the policies contained in the report:

Standing Committees

Continuing Legal Education
Ethics and Professional Responsibility
Federal Judicial Improvements / Section of Civil Rights and Social Justice
Coordinating Council for the Justice Center
Legal Aid and Indigent Defense
Law and Aging
Legal Assistants
Public Protection in the Provision of Legal Services
Standing Committee on Paralegals

Sections and Divisions

Criminal Justice
Environment, Energy and Resources
Immigration Law
Civil Rights and Social Justice
Intellectual Property Law
International Law
Legal Education and Admissions to the Bar
Litigation
National Conference of Commissioners on Uniform State Laws
Taxation
Young Lawyers

Special Committees and Commissions

Center for Public Interest Law
Law and Aging
Council on Racial and Ethnic Justice
Homelessness and Poverty
Immigration
Racial and Ethnic Justice

State, Local and Territorial Bar Associations

Bar Association of the District of Columbia
Kentucky Bar Association

Member

Robert L. Weinberg, ABA Member

Appendix C
Retained Policies

1. Military Commissions
Bar Association of District of Columbia
February, 2002 (02M8C)
2. Old Age, Survivors and Disability Insurance Programs
Commission on Legal Problems for the Elderly
February, 2002 (02M100)
3. *ABA Criminal Justice* Standards on Pretrial Release
Criminal Justice Section
February, 2002 (02M101A)
4. Voluntary and Productive Work Opportunities for Jail and Prison Inmates
Criminal Justice Section
February, 2002 (02M101B)
5. Attorney/Client Privilege in Dealing with International Money Laundering
Criminal Justice Section
February, 2002 (02M101C)
6. Facilities, Programs and Treatment for Youth and the Criminal Justice System
Criminal Justice Section
February, 2002 (02M101D)
8. Public Financing for Judicial Elections
Standing Committee on Judicial Independence
February, 2002 (01M103)
9. Perpetrators of Global Terrorism
Robert L. Weinberg, District of Columbia Bar Delegate
February, 2002 (02M104)
17. The Ten Principles of a Public Delivery System
Standing Committee on Legal Aid and Indigent Defendants
February, 2002 (02M107)
18. Technology-Based Continuing Legal Education Formats
Standing Committee on Continuing Education of the Bar
February, 2002 (02M108)
19. In-Person Language Interpreters in Court Proceedings
Council on Racial and Ethnic Justice
February, 2002 (02M110)

Appendix C

20. Access to “Who is” information from Domain Name Applicants
Section of Intellectual Property Law
February, 2002 (02M111A)
22. Disability Accessibility in Court House and Court Proceedings
Section of Individual Rights and Responsibilities
February, 2002 (02M112)
23. Rotterdam Convention
Section of International Law and Practice
February, 2002 (02M113A)
24. Stockholm Convention on Persistent Organic Pollutants
Section of International Law and Practice
February, 2002 (02M113B)
25. United Nations Convention on the Assignment of Receivables in International Trade
Section of International Law and Practice
February, 2002 (02M113C)
26. ABA Model Rule for the Licensing of Legal Consultants
Section of International Law and Practice
February, 2002 (02M113E)
27. Stafford Loan Program
Commission on Loan Repayment and Forgiveness
February, 2002 (02M300A)
28. Student Loan Forgiveness
Commission on Loan Repayment and Forgiveness
February, 2002 (02M300B)
29. Support for the State Justice Institute
Standing Committee on federal Judicial Improvements
February, 2002 (02M301)
30. Provisional Approval of the Barry University School of Law
Section on Legal Education and Admissions to the Bar
February, 2002 (02M302)
31. Model Rules of Professional Conduct
Commission on Evaluation of Rules of Professional Conduct
February, 2002 (02M401)
32. Nominees for Vacancies in Federal U.S. Courts
Kentucky Bar Association
August, 2002 (02A10A)

Appendix C

33. Funding for the LITC Program
Section of Taxation
August, 2002 (02A102)
34. Hate Crimes and Prejudice-Motivated Acts by Youth
Young Lawyers Division
August, 2002 (02A104B)
35. Ethical Guidelines for Settlement Negotiations
Section of Litigation
August, 2002 (02A105)
36. 1999 Foster Care Independence Act
Steering Committee on Unmet Legal Needs of Children
August, 2002 (02A106)
37. Pretrial Detention, Sentencing and Corrections Systems
Criminal Justice Section
August, 2002 (02A107)
38. Elder Abuse
Commission on Legal Problems of the elderly
August 2002 (02A108A)
39. Adult Guardianship Issues
Commission on Legal Problems of the elderly
August, 2002 (02A108B)
40. Abusive, Deceptive or fraudulent Lending Practices
Commission on Homelessness and Poverty
August, 2002 (02A109)
41. Indian Water Right Claims
Section of Environment, Energy and Resources
August, 2002 (02A110)
42. ABA Model Rules for Lawyers' Funds for Client Protection
Standing Committee on Client Protection
August, 2002 (02A111)
43. Judicial Campaigns
Standing Committee on Judicial Independence
August, 2002 (02A113)
44. ABA Model Rules of Professional Conduct
Standing Committee on Ethic and Professional Responsibility
August, 2002 (02A114)

Appendix C

45. Lawful Permanent Residence for Non-Citizens
Coordinating Committee on Immigration Law
August, 2002 (02A115A)
46. Rights of Immigration Detainees
Coordinating Committee on Immigration Law
August, 2002 (02A115B)
47. Crime Victim Compensation
Section of Individual Rights and Responsibilities
August, 2002 (02A117A)
48. Scientific Research for Therapeutic Purposes
Section of Individual Rights and Responsibilities
August, 2002 (02A117B)
49. Legal Assistant Education Programs
Standing Committee on Legal Assistants
August, 2002 (02A118)
50. Foreign Sovereign Immunities Act
Section of International Practice Law
August, 2002 (02A119)
51. State Jurisdictional Regulation of the Practice of Law
Commission on Multijurisdictional Practice
August, 2002 (02A201A)
52. ABA Model Rules of Professional Conduct
Commission on Multijurisdictional Practice
August, 2002 (02A201B)
53. ABA Model Rules of Professional Conduct
Commission on Multijurisdictional Practice
August, 2002 (02A201C)
54. ABA Model Rules of Lawyer Disciplinary Enforcement
Commission on Multijurisdictional Practice
August, 2002 (02A201D)
55. National Lawyer Regulatory Data Bank
Commission on Multijurisdictional Practice
August, 2002 (02A201E)
56. Model Rules on Pro Hac Vice Admission
Commission on Multijurisdictional Practice
August, 2002 (02A10F)

Appendix C

57. Model Rule on Admission by Motion
Commission on Multijurisdictional Practice
August, 2002 (02A201G)
58. ABA Model Rule for Legal Consultants
Commission on Multijurisdictional Practice
August, 2002 (02A201H)
59. Model Rule for Temporary Practice by Foreign Lawyers
Commission on Multijurisdictional Practice
August, 2002 (02A201J)
60. Convention on International Interests in Mobile Equipment and Protocol on Matters
Specific to Aircraft Equipment
Section of Business Law
August, 2002 (02A300)
61. Provisional Approval Ave Maria School of Law
Section of Legal Education and Admission to the Bar
August, 2002 (02A301A)
62. Standards for Approval of Law Schools
Section of Legal Education and Admission to the Bar
August, 2002 (02A301B)
63. Full Approval of Florida Coastal School of Law
Section of Legal Education and Admission to the Bar
August, 2002 (02A301C)
64. Full Approval of Chapman University School of Law
Section of Legal Education and Admission to the Bar
August, 2002 (02A301D)

GENERAL INFORMATION FORM

Submitting Entity: Secretary of the Association

Submitted By: Pauline A. Weaver

1. Summary of the Resolution(s).

In an ongoing effort to bring the Association's policies up to date, this resolution consists of the review of policies adopted in 2002 which were previously considered for archiving but retained. A policy that is archived is not rescinded. It is retained for historical purposes but cannot be expressed as a current position of the ABA. The Secretary recommends that the policies set forth in Attachment 1 of the resolution be archived.

2. Indicate which of the ABA's Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 2-Eliminate Bias and Enhance Diversity; 4-Advance the Rules of Law) and provide an explanation on how it accomplishes this.

This resolution advances the ABA's Four goals by ensuring that only those policies that are up to date remain as current, active policy of the ABA.

3. Approval by Submitting Entity:

The policies that have been placed on the archival list were reviewed by the entities that originally submitted them. In cases in which the submitting entity is now defunct, a successor entity was given the policy to review. They were originally approved by either the Board of Governors or the House of Delegates on the dates they were adopted.

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

Although the Association has from time to time culled its records, the policies on the archival list have not been subject to review. They were originally approved by either the Board of Governors or the House of Delegates on the dates they were adopted.

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

The archiving of any policy would have no effect on existing policies.

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

Resolution 400 mandates the review of policies 10 years old or older.

7. Status of Legislation (If applicable)

N/A

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

The Policy and Procedures Handbook will be updated to reflect those policies that have been archived.

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

None

10. Disclosure of Interest. (If applicable)

N/A

11. Referrals.

The policies identified in the Resolution with Report have been circulated to 29 entities as noted in Appendix B, and also will be sent to the Government Affairs Office.

12. 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.)

Pauline A. Weaver
321 North Clark Street
Chicago, Illinois 60654-7598
(312) 988-5169
FAX (312) 988-5153
Paweaver11@yahoo.com

Shirley Myles
American Bar Association
321 North Clark Street
Chicago, Illinois 60654
312/988-5169
Shirley.Myles@americanbar.org

13. 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 archives Association policies adopted in 2001 which were previously considered for archiving but retained. A policy that is archived is not rescinded. It is retained for historical purposes but cannot be expressed as a current position of the ABA.

2. Summary of the issue that the resolution addresses.

The archiving project, mandated by the House of Delegates in 1996, will improve the usefulness of the catalogued Association positions on issues of public policy. Many of the Association's positions were adopted decades ago and are no longer relevant or effective.

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

The archiving project will allow the Association to pursue primary objectives by focusing on current matters. It will prevent an outdated ABA policy from being cited in an attempt to refute Association witnesses testifying on more recent policy positions.

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

None at this time.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON CONSTITUTION AND BYLAWS
REPORT TO THE HOUSE OF DELEGATES

The Standing Committee on Constitution and Bylaws is directed by the Bylaws to study and make appropriate recommendations on all proposals to amend the Constitution or Bylaws, or, upon request, proposals to amend the Rules of Procedure of the House of Delegates, except for certain specified proposals that are submitted by the Committee on Scope and Correlation of Work.

Since its last report at the 2021 Annual Meeting, the Committee received and reviewed four proposals to amend the Association's Constitution and Bylaws and House Rules of Procedure. The Committee met during the virtual Midyear Meeting on February 12, 2022, and on April 14, 2022, via video conference call. The Committee herewith makes its recommendations on the proposed amendments as follows:

Proposal 1

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

Proposal 2

The Committee considered a proposal to amend §31.7 of the Bylaws to reflect the ABA Board of Governors' approved elimination of the Internal Audit function of the Standing Committee on Audit. The Committee approved the proposal as to form. The Committee did not take a position on the substance of the proposal.

11A

Proposal 3

The Committee considered a proposal to amend §31.7 of the Bylaws to increase the number of members appointed to the Standing Committee on Meetings and Travel from seven to nine members. The Committee approved the proposal as to form. The Committee did not take a position on the substance of the proposal.

Proposal 4

The Committee considered a proposal to (i) amend §6.4(a) of the Bylaws to change the year of the annual meeting upon which the minimum number of delegates a state bar association is entitled to certify is based; (ii) amend §6.4(c) to add a provision that a local bar association that had a delegate in 2016 is entitled to maintain that delegate; (iii) remove §6.4(f), which is now addressed by the amendment of §6.4(a); (iv) amend §6.6(a) to add a provision that a section is entitled to at least the same number delegates as it was entitled to certify during the 2016 annual meeting and (v) remove §6.6(b), which is now addressed by the amendment of §6.6(a). The Committee approved the proposal as to form. The Committee did not take a position on the substance of the proposal.

Respectfully submitted,

Michael Haywood Reed, Chair
Nathan D. Alder
Megan Patricia Keane
Barbara Mendel Mayden
Harry Truman Moore
Cynthia E. Nance
Hon. Brenda A. Roper
Hon. James S. Hill,
Special Advisor
Pauline A. Weaver,
Board of Governors Liaison

SPONSORS: Edward Haskins Jacobs (Principal Sponsor)

PROPOSAL: Amends Article 1, Section 1.2 of the ABA Constitution by inserting the following language between the quotation mark after the first semicolon: “to defend the right to life of all innocent human beings, including all those conceived but not yet born.”.

Amends Section 1.2 of the Association’s Constitution to read as follows:

§1.2 Purposes

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

(Legislative Draft – Additions underlined; deletions struck through)

§1.2 Purposes

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

REPORT

American Bar Association
Report to the House of Delegates

By Edward Haskins Jacobs

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

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

For consideration at the August 2022 Annual Meeting

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

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

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

Once again, God willing, I will make the above proposal at the House of Delegates annual meeting in August 2022. I made the same proposal before the House of Delegates the last twenty-one years in a row. My hope continues that some day our culture of death will be overcome. We lawyers must not turn a blind eye to our innocent children being poisoned to death and torn apart in our midst. I am crying in the wilderness, but the cry – and the thirst for justice it represents - will never die.

If adopted, the proposal would require the American Bar Association to stand up for the God-given right to life of all innocent human beings, a right that must be protected in the man-made law of all just societies. As Alexander Hamilton wrote, "[T]he first and

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primary end of human laws, is to maintain and regulate ... absolute rights of individuals. ... The sacred rights of mankind are ... written ... by the hand of the divinity itself, and can never be erased or obscured by mortal power.”¹

The proposal, if adopted, will promote the American Bar Association (sometimes “ABA”) Goal IV, “Advance the Rule of Law,” as the new ABA purpose will encourage the ABA to “work for just laws; including human rights, and a fair legal process.” The current “law” of the United States as it relates to innocent human beings in their mothers’ wombs is unjust, as it denies them the right to life, which is the most fundamental of all rights; a “human right;” and it denies them a fair legal process, as it denies them any ability to stop their murder under the common definition of murder as the intentional killing of an innocent human being. The adopted proposal will also promote ABA Goal III, as the adopted proposal will give the ABA the purpose to eliminate bias against innocent human beings in their mother’s wombs, and those whose murder failed, who have survived an abortion procedure. This encourages the ABA to work toward the “elimination of bias in the justice system.” (Quoted words are a paraphrase of the language of Goal III.) There is an obvious and fatal bias against one group of human beings under current U. S. law - innocent children in the womb; and, increasingly, children who has survived the attempted “hit” of an abortion. Every other innocent human has her rights protected under the law, at least theoretically, but not children in the womb (or, increasingly, survivors of abortion) - their fundamental rights are explicitly denied.

This report must be submitted by March 4, 2022. Given the attempt within the last week, supported by all US Senate Democrats in attendance but one, to pass the “Women’s Health Protection Act” which would have enshrined in US law abortion up to birth, and would have forced health care providers to participate in the murder of innocent children, how long will it be before we start seeing letters like this, a hypothetical future letter from daughter to mother, found in large part on the internet:

January 22, 2038

Dear Mom,

Sorry we haven’t really chatted since Christmas. I have some difficult news.

It’s about Timmy. He’s been a real problem, Mom. He’s a good kid, but quite honestly he’s an unfair burden at this time in our lives. Ted and I have talked this through and finally made a choice. Plenty of other families have made it and are much better off.

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

¹ Alexander Hamilton, *The Farmer Refuted*, February 23, 1775.

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

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

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

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

Your daughter, Nancy

I now leave our horrifying glimpse into the future to address my proposal:

In none of the meetings of the House of Delegates where my proposal was considered was there an actual vote on the proposal.² Every year there has been a motion postpone action on the proposal indefinitely and every year that motion has been approved. Those moving to postpone action indefinitely typically claimed that the proposal is inconsistent with the ABA purpose to uphold and defend the Constitution of the United States, and usually added that it would be inappropriate to include the language of the proposal as a purpose of the ABA, putting it right in the ABA constitution. I have given more detailed accounts of earlier House of Delegates action on the proposal in previous reports to the House.

I want to see the House pass this proposal, but I realize passage now would take a miracle. This is driven home in each annual meeting when new members of the House who have never been members before stand up in order to be introduced to the assemblage. Each year there are fewer than twenty new members who have never been members before. And the House quite a few years ago defeated a term limits proposal. It would seem, then, that the House of Delegates is a pretty closed club with lots of long-term members. In addition to looking for that miracle, I am also hoping that the consciences of a few of the members will be pricked enough that they will be willing to "submit a salmon slip" and stand up in the House and speak out for the right to life of the innocents in the face of embarrassment and possible ostracism. No member of the House has ever supported the adoption of the proposal these past 20 years. Recently, a House member submitted a salmon slip and appeared to acknowledge in front of all of his colleagues in the House the wrongfulness of killing innocent children, but ultimately he

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

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came out against the adopting this proposal, as he is opposed to the ABA taking positions on controversial issues, as this proposal does, since he believes adoption of controversial positions causes the ABA to lose members, and that concern apparently is more important than the ABA standing up for the rights of all innocent human beings, despite the crushing of the rights of little ones in the womb by current American "law." The official report of the 2020 meeting states that this individual spoke in favor of the proposal, but unfortunately actually the opposite is true. As I state at the end of this report, please either become a co-sponsor of this proposal or submit a salmon slip and support it at the House of Delegates meeting. Be the first! My email address is stated at the end of this report.

Even if I have no chance short of a miracle for passage of the proposal, if we can just "get the ball rolling" with a little bit of courage from members who agree, who knows? The ABA House of Delegates is a speck, but an important speck in the process. Maybe before too many more years, or at least, eventually at some point in the future when sanity is restored, baby-killing-in-the-womb (or upon emergence from the womb)³ will go the way of slavery. It could happen.

"My section [bar association, committee, etc.] does not want its representative to vote on this kind of social issue" is not a legitimate position to take, is it? The House of Delegates addresses these kinds of issues dealing with human rights and legislative proposals every annual meeting. The current ABA policy manual includes ABA policies: (1) supporting legislation on the federal and state level to finance abortion services for indigent women (adopted August 1978); (2) supporting state and federal legislation which protects the right of a woman to choose to terminate a pregnancy before fetal viability, or thereafter, if necessary to protect the life or health of the woman; and (3) opposing state or federal legislation which restricts this right. (Adopted August, 1992.) Other related and likely still current ABA policies are listed toward the end of this report.

The representative of your section, etc., must be ready to address fundamentally important legal issues if your section, etc., is to be fully represented in the House. If you are not up to taking on this mantle as a fully functioning delegate to the House, shouldn't you resign your position? Please, stand up and be counted. If you don't, won't you regret it in the end, when you look back on your life seeking evidence of courage? I write as I do in this paragraph because I sense there must be those in the House who agree with me - and a couple of times or more on the side some have expressed sympathy for the proposal privately to me - but they just have not been able to get up and say it and explain it clearly in front of the whole House. So, once again, on to the meat of the issue:

³ The human tragedy addressed by this proposal and the abandonment in the United States of the most basic rule of law demanded of any sane society has been highlighted by the failure in the United States Senate several times to have sufficient votes in favor of the Born-Alive Abortion Survivors Protection Act to protect the effort to bring the bill to a vote free from filibuster by getting 60 votes or more; as well as by efforts to allow for abortion up to the moment of birth, mentioned above, and for abandonment of care for abortion survivors. When a society labels intense evil as a good, we are truly beyond the pale. Hundreds of times in the United States abortions have failed to kill the child as intended before the child is delivered, and protection of the child who survives the "hit" on its life is sorely needed in law.

Feminism - here meaning the conviction that women's government-enforced rights and privileges have been neglected in the past and now need augmentation - begs the question, how far should women's "rights" go? If you are a mother with a child in your womb, and if bearing your child to term or keeping your child after birth would be embarrassing, inconvenient, career-killing, poverty-causing, husband-limiting, depressing, or physically more than normally risky, do you have the right to kill your child as a legally-approved exit from motherhood, as long as you do it before your child fully emerges from the protection of your body? Or, doing the killing even after birth through obvious infanticide, if positive law keeps moving the way it is in the United States? And if the positive law of the society forbids you from killing your child, do you have a higher right to take the matter into your own hands by clandestinely hiring a hit- man (or hit-woman) or using a coat hanger to do the job yourself or with an associate?

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

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

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

The stories one hears about mothers on their way to have a child in the womb poisoned to death or ripped apart by an abortionist, suddenly having a change of heart when they see a another mother walking by holding and cuddling her baby, or seeing a poster of a baby with the words "abortion kills," are heart-warming, but they also underscore how the general discussion of the abortion problem in the media depersonalizes the separate human being held by God's design in the vessel of her

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mother. That's another, separate human being in there - one who has the right to life, liberty, and the pursuit of happiness, just as we do, no matter how deeply we stick our heads in the sand.

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

Dr. Condic rightly rejects the use of these three flawed arguments about when life begins. Instead, she cogently argues that we should determine when the new human organism begins, because that is the true beginning of the human being. She points out that one must distinguish between mere living cells that are not organized into an organism, and living *organisms*. Dr. Condic points out that "[o]rganisms are living beings composed of parts that have separate but mutually dependent functions. While organisms are made of living cells, living cells themselves do not necessarily constitute an organism. The critical difference between a collection of cells and a living organism is the ability of an organism to act in a coordinated manner for the continued health and maintenance of the body as a whole. ... Unlike other definitions, understanding human life to be an intrinsic property of human organism does not require subjective judgments regarding 'quality of life' or relative worth. A definition based on the organismal nature of human beings acknowledges that individuals with differing appearance, ability, and 'desirability' are, nonetheless, equally human. ... Once the nature of human beings as organisms has been abandoned as the basis for assigning legal personhood, it is difficult to propose an alternative definition that could not be used to deny humanity to virtually anyone." The zygotes, the embryos, the fetuses in the wombs of human mothers are all human organisms; that is to say, human beings.⁴

But can any of us, with what we know about the child's unique set of DNA beginning at conception, even pretend now that this is not true? The possibility of twinning does not diminish the recognition that upon conception there is brand new, separate, unique human life in the mother's body – a new person or persons. The mother is responsible for taking care of that child, but she does not own the child – God does.

⁴ In her May 23, 2013 testimony before the Committee on the Judiciary of the U. S. House of Representatives on H.R. 1797, which would require a 20 week fetus to be protected from pain, Dr. Condic noted that "it is *entirely* uncontested that a fetus experiences pain in some capacity, from as early as 8 weeks of development." She further noted, "Imposing pain on any pain-capable living creature is *cruelty*. And ignoring the pain experienced by another human individual for any reason is *barbaric*." Dr. Condic went on to note, "Given that fetuses are members of the human species - *human beings like us* - they deserve the benefit of the doubt regarding their experience of pain and protection from cruelty under the law." [Italics in original.]

Slavery made the mistake of thinking that one human being can own another. We now know that no man should be permitted under man's law to own another. But how can one justify killing another innocent human being if one does not own him? The inconvenience and burden of the other's life on one's own is not enough. The burden of the dependent relation does not end at the birth canal. How far should the right to kill those dependent upon us go? Should the standard evolve from the complete dependence of the womb to the excessive dependence of severe mental retardation and severe physical handicaps? The "right" to kill an already born baby by lack of ordinary care is the new advocacy for those who want all preborn baby rights denied.

Just because the child is held and nourished within her mother does not give her mother the right to kill her. To the contrary, the mother with a child in the womb has a special responsibility to protect and care for her child. In the language of the law, the mother, the parents, have a fiduciary duty to the child. The generally recognized principle that parents must take care of their children once they are born applies as well to the children while they are growing and developing in the womb. I am not judging here the status of the soul of those who have had abortions or who commit abortions. I leave that (and the judging of my own soul) to God. But what we must judge as a people is what actions are so intrinsically evil, and do such harm to others who are innocent of wrongdoing (such as killing them), that the State, any decent State, must prohibit those actions from being inflicted on their victims. Obviously, the baby in the womb is the victim of abortion.

I do not want to offend the women who have been bamboozled by our abortion culture, but is not abortion the ultimate hate crime - the turning of legendary motherly love to the hatred of, and the killing of, one's own child? Perhaps it is indifference to the child rather than hatred of the child, but this may be worse in its own way, as they say the opposite of love is not hate, but apathy. Abortion is the ultimate betrayal: the mother's betrayal of her own child.

Motherly love was known through the centuries until recently as the gold standard of love – unselfish and without limit – the willingness to give one's very life for one's child. Remember the question from Isaiah 49:15, "Can a woman forget her sucking child, that she should have no compassion on the son of her womb?" attesting to this love. Motherly love is the foundation for a culture of life. Abortion, and now infanticide, is the foundation for our culture of death. Speaking of being bamboozled, recall the serpent in the Garden of Eden, enticing Eve to eat the forbidden fruit on the promise that she would become like God. Now mothers are enticed into abortion with the lie that they can become like men, and needn't be burdened with a child in the womb or that child after birth. Eat the fruit of hatred of the life of your child and abandonment and betrayal of your child, and freedom is yours. A Faustian bargain if ever there were one.

The United States of America fails in its fundamental mission if it refuses to secure for the weakest and most vulnerable innocent people amongst us the rights to life, liberty, and the pursuit of happiness. The ABA fails in its mission if it fails to stand up for the rights of the powerless. If we deny the right to life for children in the womb because they are

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developmentally immature (and therefore, in the eyes of some, not “persons”), then we not only tragically deny these children their rights - we open the door to infanticide and the killing of other weak and infirm people. This open door has already resulted in U.S. legislation in favor of infanticide, and our very U.S. Senate again and again and again refuses to allow anti-infanticide legislation to come to a vote - just as the ABA has refused this proposal the right to come up for a vote in the House of Delegates. There is a crisis in the United States over the loss of our moral roots. The ABA, which claims to be the voice of the legal profession, and to be an advocate of the protection of fundamental rights, and the Rule of Law, should become a strong voice for all the weak and vulnerable innocents who so desperately need champions now.

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

Because the proposal is every year postponed indefinitely on the false claim that defending the right to life of all innocent human beings, including all those conceived but not yet born, is inconsistent with upholding and defending the Constitution of the United States, I hereafter explain again why defending the right to life of all innocent human beings, including all those conceived but not yet born, is consistent with supporting and defending the Constitution of the United States. Later in this report I explain why the language I propose does belong in the purposes section of the ABA constitution, which positioning has also been opposed by the Standing Committee on Constitution and Bylaws.

Although the annual meeting of the House of Delegates is in August 2022, my proposal to amend the ABA constitution at that meeting had to be submitted no later than March 4, 2022, and this report accompanies the proposal, so it is being submitted prior to the U.S. Supreme Court decision in *Dobbs v. Jackson Women's Health Organization, et al.* (Supreme Court no. 19-1392), which decision may upend *Roe v. Wade* and its progeny as the fundamental abortion law of the United States. For this reason, *Roe* and its progeny, cited explicitly or implicitly year after year by the ABA Standing Committee on Constitution and Bylaws for its contention that my proposal is inconsistent with upholding and defending the U.S. Constitution, is addressed once again in this report. Professor Robert P. George, McCormick professor of Jurisprudence at Princeton University, and his co-amicus, John M. Finnis, were right in their *amicus curiae* brief submitted in *Dobbs*, that children in the womb are persons, just like all others human persons, and that this was known at the time of the adoption of the Fourteenth Amendment to the U.S. Constitution, and under an originalist analysis, those children in the womb are therefore entitled to the protections of the Fourteenth Amendment, just as the rest of us are. The Fourteenth Amendment reads, in part, “ ... nor shall an State

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

If the *Dobbs* decision overturns *Roe* and its progeny, and declares, rightly, that elective abortion is not a U.S. constitutional right, the need of the ABA to adopt my proposal will be just as urgent, as either (1) federal statutory law will be enacted to protect and promote the killing innocent children through abortion; or (2) various States (or subunits of States) within the United States will do so. Standing up for the rights of all innocents to be able to live their lives will be a necessary and critical role of the ABA then too.

So, writing now in the *Roe v. Wade* era, the inconsistency-with-upholding-the-Constitution contention has no merit. First the obvious: Nowhere does the actual language of the United States Constitution specify that the States may not defend the right to life of each and every innocent human being within their respective jurisdictions (including all those conceived but not yet born). So the claim that the defense of such life is inconsistent with defending and upholding the Constitution is on its face highly suspect. If the inconsistency argument does not rest on the actual language of the Constitution, let us go beyond the actual language of the Constitution and try to articulate the argument.⁵ The inconsistency argument could be so stated:

⁵ Like St. Thomas Aquinas, I construct the argument against my position. In 2021, in item 11A in the Resolutions with Reports to the House of Delegates, the Standing Committee on Constitution and Bylaws stated that the proposal is “out of order” and “should not be approved”, stating that the proposal “is incompatible with the Supreme Court’s interpretation of the Constitution of the United States that the Association is committed to uphold and defend”; “it would be redundant and unnecessary should the Supreme Court adopt” the proposal’s interpretation of the Constitution; and the ABA constitution is not the place for the proposal since it would not state an “overarching purpose” of the ABA. But according to the ABA constitution, the ABA is committed to uphold and defend the United States Constitution, not the Supreme Court’s interpretation of it. For instance, would the House of Delegates agree that the ABA must support the Supreme Court’s decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), ending unconstitutional muzzling of free speech regarding elections? Doubtful. The ABA is not committed to uphold and defend all Supreme Court interpretations of the Constitution; it is just that the Committee wants the ABA to uphold and defend *Roe v. Wade*, *Doe v. Bolton*, and *Planned Parenthood v. Casey*, but the Committee is not willing to come out and say this directly, instead pretending the ABA constitution says that the ABA must uphold and defend the erroneous *Roe* interpretation of the US Constitution. If the Committee is going to identify a particular Supreme Court decision with the Constitution, it needs to explain why that Supreme Court decision correctly interprets the Constitution, especially where the decision is hotly contested. The Committee made no effort to do this, thus once again failing to truly explain why it always moves or gets someone else to move to postpone the proposal indefinitely. For this reason, I construct an argument for the Committee and refute it herein. Please note this report is finalized in early March 2022, before the annual meeting and the author has no opportunity to address the current position of the Standing Committee, as it is unknown when this report is submitted.

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1. *Roe v. Wade, Doe v. Bolton, and Planned Parenthood v. Casey* prohibit each State from defending the right to life of each and all innocent human beings conceived but not yet born, within the State's jurisdiction.⁶
2. The Supreme Court has determined that the Constitution's penumbra of privacy rights attendant to the pregnant mothers is what prohibits the States from defending the right to life of each and all those conceived but not yet born.
3. Therefore, it is the Constitution itself that prohibits the defense by the States of the right to life of all those conceived but not yet born.
4. Therefore, advocating the defense of the right to life of all those conceived but not yet born is inconsistent with upholding and defending the Constitution since the Constitution prohibits that defense.

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

Now, maybe a persuasive argument could be made that although some Supreme Court interpretations of the Constitution are subject to later change, some are so indisputably correct or for some other reason unassailable that in some real sense the interpretation could be said to be the Constitution itself, or at least, to be considered so entrenched and unassailable as to be considered a "super precedent" very, very unlikely to be overturned. This might be said of *Brown v. Board of Education*, 347 U.S. 483 (1954), described as a "super precedent" by Amy Coney Barrett in her October 2020 confirmation proceedings to be come a Justice of the United States Supreme Court. She rightly denied in her confirmation hearings that *Roe v. Wade* deserves the status of a "super precedent." If the Supreme Court rationale for *Roe v. Wade, Doe v. Bolton, and Planned Parenthood v. Casey* were so rock-solid and accepted by American society in general as the proper articulation of a virtually undisputed fundamental individual right grounded in the Constitution, one could argue that in effect these Supreme Court decisions are equivalent to the Constitution; but that is certainly not the case with *Roe v. Wade, Doe v. Bolton, and Planned Parenthood v. Casey*. (And note that *Planned Parenthood* itself modified fundamental holdings of *Roe* and *Doe*.)

⁶ 410 U.S. 113 (1973); 410 U.S. 179 (1973); and 505 U.S. 833 (1992).

The truth is quite to the contrary of the typical position of the Standing Committee on Constitution and Bylaws. The reality is that the rationale underlying these two Supreme Court decisions deserves no support from an organization pledged to uphold and defend the Constitution of United States.⁷ This is because the underlying rationale for the decisions is bogus, even if one accepts the concept of the privacy rights penumbra. The Supreme Court's opinion in *Roe v. Wade* takes the position that neither Texas nor any other State may legislatively determine that human life begins at conception, since (the Court asserted) there is uncertainty over the legitimacy of that claim - that human life does begin at conception. But this claimed uncertainty is a figment of the Supreme Court's imagination. There is no real uncertainty over the point at which each human life begins - we all have our own unique set of 46 chromosomes. This set is forged at the moment of conception. The new child (or, perhaps, eventually, the new twins) is new human life, a new human organism, just as each of us is a human organism - residing within the child's mother, but not simply a part of her.

Based on the faulty contention that the child in the womb cannot properly be legislatively determined to be a human being, the Supreme Court denigrated the child to the status "potential life," stripping the child of her rightful status under the law as a human being. The Court then set up a false dichotomy of competing rights: the mother's "right to privacy" right to kill the non-human blob in her womb verses the State's interest in protecting the "potential life" in the womb and the health of the mother.⁸ (Referring to a living being with its own DNA as "potential life" is doublespeak at its best.) The hand dealt the child in the womb by the Supreme Court was dealt from a stacked deck - based upon the lie that the child in the womb is not really a child. As a "potential life" rather than a real, live human being, the child's real rights get pushed aside by the Supreme Court. The rationale of *Roe v. Wade* is **not** indisputable (and thus, one might argue, the Constitution itself); rather, the rationale of *Roe v. Wade* is fatuous.

⁷ As one wise observer has noted, "*Roe v. Wade* has deformed a great nation. The so-called right to abortion has pitted mothers against their children and women against men. It has sown violence and discord at the heart of the most intimate human relationships. It has aggravated the derogation of the father's role in an increasingly fatherless society. It has portrayed the greatest of gifts—a child—as a competitor, an intrusion, and an inconvenience.... Human rights are not a privilege conferred by government. They are every human being's entitlement by virtue of his humanity. The right to life does not depend, and must not be declared to be contingent, on the pleasure of anyone else, not even a parent or a sovereign."

⁸ Nor does basing a supposed constitutional right to abortion upon the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution ("... nor shall any State ... deny to any person within its jurisdiction the equal protection of the laws."), as advocated by Justice Ginsburg and three other Justices in the Ginsburg dissent in *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) make any more sense. The child in the womb is still a human being; a child; and her right to life trumps the mother's interest in having her killed, whether based on a supposed right to privacy or upon the Equal Protection Clause. See also, Erika Bachiochi, Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights, *Harvard Journal of Law & Public Policy*, vol. 34, no. 3, Summer 2011. The truth is the exact opposite, as the Fourteenth Amendment's due process and equal protection provisions should be extended to preborn human beings, as explained by Robert P. George and his cohort in their *Dobbs* brief, mentioned above. The brief is available on the U. S. Supreme Court's website.

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

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

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

Well, our country has abandoned its fundamental argument for its own formation when it denies to some innocents the inalienable God-given right to life itself, allowing others with the sanction of law to kill off innocents. This is a fundamental perversion of what the United States should be. The ABA should make the correction of this deviation one of its bedrock, fundamental policies – that is, one of its very purposes of being. The

ABA goes on and on nowadays about its support of “the rule of law,” but where is that support when it comes to children in the womb? Where are their lawyers defending their rights? Where is the defense and pursuit of justice here?

The Committee charged with review of this proposal has in the past claimed that the subject of the proposal is not fundamental enough - or is not of the right character - to be included in the purposes section of the ABA constitution. But compare a stance against stripping the right to life from millions of innocents to the purposes that are in the ABA constitution. Defending the right to life of innocents when it is being denied by our “law” is much more fundamental than even the upholding and defending of our hallowed U.S. Constitution and representative government. The ABA purpose I propose goes to the very heart of what an association of American lawyers should be all about. We are supposed to be the upholders of the law. We are supposed to champion those whose rights are being disrespected. Incredibly, a fundamental disrespect for a category of persons’ rights has been incorporated as a fundamental tenant of our American “law.” A stand against this cries out for inclusion in the purposes section of the ABA constitution. As mentioned toward the beginning of this report, the proposal if adopted would advance the rule of law, working for sorely needed correction of our “law,” making it just, finally correcting the huge long-standing injustice against the human rights of little children, and finally making the legal process fair for them, advancing the ABA Goal IV, and eliminating bias in the justice system against the youngest of our children, advancing ABA Goal III.

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

At the House of Delegates in August 2001, the speaker who advocated postponing the proposal indefinitely said that the proposal “changes fundamentally the purpose of the American Bar Association and the Constitution and Bylaws, and has ramifications over a wide array of policy that the Association has adopted and implemented.” The ABA has in the past taken action directly contrary to the proposal I make here, and they would all be revoked by implication if the proposal is adopted and becomes a purpose of the ABA. A recent example of actions based on an opposite view of the desirability of abortion occurred at the 2021 Midyear meeting, where the House of Delegates approved an item taking a position against the criminalization of abortion, based upon a report to the House of Delegates that presents abortion as a positive good to be protected and promoted. There are other earlier examples. For instance, in 1978, the ABA adopted a policy supporting federal and state legislation to “finance abortion services for indigent women.” In 1991, the ABA adopted a policy supporting legislation to promote “full counseling and referrals on all medical options” in federally funded family planning clinics. In 1992, the ABA adopted a policy, opposing federal legislation restricting abortions prior to viability

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and thereafter if the abortion is “necessary to protect the life or health of the woman” And in 1994, the ABA adopted a policy recommending that the United States, at the Fourth World Conference on Women in Beijing, China, in 1995, “actively support the inclusion in the Platform for Action of [e]ffective measures to accelerate the removal of the remaining obstacles to the realization of women’s basic rights.” At the annual meeting in 2001 the ABA adopted a policy provision opposing the Mexico City Policy, which prohibits overseas funding by the United States of nongovernmental organizations that provide abortion-related health or medical services. President Trump re-instituted and expanded the Mexico City Policy after it had been killed off by President Obama, but Joseph Biden revoked it as one of his first actions after inauguration. The ABA House of Delegates has also fairly recently adopted a policy implicitly approving government-funded killing of innocent human beings in their embryonic stage for stem cell and other research work.

Legal protection for all innocent human life is essential to a properly ordered society. Advocacy of such protection should be fundamental ABA policy.

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

Feel free to join me as a sponsor next year, or at least to submit a salmon slip to speak in favor of the proposal. Email me at edwardjacobs@yahoo.com.

SPONSORS: Ilene Knable Gotts (Principal Sponsor), Bonnie E. Fought, Koji F. Fukumura, Kevin D. Judd, John Levitske, Amy Lin Meyerson, Kevin L. Shepherd

PROPOSAL: Amends Section 31.7 of the ABA Constitution and Bylaws to reflect the Board of Governors-approved elimination of the Internal Audit function.

Amends Section 31.7 of the Association's Bylaws to read as follows:

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

Audit. (a) The Standing Committee on Audit consists of seven members including the Treasurer, who is a member *ex-officio* with a vote. Three members of the Committee shall be Association members who are not members of the Board of Governors. Three members of the committee, other than the Treasurer, shall be members of the Board of Governors representing each of the three Association years of the term on the Board. At the Annual Meeting in 2005 and each succeeding third year, one of these members shall be appointed. At the Annual Meeting in 2006 and each succeeding third year, one of these members shall be appointed. At the annual meeting in 2007 and each succeeding third year, one of these members shall be appointed. Members other than the Treasurer shall be appointed by the Board of Governors upon recommendation of the President. The President shall annually designate a chair. All members should be financially knowledgeable and have no relationship that may interfere with the exercise of their independence with respect to the Association and its management.

(b) The Audit Committee shall:

- (1) recommend the selection, retention, and compensation of the Association's independent auditors for approval by the Board of Governors;
- (2) ascertain that the Association's auditors are independent from the Association and its management and are ultimately accountable to the Board of Governors;
- (3) review for the Association and all organizations required to be consolidated with the Association under generally accepted accounting principles (a) the results of the annual external audits of all financial statements and records; (b) the reports of independent auditors on the applicable financial statements; (c) any matters required to be communicated to the Committee by the independent auditors under generally accepted auditing standards and the disclosure requirements of the Independence Standards Board; (d) the system of internal controls; (e) any

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- 26 management letter provided by the independent auditor; (f) the Association
27 management's responses to the independent auditor's management letter; and
28 (g) after reviewing all of these items to its satisfaction, the Audit Committee shall
29 recommend to the Board of Governors that the Board of Governors accept the
30 Association's audited financial statements;
- 31 (4) oversee management's process to receive, investigate when necessary, and
32 cause response to be made to inquiries or complaints by any member or
33 employee of the Association concerning financial operations of the Association;
34 and
- 35 (5) assist the Board of Governors in fulfilling its oversight responsibility relating to:
36 (i) the integrity of the Association's financial statements and financial reporting
37 process and the effectiveness of the Association's system of internal accounting
38 and financial controls; (ii) the evaluation of management's processes to identify,
39 assess and manage the Association's enterprise risk issues; (iii) the
40 administration of the Association's Business Conduct Standards, compliance
41 process and activities through the Association's Ethics Office; and (iv) such other
42 matters as may be delegated to it by the Board of Governors from time to time.

(Legislative Draft – Additions underlined; deletions struck through)

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

- 1 **Audit.** (a) The Standing Committee on Audit consists of seven members including the
2 Treasurer, who is a member *ex-officio* with a vote. Three members of the Committee shall
3 be Association members who are not members of the Board of Governors. Three
4 members of the committee, other than the Treasurer, shall be members of the Board of
5 Governors representing each of the three Association years of the term on the Board. At
6 the Annual Meeting in 2005 and each succeeding third year, one of these members shall
7 be appointed. At the Annual Meeting in 2006 and each succeeding third year, one of
8 these members shall be appointed. At the annual meeting in 2007 and each succeeding
9 third year, one of these members shall be appointed. Members other than the Treasurer
10 shall be appointed by the Board of Governors upon recommendation of the President.
11 The President shall annually designate a chair. All members should be financially
12 knowledgeable and have no relationship that may interfere with the exercise of their
13 independence with respect to the Association and its management.
- 14 (b) The Audit Committee shall:
- 15 (1) recommend the selection, retention, and compensation of the Association's
16 independent auditors for approval by the Board of Governors;
- 17 (2) ascertain that the Association's auditors are independent from the Association
18 and its management and are ultimately accountable to the Board of Governors;

- (3) review for the Association and all organizations required to be consolidated with the Association under generally accepted accounting principles (a) the results of the annual external audits of all financial statements and records; (b) the reports of independent auditors on the applicable financial statements; (c) any matters required to be communicated to the Committee by the independent auditors under generally accepted auditing standards and the disclosure requirements of the Independence Standards Board; (d) the system of internal controls; (e) any management letter provided by the independent auditors' letter of recommendations; (f) the Association management's responses to the independent auditor's management letter of recommendations; and (g) after reviewing all of these items to its satisfaction, the Audit Committee shall recommend to the Board of Governors that the Board of Governors accept the Association's audited financial statements;
- ~~(4) review the internal audit function of the Association including (a) the independence and authority of its reporting obligations; (b) the proposed internal audit plan for each fiscal year; and (c) all reports issued by the internal audit department;~~
- ~~(5)~~ (4) oversee management's process to receive, investigate when necessary, and cause response to be made to inquiries or complaints by any member or employee of the Association concerning financial operations of the Association; and
- (6) (5) assist the Board of Governors in fulfilling its oversight responsibility relating to: (i) the integrity of the Association's financial statements and financial reporting process and the effectiveness of the Association's system of internal accounting and financial controls; (ii) the evaluation of management's processes to identify, assess and manage the Association's enterprise risk issues; (iii) the administration of the Association's Business Conduct Standards, compliance process and activities through the Association's Ethics Office; and (iv) such other matters as may be delegated to it by the Board of Governors from time to time.

REPORT

At the beginning of FY2022, the Standing Committee on Audit (Audit Committee) undertook an in-depth review of its governing documents to reflect the ABA Board of Governors-approved elimination of the Internal Audit function. Therefore, the Audit Committee, with Board of Governors concurrence, proposes the foregoing amendment of its Bylaws contained in Article 31, §31.7, of the ABA Bylaws. The proposed amended Bylaws read:

Audit. (a) The Standing Committee on Audit consists of seven members including the Treasurer, who is a member ex-officio with a vote. Three members of the Committee shall be Association members who are not members of the Board of Governors. Three members of the committee, other than the Treasurer, shall be members of the Board of Governors representing each of the three Association years of the term on the Board. At the Annual Meeting in 2005 and each succeeding third year, one of these members shall be appointed. At the Annual Meeting in 2006 and each succeeding third year, one of these members shall be appointed. At the annual meeting in 2007 and each succeeding third year, one of these members shall be appointed. Members other than the Treasurer shall be appointed by the Board of Governors upon recommendation of the President. The President shall annually designate a chair. All members should be financially knowledgeable and have no relationship that may interfere with the exercise of their independence with respect to the Association and its management.

(b) The Audit Committee shall:

- (1) recommend the selection, retention, and compensation of the Association's independent auditors for approval by the Board of Governors;
- (2) ascertain that the Association's auditors are independent from the Association and its management and are ultimately accountable to the Board of Governors;
- (3) review for the Association and all organizations required to be consolidated with the Association under generally accepted accounting principles (a) the results of the annual external audits of all financial statements and records; (b) the reports of independent auditors on the applicable financial statements; (c) any matters required to be communicated to the Committee by the independent auditors under generally accepted auditing standards and the disclosure requirements of the Independence Standards Board; (d) the system of internal controls; (e) any management letter provided by the independent auditor; (f) the Association management's responses to the independent auditor's management letter; and (g) after reviewing all of these items to its satisfaction, the Audit Committee shall recommend to the Board of Governors that the Board of Governors accept the Association's audited financial statements;
- (4) oversee management's process to receive, investigate when necessary, and cause response to be made to inquiries or complaints by any member or employee of the Association concerning financial operations of the Association; and
- (5) assist the Board of Governors in fulfilling its oversight responsibility relating to:
 - (i) the integrity of the Association's financial statements and financial reporting process and the effectiveness of the Association's system of internal accounting

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and financial controls; (ii) the evaluation of management's processes to identify, assess and manage the Association's enterprise risk issues; (iii) the administration of the Association's Business Conduct Standards, compliance process and activities through the Association's Ethics Office; and (iv) such other matters as may be delegated to it by the Board of Governors from time to time.

Thank you for your consideration of this matter. I would be pleased to answer any questions. I may be reached at ikgotts@wlrk.com.

Respectfully Submitted,

Ilene Knable Gotts
Chair, FY2022 Standing Committee on Audit

SPONSORS: Edith G. Osman (Principal Sponsor), Robert L. Brown, H. Russell Frisby, Jr., Juanita Hernandez, Miriah Holden, Susan M. Holden, Scott C. LaBarre

PROPOSAL: Amends Article 31, §31.7 of the ABA Constitution concerning the Standing Committee on Meetings and Travel

Amends §31.7 of the Constitution to read as follows:

- 1 **§31.7 Standing Committee on Meetings and Travel**
- 2 Consists of nine members. Shall develop plans for the maintenance,
- 3 improvement and integration of meeting and travel programs and procedures.

(Legislative Draft – Additions underlined; deletions struck through)

- 1 **§31.7 Standing Committee on Meetings and Travel**
- 2 Consists of ~~seven~~ nine members. Shall develop plans for the maintenance,
- 3 improvement and integration of meeting and travel programs and procedures.

REPORT

We, the undersigned members of the ABA Standing Committee on Meetings and Travel, propose amendment of the Standing Committee's jurisdictional statement contained within Article 31, §31.7 of the Association's Bylaws. The Committee seeks to change its jurisdictional statement to increase the size of the Committee from seven to nine members, thus amending Article 31, §31.7 to read:

Current Language:

Consists of seven members. Shall develop plans for the maintenance, improvement and integration of meetings and travel programs and procedures.

Proposed Language:

Consists of nine members. Shall develop plans for the maintenance, improvement and integration of meetings and travel programs and procedures.

In the past three years, the scope of the work of the Standing Committee on Meetings and Travel has evolved due to the need for study and analysis related to the Covid-19 pandemic. In a phenomenon that has not occurred before, the Committee has had to deal with how to dismantle and reassemble Meetings in a different format rather than creating new and exciting meetings as it had done in the past. The Committee is frequently required to quickly assemble to monitor this most dynamic and evolving situation, study the facts and make recommendations to the Board of Governors on surveys, suitable alternatives for in-person Midyear and Annual Meetings, etc.... Although the pandemic is hopefully passing the issues related to the occurrence of new strains and how to move forward as a result of new technology will continue.

We have a dedicated and vigorous Committee. We believe that the perspective and experience of our members provides valuable guidance and analysis to the Board of Governors and the Meetings and Travel Department. Adding two members to our ranks will help ensure that we have a sufficiently diverse group of opinions, sufficient participation when some members are unable to attend a meeting, and input when immediate recommendations are required by the Board of Governors in urgent situations. The perspective of additional Committee members will also be helpful as we emerge from the pandemic and need to evaluate future meetings in light of the changes that have occurred to meeting structures. Additionally, it will assist as we turn our attention to the work of the Committee's Annual Meeting Task Force which is focused on holistically evaluating the ABA Annual Meeting to ensure that it continues to thrive and meet the needs of ABA Membership in a post-pandemic environment.

In summary, expanding the Standing Committee's size from seven to nine will increase the depth and breadth of expertise on the Committee to continue to meet the increasingly strategic – and often immediate – demands of the Committee. There are currently no

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travel reimbursements being provided for members of the Standing Committee on Meetings and Travel.

Thank you for your consideration.

Respectfully submitted by the following sponsors,

Edith G. Osman (Principal Sponsor & Chair, Standing Committee on Meetings & Travel)

Robert L. Brown

H. Russell Frisby, Jr.

Juanita C. Hernandez

Miriah Holden

Susan M. Holden

Scott C. LaBarre

SPONSORS: Bob Carlson (Principal Sponsor), Nate Alder, Deborah Enix-Ross, Paula Frederick, Tom Grella, William Horton, Scott LaBarre, Eileen Letts, Amie Martinez, Jennifer Parent, Wendy Shiba, Mary Torres, Gene Vance, Janet Welch, Sheila Willis

PROPOSAL: Amends §6.4 (a) [State Bar and Local Bar Association Delegates] of the Constitution of the American Bar Association to change the year of the annual meeting upon which the minimum number of delegates a state bar association is entitled to certify is based; amends §6.4 (c) to add a provision that a local bar association that had a delegate in 2016 is entitled to maintain that delegate; removes §6.4(f), which is now addressed by the amendment to §6.4 (a); and amends §6.6 (a) [Section Delegates] to add a provision that a section is entitled to at least the same number delegates as it was entitled to certify during the 2016 annual meeting and removes 6.6 (b), which is now addressed by the amendment to §6.6 (a).

Amends Section 6.4(a) of the ABA Constitution to change the year of the annual meeting upon which the minimum number of delegates a state bar association is entitled to certify is based.

§6.4 State Bar and Local Bar Association Delegates.

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

21 definition of a young lawyer at the beginning of his or her term. It is the
22 responsibility of the state bar association to ensure that this requirement is
23 satisfied. However, a state bar association is entitled to at least as many delegates
24 as it was entitled to certify at the 2016 annual meeting.
25

(Legislative Draft – Additions underlined; deletions struck through)

1 **§6.4 State Bar and Local Bar Association Delegates.**

2
3 (a) A state bar association is entitled to at least one delegate in the
4 House of Delegates, except that if there is more than one state bar association in
5 a state the House shall determine which associations may select delegates. A
6 state bar association in a state that has more than 4,000 lawyers is entitled to an
7 additional delegate for each additional 2,500 lawyers above 4,000 until it is entitled
8 to four delegates. A state bar association in a state that has more than 14,000
9 lawyers and not more than 20,000 lawyers is entitled to five delegates. If it has
10 more than 20,000 lawyers, it is entitled to six delegates. If the bar associations of
11 a state are entitled to four or more delegates, at least one delegate representing
12 the state bar or a local bar association in that state must have been admitted to
13 practice in his or her first bar within the past five years, or must be less than 36
14 years old at the beginning of the term, or meet the state's definition of a young
15 lawyer. Each state delegation, as well as the United States Virgin Islands, that did
16 not have an additional young lawyer delegate prior to the 2015 Annual Meeting
17 shall be entitled to one additional delegate, chosen by either the state bar
18 association or one of the qualifying local bar associations referred to in Articles
19 6.4(b) and 6.9 below, provided that such delegate was admitted to his or her first
20 bar within the past five years or is less than 36 years old or meets the state's
21 definition of a young lawyer at the beginning of his or her term. It is the
22 responsibility of the state bar association to ensure that this requirement is
23 satisfied. However, a state bar association is entitled to at least as many delegates
24 as it was entitled to certify at the ~~1990~~ 2016 annual meeting.

Amends Section 6.4(c) of the ABA Constitution to add a provision that a local bar association that had a delegate in 2016 is entitled to maintain that delegate.

§6.4 State Bar and Local Bar Association Delegates.

(c) A local bar association that has 2,000 or more members is entitled to one delegate in the House. This section also applies to a local bar association that had 2000 or more members as of the 2016 annual meeting.

(Legislative Draft – Additions underlined; deletions struck through)

§6.4 State Bar and Local Bar Association Delegates.

(c) A local bar association that has 2,000 or more members is entitled to one delegate in the House. This section also applies to a local bar association that had 2000 or more members as of the 2016 annual meeting.

Removes Section 6.4(f), which is now addressed by the amendment to 6.4 (a).

(Legislative Draft – Additions underlined; deletions struck through)

~~(f) Notwithstanding the provisions of §§6.2(b) and 6.4(a), (b) and (c), effective upon the adjournment of the 2021 Annual Meeting, state and local bar associations shall be entitled to at least the same number of delegates to which they were entitled during the 2021 Annual Meeting until the conclusion of the 2023 Annual Meeting.~~

Amends Section 6.6(a) of the ABA Constitution to add a provision that a section is entitled to at least the same number delegates as it was entitled to certify during the 2016 annual meeting and removes Section 6.6 (b), which is now addressed by the amendment to 6.6 (a).

§6.6 Section Delegates.

(a) Each section shall be entitled to a minimum of two delegates. A section with more than 20,000 members and International Lawyer members, shall elect from its membership one additional delegate to the House. A section with more than 45,000 members and International Lawyer members, shall elect from its membership one additional delegate. A section is entitled to at least as many delegates as it was entitled to certify at the 2016 annual meeting. All terms shall

be staggered and in each succeeding third year each position shall then be elected for a term of three Association years. The term of a Section Delegate is three Association years, beginning with the adjournment of the annual meeting during which elected. A Section Delegate elected as an officer or member of the Board of Governors ceases to be a Section Delegate at the beginning of the term as officer or governor. If a vacancy occurs, the council of the section shall select a successor for the unexpired term. This section does not apply to divisions.

(Legislative Draft – Additions underlined; deletions struck through)

§6.6 Section Delegates.

(a) Each section shall be entitled to a minimum of two delegates. A section with more than 20,000 members and International Lawyer members, shall elect from its membership one additional delegate to the House. A section with more than 45,000 members and International Lawyer members, shall elect from its membership one additional delegate. A section is entitled to at least as many delegates as it was entitled to certify at the 2016 annual meeting. All terms shall be staggered and in each succeeding third year each position shall then be elected for a term of three Association years. The term of a Section Delegate is three Association years, beginning with the adjournment of the annual meeting during which elected. A Section Delegate elected as an officer or member of the Board of Governors ceases to be a Section Delegate at the beginning of the term as officer or governor. If a vacancy occurs, the council of the section shall select a successor for the unexpired term. This section does not apply to divisions.

~~(b) — Notwithstanding the provisions of §§6.2(b) and 6.6(a), effective upon the adjournment of the 2021 Annual Meeting, each section shall be entitled to at least the same number of delegates to which it was entitled during the 2021 Annual Meeting until the conclusion of the 2023 Annual Meeting.~~

REPORT

I. Introduction

The purpose of this proposal to amend the Constitution of the American Bar Association (the “**Constitution**”) is to ensure a continued level of representation in the House of Delegates (the “**House**”) by state and local bar association and sections. In August 2021, members of the Working Group on House Operations, as well as representatives from several other constituent entities proposed, and the House adopted, Constitution and Bylaw Amendment 21A11-2, postponing, until the conclusion of the 2023 Annual Meeting, a determination of whether representation of state and local bar associations should be reduced based on membership numbers. This proposal is intended to offer, in part, a more permanent solution to the challenge temporarily addressed by Constitution and Bylaw Amendment 21A11-2 by establishing a minimum number of delegates to which state and local bar associations and sections are entitled.

II. Background

Section 6.4(a) of the Constitution provides that “a state bar association is entitled to at least as many delegates as it was entitled to certify at the 1990 annual meeting.” Section 6.4(c) provides that “A local bar association that has 2,000 or more members is entitled to one delegate in the House.” Section 6.6(a) provides in pertinent part that “Each section shall be entitled to a minimum of two delegates. A section with more than 20,000 members and International Lawyer members, shall elect from its membership one additional delegate to the House. A section with more than 45,000 members and International Lawyer members, shall elect from its membership one additional delegate.” Membership levels at the time the above language was adopted were arguably very different than those of today. While these provisions were likely very reasonable at the time of adoption, today, this is no longer the case. It is now necessary to ensure that a minimum level of representation, for state and local bar associations and sections, be established that is both reasonable and more reflective of membership levels during less turbulent and unpredictable times. For this purpose, the year 2016 was selected.

Sections 6.4(f) and 6.6(b) have been deleted. These Sections were added by the House of Delegates at the 2021 Annual Meeting as placeholders to give the Working Group time to bring more permanent amendments to the House. The recommended deletions are made to avoid any inconsistency between the new amendments and the language of the above referenced subsections.

III. Conclusion

This proposal has been prepared to ensure that independent of any actions taken as a result of the constitutionally mandated five-year review of delegate allocations, adequate representation from state and local bar delegates, as well as section delegates, is maintained. As expressed in the report accompanying Constitution and Bylaw

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Amendment 21A11-2, “state and local bar associations bring the voice of lawyers of all types from across the nation. Those voices would not be heard if it were not for the Delegates representing state and local bar associations.” By the same token, sections bring their own unique perspectives to House deliberations, and it is imperative that all of these voices continue to be amplified by ensuring a minimum level of representation.

Respectfully Submitted,

Bob Carlson (Principal Sponsor)

Nate Alder

Deborah Enix-Ross

Paula Frederick

Tom Grella

William Horton

Scott LaBarre

Eileen Letts

Amie Martinez

Jennifer Parent

Wendy Shiba

Mary Torres

Gene Vance

Janet Welch

Sheila Willis

AMERICAN BAR ASSOCIATION
SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR
REPORT TO THE HOUSE OF DELEGATES
RESOLUTION

- 1 RESOLVED, That the American Bar Association House of Delegates concurs in
- 2 the action of the Council of the Section of Legal Education and Admissions to the
- 3 Bar in making amendments dated August 2022 to Standards 206 and 405 of the
- 4 *ABA Standards and Rules of Procedure for Approval of Law Schools*:
- 5
- 6 Standard 206: Diversity and Inclusion.
- 7 Standard 405: Professional Environment.

American Bar Association
Section of Legal Education and Admissions to the Bar
Revised Standards for Approval of Law Schools
August 2022

(Insertions underlined; deletions ~~struck through~~.)

Standard 206: Diversity, Equity, and Inclusion

~~(a) Consistent with sound legal education policy and the Standards, a law school shall demonstrate by concrete action a commitment to diversity and inclusion by providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.~~

(a) A law school shall ensure the effective educational use of diversity by providing:

(1) Full access to the study of law and admission to the profession to all persons, particularly members of underrepresented groups related to race and ethnicity;

(2) A faculty and staff that includes members of underrepresented groups, particularly those related to race and ethnicity; and

(3) An inclusive and equitable environment for students, faculty, and staff with respect to race, color, ethnicity, religion, national origin, gender, gender identity or expression, sexual orientation, age, disability, and military status.

~~(b) Consistent with sound educational policy and the Standards, a law school shall demonstrate by concrete action a commitment to diversity and inclusion by having a faculty and staff that are diverse with respect to gender, race, and ethnicity.~~

(b) A law school shall report in the Annual Questionnaire and publish in accordance with Standard 509(b) data that reflects the law school's performance in satisfying Standard 206(a)(1)-(2).

(c) A law school shall annually assess the extent to which it has created an educational environment that is inclusive and equitable under Standard 206(a)(3). The law school shall provide the results of such annual assessment to the faculty. Upon request of the Council, a law school shall provide the results of such assessment and the concrete actions the school is taking to address any deficiencies in the educational environment as well as the actions taken to maintain an inclusive and equitable educational environment.

Interpretation 206-1

Underrepresented groups are groups related to race, ethnicity, religion, national origin,

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gender, gender identity or expression, sexual orientation, age, disability, and military status that are underrepresented in the legal profession in the United States when compared to their representation in the general population of the United States. Faculty for purposes of Standard 206(a)(2) includes full-time and part-time tenured and tenure-track faculty, as well as contract faculty, research faculty, adjunct faculty, and any other faculty category.

Interpretation 206-1

~~The requirement of a constitutional provision or statute that purports to prohibit consideration of gender, race, ethnicity, or national origin in admissions or employment decisions is not a justification for a school's non-compliance with Standard 206. A law school that is subject to such constitutional or statutory provisions would have to demonstrate the commitment required by Standard 206 by means other than those prohibited by the applicable constitutional or statutory provisions.~~

Interpretation 206-2

To ensure the effective educational use of diversity, a law school should include among its faculty, staff, and students, members of underrepresented groups generally, but should be particularly focused on those groups that historically have been underrepresented in the legal profession because of race or ethnicity.

Interpretation 206-2

~~In addition to providing full opportunities for the study of law and the entry into the legal profession by members of underrepresented groups, the enrollment of a diverse student body promotes cross-cultural understanding, helps break down racial, ethnic, and gender stereotypes, and enables students to better understand persons of different backgrounds. The forms of concrete action required by a law school to satisfy the obligations of this Standard are not specified. If consistent with applicable law, a law school may use race and ethnicity in its admissions process to promote diversity and inclusion. The determination of a law school's satisfaction of such obligations is based on the totality of the law school's actions and the results achieved. The commitment to providing full educational opportunities for members of underrepresented groups typically includes a special concern for determining the potential of these applicants through the admission process, special recruitment efforts, and programs that assist in meeting the academic and financial needs of many of these students and that create a favorable environment for students from underrepresented groups.~~

Interpretation 206-3

Standard 206 does not authorize schools to engage in racial balancing, nor does it authorize schools to limit representation of individuals from any group.

Interpretation 206-4

Concrete actions towards creating an inclusive and equitable environment under Standard 206(a)(3) may include, but are not limited to:

(1) Support of student affinity groups and the provision of student mentoring

opportunities;

(2) Diversity, equity, and inclusion education for faculty, staff, and students;

(3) Provision of mentoring opportunities for junior faculty members with particular focus on promotion, tenure, and retention of faculty members from groups underrepresented in legal education;

(4) Support of pro bono and externship opportunities that reflect a commitment to an inclusive and equitable environment; and

(5) Continuing education for faculty members regarding the effective use of diversity in the classroom.

The determination of a law school's satisfaction of its obligations under Standard 206(c) is based on the totality of the law school's actions as well as the results achieved.

Interpretation 206-5

To the extent that Standard 206 requires a religiously affiliated law school to provide an environment that is inclusive and equitable with respect to sexual orientation and gender identity or expression, the school is not required to act inconsistently with the essential elements of its religious values and beliefs provided that its actions are protected by applicable law.

Interpretation 206-6

For law schools in jurisdictions that prohibit the consideration of race and ethnicity in employment and admissions decisions, Standard 206 does not compel the consideration of race and ethnicity in such decisions.

Interpretation 206-7

Consistent with academic freedom, the requirement of creating an inclusive and equitable environment does not require law schools to censure or prohibit ideas that may be controversial or offensive to some students, faculty, or staff.

Standard 405. Professional Environment

(b) A law school shall ~~adopt, publish, and adhere to a have an established and announced~~ policy with respect to academic freedom and tenure of which Appendix 1 herein is an example but is not obligatory.

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 206 and 405 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 Procedure 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 Council approved the amendments to Standard 206 for Notice and Comment at its May 13-15, 2021, and November 18-19, 2021, meetings and approved the amendments to Standard 405 for Notice and Comment at its November 18-19, 2021, meeting. The Council approved all amendments at its February 17-19, 2022, meeting.

Standard 206. Diversity and Inclusion: The amendments to Standard 206 aim to achieve the effective educational use of diversity, the compelling state interest recognized in *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Fisher v. University of Texas*, 570 U.S. 297 (2013) (*Fisher I*), and *Fisher v. University of Texas*, 136 S. Ct. 2198 (2016) (*Fisher II*). In *Grutter*, the U.S. Supreme Court found “that the Equal Protection Clause does not prohibit the Law School’s [University of Michigan Law School’s] narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the education benefits that flow from a diverse student body.”² In *Fisher I*, the U.S. Supreme Court found that “the Equal Protection Clause of the Fourteenth Amendment permit[s] the consideration of race in undergraduate admissions decisions...but only under a standard of strict judicial scrutiny.”³ The Court found that strict scrutiny was not used by the lower courts in their review of this case. In *Fisher II*, the U.S. Supreme Court found that “The University of Texas’ use of race as a consideration in the admissions process did not violate the Equal Protection Clause of the Fourteenth Amendment...[and] the University of Texas’ use of race as a factor in the holistic review used to fill the spots remaining after the Top Ten Percent Plan was narrowly tailored to serve a compelling state interest.”⁴

¹ “2021-2022 ABA Standards and Rules of Procedure for Approval of Law Schools,” http://www.americanbar.org/groups/legal_education/resources/standards.html

² “*Grutter v. Bollinger*,” Oyez, <https://www.oyez.org/cases/2002/02-241>

³ “*Fisher v. University of Texas*,” Oyez, <https://www.oyez.org/cases/2012/11-345>

⁴ “*Fisher v. University of Texas*,” Oyez, <https://www.oyez.org/cases/2015/14-981>

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The amendments require individual law schools to ensure the effective educational use of diversity by providing (1) full access to the study of law and membership in the profession to all persons with a particular focus on underrepresented groups related to race and ethnicity, (2) a faculty and staff that includes members of underrepresented groups with the same focus related to race and ethnicity, and (3) an inclusive and equitable environment for a larger list of groups.

Standard 405. Professional Environment: The amendments revise part (b) to state that “a law school shall adopt, publish, and adhere to a policy with respect to academic freedom and tenure...” to clarify that a law school must adhere to its policies.

Respectfully submitted,

Leo Martinez, Chair
Council of the Section of Legal
Education and Admissions to the Bar

August 2022

GENERAL INFORMATION FORM

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

Submitted By: Leo Martinez, Chair

1. Summary of the Resolution(s).

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the resolution seeks concurrence in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated August 2022 to Standards 206 and 405 of the *ABA Standards and Rules of Procedure for Approval of Law Schools*. Amendments to Standard 206 require individual law schools to ensure the effective educational use of diversity by providing (1) full access to the study of law and membership in the profession to all persons with a particular focus on underrepresented groups related to race and ethnicity, (2) a faculty and staff that includes members of underrepresented groups with the same focus related to race and ethnicity, and (3) an inclusive and equitable environment for a larger list of groups. Amendments to Standard 405 require law schools to follow their tenure and academic freedom policies.

2. Indicate which of the ABA's Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

This resolution seeks to advance Goal 1 by providing additional clarity and information for law schools on accreditation matters in Standards 206 and 405, and Goal 3 by requiring law schools to ensure the effective educational use of diversity through student access; faculty and staff diversity; and an inclusive and equitable environment through amendments to Standard 206.

3. Approval by Submitting Entity.

The Council approved the amendments to Standard 206 for Notice and Comment at its May 13-15, 2021, and November 18-19, 2021, meetings and approved the amendments to Standard 405 for Notice and Comment at its November 18-19, 2021, meeting. The Council approved all amendments at its February 17-19, 2022, meeting.

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

No.

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

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

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

Not Applicable.

7. Status of Legislation. (If applicable)

Not Applicable.

8. 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*.

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

Not Applicable.

10. Disclosure of Interest. (If applicable)

Not Applicable.

11. Referrals.

ABA Entities

ABA Diversity and Inclusion Center plus:
Coalition on Racial and Ethnic Justice
Commission on Disability Rights
Commission on Hispanic Legal Rights & Responsibilities
Commission on Racial and Ethnic Diversity in the Profession
Commission on Sexual Orientation and Gender Identity
Commission on Women in the Profession
Council for Diversity in the Educational Pipeline
ABA Diversity and Inclusion Advisory Council
ABA Law Student Division
All ABA Sections and Divisions
ABA Standing and Special Committees, Task Forces, & Commissions
ABA Young Lawyers Division
Conference of State Delegates
Racial and Ethnic Diversity Caucus

National Caucus of State Bar Associations

Non-ABA Entities

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
 Deans and Associate Deans of Law Schools
 Law School Admission Council
 National Association for Law Placement
 National Association of Bar Executives
 National Conference of Bar Examiners
 National Conference of Bar Presidents
 SBA Presidents
 Society of American Law Teachers
 University Presidents

12. 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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13. 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 SUMMARY1. 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 August 2022 to Standards 206 and 405 of the *ABA Standards and Rules of Procedure for Approval of Law Schools*. Amendments to Standard 206 require individual law schools to ensure the effective educational use of diversity by providing (1) full access to the study of law and membership in the profession to all persons with a particular focus on underrepresented groups related to race and ethnicity, (2) a faculty and staff that includes members of underrepresented groups with the same focus related to race and ethnicity, and (3) an inclusive and equitable environment for a larger list of groups. Amendments to Standard 405 require law schools to follow their tenure and academic freedom policies.

2. Summary of the issue that the resolution addresses.

The resolution addresses Standards 206 and 405 of the *ABA Standards and Rules of Procedure for Approval of Law Schools*. Amendments to Standard 206 require law schools to ensure the effective educational use of diversity through student access; faculty and staff diversity; and an inclusive and equitable environment. Amendments to Standard 405 will provide additional clarity and information to law schools on accreditation matters.

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

The proposals amend the 2021-2022 *ABA Standards and Rules of Procedure for Approval of Law Schools*.

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

None.

AMERICAN BAR ASSOCIATION
SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association House of Delegates concurs in
2 the action of the Council of the Section of Legal Education and Admissions to the
3 Bar in making amendments dated August 2022 to Definitions (7) and (8) and
4 Standards 306 and 311 of the *ABA Standards and Rules of Procedure for Approval*
5 *of Law Schools*:
6
7 Definition (7): Distance Education Course
8 Definition (8): Distance Education J.D. Program
9 Standard 306: Distance Education
10 Standard 311: Academic Program and Academic Calendar

**American Bar Association
Section of Legal Education and Admissions to the Bar
Revised Standards for Approval of Law Schools
August 2022**

(Insertions underlined; deletions ~~struck through~~.)

Definition (7) – Distance Education Course

(7) “Distance education course” means one in which students are separated from all the ~~faculty members or each other~~ for more than one-third of the instruction and the instruction involves the use of technology to support regular and substantive interaction ~~among students and between the students and the~~ all faculty members, either synchronously or asynchronously.

Definition (8) – Distance Education J.D. Program

(8) “Distance Education J.D. Program” means a program where a law school grants a student more than one-third of the credit hours required for the J.D. degree for distance education courses; ~~or more than 10 credit hours during the first one-third of a student's~~ program of legal education.

Standard 306. Distance Education – ~~Reserved and Deleted August 2020~~

Distance Education law school courses for which credit is given towards the J.D. degree must provide regular and substantive interaction between the students and faculty teaching the course. Distance education credits may not be counted towards the J.D. degree if they exceed the credit hour limitations in Standard 311(e).

(a) Regular interaction between a student and a faculty member in a distance education course shall include:

(1) providing the opportunity for substantive interactions with the student on a predictable and scheduled basis commensurate with the length of time and the amount of content in the course as defined by Standard 310(b);

(2) monitoring the student's academic engagement and success; and

(3) ensuring that the faculty member is responsible for promptly and proactively engaging in substantive interaction with the student when needed on the basis of such monitoring, or upon request by the student.

(b) Substantive interaction in a distance education course requires engaging students in teaching, learning, and assessment, consistent with the content under discussion, and includes at least two of the following:

(1) providing direct instruction;

(2) assessing or providing feedback on a student's coursework;

(3) providing information or responding to questions about the content of a course; or

(4) facilitating a group discussion regarding the content of a course.

(c) Remote participation in a non-distance education course by a student as an accommodation provided under law (such as the Americans with Disabilities Act) or under exceptional circumstances shall not cause the course to count towards the distance education credit limits in Standard 311(e) for that student. The law school shall document all instances in which it permits a student's remote participation in a non-distance education course for which the credits will not be counted towards the credit hour limits in Standard 311(e).

Standard 311. Academic Program and Academic Calendar

(c) A law school shall not permit a student to be enrolled at any time in coursework for credit in the J.D. program that exceeds 20 percent of the total credit hours required by that school for graduation.

...

(e) A law school that does not offer a J.D. degree via distance education under Standard 105(a)(12)(ii) may grant a student up to one-third of the credit hours required for the J.D. degree for Distance Education Courses; up to 10 credit hours required for the J.D. degree for distance education courses of those credit hours may be granted during the first one-third of a student's program of legal education.

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 Definitions (7) and (8) and Standards 306 and 311 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 Procedure 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 Council approved the amendments to Definitions (7) and (8) and Standards 306 and 311 for Notice and Comment at its November 18-19, 2021, meeting. The Council approved the amendments at its meeting on February 17-19, 2022.

Definition (7): Distance Education Course: The amendments clarify that a course will be a Distance Education Course only if students are separated from all faculty members teaching the course to align with the U.S. Department of Education's (USDE) "Distance Education" definition and remove the phrases "or each other" and "among students" so the presence of one or more remote students in an otherwise in-person course will not "convert" the course to a Distance Education Course for students taking the course in-person.

Definition (8): Distance Education J.D. Program: The amendments add the distance education credit limits currently found in Standard 311(e) related to the first one-third of a student's program of legal education.

Standard 306: Distance Education: The amendments add information from the USDE regarding what "regular interaction" and "substantive interaction" must include in terms of distance education courses. The amendments also address remote participation by students as an ADA accommodation or in exceptional circumstances and whether those courses count towards the distance education credit limits for that student.

Standard 311: Academic Program and Academic Calendar: The amendments to part (c) clarify that any credits that count for the J.D. program are included in the 20 percent limitation. The amendments to part (e) clarify that a law school may grant a student up to one-third of the credit hours required for the J.D. degree for distance education courses without applying for a substantive change under Standard 105(a)(12)(ii).

¹ "2021-2022 ABA Standards and Rules of Procedure for Approval of Law Schools," http://www.americanbar.org/groups/legal_education/resources/standards.html

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Respectfully submitted,

Leo Martinez, Chair
Council of the Section of Legal
Education and Admissions to the Bar

August 2022

GENERAL INFORMATION FORM

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

Submitted By: Leo Martinez, Chair

1. Summary of the Resolution(s).

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the resolution seeks concurrence in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated August 2022 to Definitions (7) and (8) and Standards 306 and 311 of the *ABA Standards and Rules of Procedure for Approval of Law Schools*. Definitions (7) and (8) and Standards 306 and 311 provide clarification on the Council's current distance education limits, incorporate new information from the U.S. Department of Education (USDE), provide guidance on remote participation by students as an ADA accommodation or in exceptional circumstances, and clarify credits included in the 20 percent limitation.

2. Indicate which of the ABA's Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

The resolution will advance Goal 1 as the amendments to Definitions (7) and (8) and Standards 306 and 311 will provide additional clarity and information for law schools on accreditation matters.

3. Approval by Submitting Entity.

The Council approved the amendments to Definitions (7) and (8) and Standards 306 and 311 for Notice and Comment at its November 18-19, 2021, meeting. The Council approved the amendments at its meeting on February 17-19, 2022.

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

No.

5. 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*.

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

Not Applicable.

7. Status of Legislation. (If applicable)

Not Applicable.

8. 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*.

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

Not Applicable.

10. Disclosure of Interest. (If applicable)

Not Applicable.

11. Referrals.

ABA Entities

ABA Diversity and Inclusion Center plus:
Coalition on Racial and Ethnic Justice
Commission on Disability Rights
Commission on Hispanic Legal Rights & Responsibilities
Commission on Racial and Ethnic Diversity in the Profession
Commission on Sexual Orientation and Gender Identity
Commission on Women in the Profession
Council for Diversity in the Educational Pipeline
ABA Diversity and Inclusion Advisory Council
ABA Law Student Division
All ABA Sections and Divisions
ABA Standing and Special Committees, Task Forces, & Commissions
ABA Young Lawyers Division
Conference of State Delegates
Racial and Ethnic Diversity Caucus
National Caucus of State Bar Associations

Non-ABA Entities

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
 Deans and Associate Deans of Law Schools
 Law School Admission Council
 National Association for Law Placement
 National Association of Bar Executives
 National Conference of Bar Examiners
 National Conference of Bar Presidents
 SBA Presidents
 Society of American Law Teachers
 University Presidents

12. 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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13. 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.*

Joan S. Howland
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EXECUTIVE SUMMARY1. 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 August 2022 to Definitions (7) and (8) and Standards 306 and 311 of the *ABA Standards and Rules of Procedure for Approval of Law Schools*. Definitions (7) and (8) and Standards 306 and 311 provide clarification on the Council's current distance education limits, incorporate new information from the U.S. Department of Education (USDE), provide guidance on remote participation by students as an ADA accommodation or in exceptional circumstances, and clarify credits included in the 20 percent limitation.

2. Summary of the issue that the resolution addresses.

The resolution addresses Definitions (7) and (8) and Standards 306 and 311 of the *ABA Standards and Rules of Procedure for Approval of Law Schools*. Amendments to Definitions (7) and (8) and Standards 306 and 311 will provide additional clarity and information for law schools on accreditation matters.

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

The proposals amend the 2021-2022 *ABA Standards and Rules of Procedure for Approval of Law Schools*.

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

None.

AMERICAN BAR ASSOCIATION
SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR
REPORT TO THE HOUSE OF DELEGATES
RESOLUTION

1 RESOLVED, That the American Bar Association House of Delegates concurs in the
2 action of the Council of the Section of Legal Education and Admissions to the Bar in
3 making amendments dated August 2022 to Rules 19 and 29 of the *ABA Standards and*
4 *Rules of Procedure for Approval of Law Schools*:

- 5
6 Rule 19: Attendance at Council Meetings and Hearings
7 Rule 29: Teach-Out Plan

**American Bar Association
Section of Legal Education and Admissions to the Bar
Revised Standards for Approval of Law Schools
August 2022**

(Insertions underlined; deletions ~~struck through~~.)

Rule 19: Attendance at Council Meetings and Hearings

(a) A law school has a right to have representatives of the law school, including legal counsel, appear before the Council at a hearing regarding

(1) ~~(i)~~ the law school's application for provisional approval,

(2) ~~(ii)~~ the law school's application for full approval,

(3) ~~(iii)~~ the law school's application for acquiescence in a substantive change under Rule 24(a)(1) – 24(a)(18) [excluding Rule 24(a)(12)(iii)], or

(4) ~~at a hearing to determine~~ whether to impose sanctions and/or direct specific remedial action on the part of the law school.

(b) The Managing Director₁ in consultation with the Chair of the Council₁ may set reasonable limitations on the number of law school representatives that may appear and on the amount of time allotted for the appearance.

(c) Except as permitted in subsection (a), a law school does not have a right to appear at a meeting of the Council or to observe the deliberations of the Council related to the law school's appearance at a hearing.

(d) The Managing Director or designee and any additional staff designated by the Managing Director shall be present at Council meetings and hearings. Legal Counsel for the Section may also be present at Council meetings and hearings.

Rule 29: Teach-Out Plan

(c) A provisional or fully approved law school must submit a teach-out plan, and if practicable, teach-out agreements 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 to operate its approved program of legal education at the law school or 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 placed the law school on the reimbursement payment method under 34 CFR 668.162(c) or heightened cash monitoring payment method, requiring the Secretary's review of the law school's supporting documentation under 34 CFR 668.162(d)(2);

(4) 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;

(5) 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;

(6) The Council or its 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.

...
(f) The Council or its Executive Committee 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.

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

(h) If the Council or its Executive Committee 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.

(i) A law school is not permitted to serve as a teach-out law school if the law school is subject to the conditions of (b) or (c), or is under investigation, subject to an action, or being prosecuted for an issue related to academic quality, misrepresentation, fraud, or other severe matters by a law enforcement agency.

(j) The Council or its Executive Committee may waive requirements regarding the percentage of credits that must be earned by a student at the law school awarding the J.D. if the student is completing a program through a written teach-out agreement or transfer.

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

93
94 (1) Approval of the teach-out plan may be conditioned on specified changes to the plan.
95
96 (2) If the teach-out plan is ~~denied~~ rejected, the law school must revise the plan to meet
97 the deficiencies identified and resubmit the plan as directed, after receiving notice of the
98 decision.
99 ...

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 Rules 19 and 29 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 Procedure 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 Council approved the amendments to Rules 19 and 29 for Notice and Comment at its November 18-19, 2021, meeting. The Council approved the amendments at its February 17-19, 2022, meeting.

Rule 19: Attendance at Council Meetings and Hearings: Part (a) outlines when law schools have the right to appear before the Council at a hearing. Most of these are self-explanatory, but some additional explanation may be helpful for part (a)(3). All law schools must submit an application to the Council for acquiescence in a substantive change if the change they seek to make is covered by Rule 24(a)(1)-24(a)(18). Examples include starting a branch campus or separate location, establishing a Distance Education J.D. program, changing the location of the law school, and merging with another law school, among other changes. Law Schools applying to make these changes have a right to appear at a hearing before the Council. The amendments create an exception for the application for a substantive change covered by Rule 24(a)(12)(iii). Rule 24(a)(12)(iii) covers a law school's application for acquiescence in a substantive change involving the establishment of a new or different program leading to a certificate or degree other than the J.D. degree, but unlike the other applications for acquiescence in a substantive change, there is no right to a hearing. Finally, the amendments to part (c) clarify that a law school does not have the right to observe the deliberations of the Council related to the law school's appearance at a hearing.

Rule 29: Teach-Out Plan: The amendments make the following revisions: (1) replace a few instances of "Council" with "Council or its Executive Committee" so decisions related to teach-out plans, due to their time-sensitive nature, can be made by either the full Council or the Executive Committee depending on when the teach-out plan is submitted to the Managing Director's Office; (2) replace "Executive Committee" with "Council or its

¹ "2021-2022 ABA Standards and Rules of Procedure for Approval of Law Schools," http://www.americanbar.org/groups/legal_education/resources/standards.html.

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Executive Committee” in a few instances for the same reason as (1); and (3) replace “deny” with “reject” regarding teach-out plans as this is a more appropriate term.

Respectfully submitted,

Leo Martinez, Chair
Council of the Section of Legal Education and Admissions to the Bar

August 2022

GENERAL INFORMATION FORM

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

Submitted By: Leo Martinez, Chair

1. Summary of the Resolution(s).

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the resolution seeks concurrence in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated August 2022 to Rules 19 and 29 of the *ABA Standards and Rules of Procedure for Approval of Law Schools*. Rule 19 now includes when law schools do not have a right to attend Council deliberations and when there is no right to a Council hearing, and Rule 29 has been revised to allow either the Council or its Executive Committee to approve or reject a law school's teach-out plan.

2. Indicate which of the ABA's Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

The resolution will advance Goal 1 (Serve our Members) as the amendments to Rules 19 and 29 will provide additional clarity and information for law schools on accreditation matters.

3. Approval by Submitting Entity.

The Council approved the amendments to Rules 19 and 29 for Notice and Comment at its November 18-19, 2021, meeting. The Council approved the amendments at its meeting on February 17-19, 2022.

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

No.

5. 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*.

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

Not Applicable.

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7. Status of Legislation. (If applicable)

Not Applicable.

8. 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*.

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

Not Applicable.

10. Disclosure of Interest. (If applicable)

Not Applicable.

11. Referrals.

ABA Entities

ABA Diversity and Inclusion Center plus:
Coalition on Racial and Ethnic Justice
Commission on Disability Rights
Commission on Hispanic Legal Rights & Responsibilities
Commission on Racial and Ethnic Diversity in the Profession
Commission on Sexual Orientation and Gender Identity
Commission on Women in the Profession
Council for Diversity in the Educational Pipeline
ABA Diversity and Inclusion Advisory Council
ABA Law Student Division
All ABA Sections and Divisions
ABA Standing and Special Committees, Task Forces, & Commissions
ABA Young Lawyers Division
Conference of State Delegates
Racial and Ethnic Diversity Caucus
National Caucus of State Bar Associations

Non-ABA Entities

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
 Deans and Associate Deans of Law Schools
 Law School Admission Council
 National Association for Law Placement
 National Association of Bar Executives
 National Conference of Bar Examiners
 National Conference of Bar Presidents
 SBA Presidents
 Society of American Law Teachers
 University Presidents

12. 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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13. 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 SUMMARY1. 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 August 2022 to Rules 19 and 29 of the *ABA Standards and Rules of Procedure for Approval of Law Schools*. Rule 19 now includes when law schools do not have a right to attend Council deliberations and when there is no right to a Council hearing, and Rule 29 has been revised to allow either the Council or its Executive Committee to approve or reject a law school's teach-out plan.

2. Summary of the issue that the resolution addresses.

The resolution addresses Rules 19 and 29 of the *ABA Standards and Rules of Procedure for Approval of Law Schools*. Amendments to Rules 19 and 29 will provide additional clarity and information to law schools on accreditation matters.

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

The proposals amend the 2021-2022 *ABA Standards and Rules of Procedure for Approval of Law Schools*.

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

None.

AMERICAN BAR ASSOCIATION**NEW YORK CITY BAR ASSOCIATION
SECTION OF INTERNATIONAL LAW
CENTER FOR HUMAN RIGHTS****REPORT TO THE HOUSE OF DELEGATES****RESOLUTION**

1 RESOLVED, That the American Bar Association urges the President of the United States
2 to support the right of the people of Western Sahara to self-determination under the
3 principles of UN General Assembly Resolution A/RES/1514 (XV), the Charter of the
4 United Nations, and international law by:

5
6 1. Rescinding the “Proclamation on Recognizing the Sovereignty of the Kingdom of
7 Morocco Over The Western Sahara” issued by President Donald Trump on December
8 10, 2020, and withdrawing the United State government’s recognition of Morocco’s
9 sovereignty over Western Sahara.

10
11 2. Urging Morocco, through all available diplomatic channels, to grant the people of
12 Western Sahara self-determination and to adhere to principles of international law by:

13
14 (a) allowing the people of Western Sahara to choose freely whether to establish
15 an independent state or agree to incorporation within Morocco;

16 (b) allowing the people of Western Sahara to freely express their support for
17 independence or a referendum to determine the status of the territory;

18 (c) affirming the right of the people of Western Sahara to the enjoyment of their
19 natural resources and their right to dispose of those resources in their best interest as
20 affirmed in UN General Assembly Resolution A/RES/61/123; and

21 (d) using the resources of the territory of Western Sahara only with the permission
22 of the people of Western Sahara and if such use principally benefits such people as
23 required by applicable international law principles.

24
25 3. Continuing the policy of excluding products from Western Sahara from the U.S. –
26 Morocco Free Trade Agreement.

27
28 FURTHER RESOLVED, That the American Bar Association urges the members of
29 Congress to adopt policies and measures that are consistent with principles of
30 international law by:
31

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(a) ensuring that any humanitarian or military aid to Morocco included in appropriations or other bills passed by Congress is conditioned on Morocco's removal of restrictions on the free speech or movement of the people of Western Sahara, its willingness to permit journalists free access to Western Sahara, and its willingness to accept a solution that would include the option of independence for the territory; and

(b) passing legislation in Congress that would ensure that all importations from Western Sahara as well as business between United States entities and Western Sahara comply with international law principles concerning the use of resources of Non-Self-Governing Territories; and

FURTHER RESOLVED, That the American Bar Association urges the President of the United States to have the U.S. Ambassador to the United Nations support in the United Nations Security Council the expansion of the mandate of the U.N. Mission for Western Sahara (MINURSO) to monitor human rights violations in both Western Sahara and the Polisario camps and to introduce a resolution in the United Nations Security Council to that effect.

REPORT

Introduction

In 1963 Spanish Sahara,¹ now known as Western Sahara, was included on the UN's list of Non Self Governing Territories whose people were entitled to self-determination under the policy of the United Nations concerning the de-colonization of territories held by Western governments.² In 1974 Spain agreed to allow the Sahrawis a referendum under which they could choose either independence or some other status.

However, before that referendum could be held Morocco and Mauritania interposed claims of sovereignty over the territory based upon alleged ties between the territory and their rulers in pre-colonial days and in 1974 convinced the United Nations to have Spain postpone the referendum in order to have their claims adjudicated by the International Court of Justice (ICJ). The U.N. agreed, but sent a Mission to ascertain the wishes of the people. In 1975 this Mission issued a report indicating that the overwhelming majority of the people wished independence and not integration with another state.³ Shortly thereafter the ICJ issued an Advisory Opinion rejecting the claims of both Morocco and Mauritania and confirming the right of the people of the territory to self-determination.⁴ Despite this ruling the King of Morocco threatened to send thousands of Moroccan civilians into the territory to claim it unless Spain agreed to withdraw.⁵

¹ Western Sahara, known as Spanish Sahara when it was a colony of Spain, is a territory no larger than the state of Colorado, situated between Morocco to the north, Mauritania to the south, and Algeria to the east. It is mostly desert and the ancestral home of nomadic people called the Sahrawi.

² General Assembly Resolution 1514 (XV), December 14, 1960.

³ The report of this Mission is entitled "The Report of the Special Committee on the Situation With Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples," UN Doc. A/100023/Add.5, Annex, at 26 (1975). ("The U.N. Mission Report")

⁴ *Advisory Opinion on Western Sahara* (1975), ICJ Rep. 12 ("Western Sahara Case"). In the words of the Court: "The Court's conclusion is that the material and information presented to it do no establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco Thus the Court has not found ties of such a nature as might affect the application of Resolution 1514 (XV) in the decolonization of Western Sahara, and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory" (at 162) The Court's response to Mauritania's claim was essentially the same (at 49).

⁵ Two days after the Court's opinion the King announced that there would be a massive march of 350,000 civilians from Morocco into Western Sahara, later called the "Green March," to gain recognition of Morocco's sovereignty. Letter from the Permanent Representative of Morocco to the U. N. addressed to the President of the Security Council, October 18, 1975. UN Doc. S/11852 (1975). It was clear that the ultimate purpose of the march was to put pressure on Spain to negotiate with Morocco and Mauritania before the General Assembly could conduct the referendum. See, R. Vance, Jr., *Recognition as an Affirmative Step in the Decolonization Process: The Case of Western Sahara*, 7 Yale J. World Pub. Ord. 45, 50 (19 80) "Vance").

Faced with this threat Spain withdrew from the territory and in 1975 both Morocco and Mauritania sent troops to occupy it.⁶ Roughly half the inhabitants then fled the cities.⁷ However, after being bombed by Moroccan aircraft, they were offered asylum in Algeria.⁸ To this day they and their descendants remain in refugee camps in the desert at a place called Tindouf. The occupation also ignited a war with the Polisario, a Sahrawi independence movement.

Mauritania withdrew from the territory in 1979, but the fighting between the Polisario and Morocco only ended in 1991 when Morocco agreed to permit the United Nations to conduct a referendum through which the Sahrawis could choose whether Western Sahara would be an independent state or part of Morocco, and a ceasefire was declared. This agreement was called the Settlement Plan.

The parties accepted the Plan in principle in 1988,⁹ and on June 18, 1990, the Secretary General issued a report¹⁰ outlining further details.¹¹ Throughout this period Western Sahara still remained on the United Nation's list of Non-Self-Governing Territories whose people are entitled to self-determination, and remains on that list today.¹²

Following the ceasefire the conduct of the referendum was placed under the aegis of the U.N. Security Council and a U.N. Peacekeeping Mission called MINURSO was created to conduct it. In 1999 the U.N. published a list of persons eligible to participate in the referendum according to the criteria and procedures agreed to by the parties. However, Morocco subsequently pulled out of the referendum process when it saw that the list was

⁶ On November 14, the governments of Morocco, Mauritania and Spain issued a joint communiqué notifying the world of certain agreements, later dubbed the "Madrid Accords," reached as a result of negotiations on the Western Sahara issue. Declaration of Principles on Western Sahara by Spain, Morocco and Mauritania, Annex II to U.N. Doc. S/11880, November 19, 1987, in Security Council Official Records, 30th Year, Supplement for October, November and December 1975, at 41.

⁷ A February 1976 report by the International Federation of Human Rights noted that soldiers "butchered hundreds and perhaps thousands of Sahrawis, including children and old people who refused to publicly acknowledge the king of Morocco" and that by that date 80 percent of the inhabitants of Laayoune had left. T. Hodges, WESTERN SAHARA: THE ROOTS OF A DESERT WAR (Lawrence Hill & Co. 1983) ("Hodges") at 232. When they were later strafed by Moroccan aircraft, killing or wounding many of them, Boumedienne, the President of Algeria, allowed them to set up camps in Tindouf, Hodges at 233.

⁸ Hodges at 233.

⁹ On August 11, 1988 the Secretary General of the U.N. and a representative of the President of the Organization of African Unity (OAU), now the African Union (AU), presented an outline of a plan to both parties, which was accepted by both parties on August 30, 1988.

¹⁰ S/21360/1990 (18 June 1990).

¹¹ Id, at 5. This report confirmed their agreement that the future of the territory would be determined by a referendum conducted under the auspices of the United Nations and the Organization of African Unity (now the African Union) in which the indigenous population, defined as "all Sahrawis included on the Spanish census of 1974 eighteen years of age or older," would be allowed to vote between independence and integration with Morocco. The terms of the Plan were further delineated in the next report of the Secretary General, S/22464/1991 (April 19, 1991), again confirming these details. However, after lobbying by Morocco, the Secretary General proposed broadening the criteria for voter eligibility to include certain Sahrawis who were not on the 1974 Spanish census, which criteria were finally accepted by the parties.

¹² For a recent acknowledgment that Western Sahara remains a Non-Self-Governing Territory, see Special Committee on Decolonization 4th Meeting (AM), GA/COL/3159, June 6, 2007, paras. 6 and 8.

not in its favor and that it could not re-litigate eligibility determinations through the appeals process.¹³

Rather than press Morocco to go forward with the Settlement Plan, the Security Council in 2000 adopted a resolution calling for a mutually acceptable “political solution.”¹⁴ In 2001 Morocco suggested that it might grant the inhabitants of Western Sahara some type of autonomy within the state of Morocco. James Baker III, who was the Personal Representative of the U.N. Secretary General at the time, incorporated this idea into several proposals, the last being the “Peace Plan” under which Western Sahara would enjoy a period of autonomy after which a referendum would be held through which eligible voters would be able to choose whether to be incorporated into Morocco or establish an independent state. In May of 2003, the Secretary General publicly announced his support for Baker’s “Peace Plan,”¹⁵ and on July 31, 2003, the Security Council voted unanimously to “support strongly” what it described as “an optimum political solution on the basis of agreement between the two parties.”¹⁶

However, Morocco rejected that plan.¹⁷ In April of 2004, the Secretary General confirmed that “Morocco does not accept the Settlement Plan to which it had agreed for many years . . . and it also now does not accept essential elements of the Peace Plan (of Baker). It accepts nothing but negotiations about the autonomy of Western Sahara ‘in the framework of Moroccan sovereignty.’”¹⁸

Since then the Security Council has urged the parties to negotiate a political solution that would, nonetheless, permit the people of the territory to exercise their right to self-determination.¹⁹ However, Morocco has insisted that its autonomy proposal is the only

¹³ S. Zunes & J. Mundy, *WESTERN SAHARA: WAR, NATIONALISM, AND CONFLICT IRRESOLUTION*, (Syracuse U. Press, 2010) (“Zunes & Mundy”) pps. 211 et seq; also UN Doc. S/1999/1219, par. 9.

¹⁴ S/Res/2000/1309 (25 July 2000); S/RES/2000/1324 (30 October 2000). Nevertheless, the Security Council emphasized that any political solution would have to be “in the context of arrangements consistent with the principles and purposes of the Charter of the United Nations” and indicated its willingness to consider “any approach which provides for self-determination.” S/RES./1429 (30 July 2002).

¹⁵ S/2003/565 (23 May 2003).

¹⁶ Press Release SC/7833, July 31, 2003.

¹⁷ As the Secretary General commented at the time: “It is difficult to envision a political solution that . . . provides for self-determination but that nevertheless precludes the possibility of independence as one of several ballot questions. This is particularly difficult to envision given . . . the stated commitment of Morocco to the settlement plan . . . over so many years;” S/2002/565 at 10.

¹⁸ Report of the Secretary-General on the Situation Concerning Western Sahara, UN Doc. S/2004/325. In mid-2007 Morocco submitted a formal autonomy proposal to the UN.

¹⁹ The Security Council adopted Resolution 1754, calling upon the parties: “[t]o enter into negotiations without preconditions in good faith, taking into account the developments of the last months, with a view to achieving a just, lasting and mutually acceptable political solution, which will provide for self-determination of the Western Sahara.” S/RES/1754, 30 April 2007

option for Western Sahara,²⁰ and has described the territory in official documents and legislation as its “Southern Province.”²¹

Morocco also has encouraged large numbers of Moroccans to settle in the territory so that today they greatly outnumber the native Sahrawis. This effort was intensified after the 1991 ceasefire, and today it is estimated that of the 500,000 or so residents of Western Sahara, only 25% are native Sahrawis.²²

Tensions have increased among the Sahrawis, particularly Sahrawi youth, who have become increasingly angry at the denial of their rights by Morocco and the inability of the international community to support their rights.

On November 13, 2020, Morocco evicted Sahrawi civilians who had blocked a Moroccan road that connects Western Sahara with Mauritania through a buffer zone. The Polisario considered the road and eviction a violation of the 1991 ceasefire and declared an end to the agreement.²³

Unless steps are taken immediately to address the situation, there is a chance that it will erupt into a full-scale war. A new special representative of the UN Secretary General has recently been appointed and has reconvened talks between the parties, but there is no indication of any progress in these talks.

DISCUSSION

1. The decision to recognize Morocco’s sovereignty over Western Sahara should be rescinded and such recognition withdrawn because it conflicts with international law and, specifically, the right to self-determination under the United Nations Charter, General Assembly resolutions, and international covenants.

What we now refer to as the “principle of self-determination” was recognized implicitly in at least three Articles of the United Nations Charter.²⁴ However, it was not until a decade

²⁰ In a speech commemorating Throne Day, the King proclaimed: Morocco is . . . clear in terms of its fundamental convictions: the way to achieve the desired settlement can be none other than through Moroccan full sovereignty and within the framework of the autonomy initiative.” See, King Mohammed VI Speech on Throne Day, July 29, 2019.

²¹ In all official documents and legislation Western Sahara is listed as Morocco’s “Southern Province.” See, e.g., Article 21 of the Moroccan “Hydrocarbon Law.” In a speech to the nation on November 6, 2014, the 39th anniversary of the Green March, cited in moroccoworldnews.com, the King of Morocco clearly stated his position: “We say ‘No’ to the attempt to change the nature of this regional conflict and to present it as a decolonization issue. Morocco is in its Sahara [sic] and never was an occupying power or an administrative power. In fact, it exercises its sovereignty over its territory.”

²² U.S. State Department Report, “Human Rights Practices in Western Sahara,” 2015, at 2.

²³ Human Right Watch Report: “Western Sahara: Morocco Cracks Down on Activists,” December 18, 2020.

²⁴ Article 1 describes “[t]he principle of equal rights and self-determination of peoples,” as a measure that “strengthens universal peace.” Article 55 recognizes that respect for the principle of self-determination is necessary for the “creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations.” Article 73(b) obliges member states with colonies “to develop self-

after the Second World War that a consensus began to emerge that this principle should be considered a “right” under international law.²⁵

This “right” was first officially acknowledged in 1960 in Resolution 1514,²⁶ when the UN General Assembly proclaimed that “all peoples have a right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” General Assembly Resolution 1541, also adopted in December 1960, and intended to complement Resolution 1514, declared that “The authors of the Charter of the United Nations had in mind that Chapter XI should be applicable to territories which were then known to be of the colonial type.” This right has been recognized and affirmed by the United Nations and other international bodies, including the International Court of Justice, as the principal right at stake in decolonization,²⁷ and has been affirmed in numerous United Nations resolutions and decisions of the ICJ.²⁸

Today, the right of the peoples of Non-Self-Governing Territories to self-determination is widely accepted as customary international law.²⁹ A consequence of this development is that states have a duty to promote the realization of this right in their policies.

government, to take account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions.”

²⁵ As Professor Ian Brownlie of Oxford once said: “Until recently the majority of Western jurists assumed or asserted that the principle [of self-determination] had no legal content, being an ill-defined concept of policy and morality. Since 1945 developments in the United Nations have changed this position, and Western jurists generally admit that self-determination is a legal principle.” BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 8th ed., James Crawford (ed.) 2012, (“Brownlie”) at 553.

²⁶ A/RES/1514 (XV) December 14, 1960. Resolution 1514 also went on to say that “Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinctions as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.”

²⁷ The International Court of Justice in 1971 declared in its Advisory Opinion on Namibia that Resolutions 1514, 1541, 2625, and others, representing “the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them.” *The Legal Consequences for States for the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 4 (June 21), at 31.

²⁸ In 1975 in a separate opinion in the Western Sahara case, Justice Dillard adopted the principle that the cumulative effect of such resolutions gives rise to a norm of international law, and applied it in his decision supporting the application of the principle of self-determination to Western Sahara. In his words, “. . . the cumulative impact of many resolutions when similar in content, voted for by overwhelming majorities and frequently repeated over a period of time may give rise to a general *opinio juris* and thus constitute a norm of customary international law [T]his is the precise situation manifested by the long list of resolutions which, following in the wake of resolution 1514 (XV), have proclaimed the principle of self-determination to be an operative right in the decolonization of non-self-governing territories.” Advisory Opinion on Western Sahara, at 121.

²⁹ L. Hanauer, *The Irrelevance of Self-Determination Law to Ethno-National Conflict: A New Look at the Western Sahara Case*, 9 Emory Int’l Law Review 133 (1995) at 152 (collectively resolutions of the United Nations establishing norms of self-determination in the context of decolonization have risen to the status of customary international law); Vance, *supra*, (“The right of colonial peoples to self-determination is a widely accepted norm of customary international law.”)

This was affirmed by the majority of the Court in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* (2004),³⁰ and noted by James Crawford, former Professor of International Law at Cambridge University, England and others.³¹ The Court in its Advisory Opinion [Wall] affirmed the *erga omnes* character of that right.³²

It is evident that the people of the territory today enjoy a right under international law to self-determination. Not only was Spanish (now Western) Sahara in 1963 placed on the list of Non-Self-Governing Territories whose people were entitled to self-determination, but Western Sahara also falls within the category of entities that enjoy this right under the United Nations Charter and the many General Assembly resolutions that attempt to define self-determination, in particular Resolution 1514, as well as international covenants³³ which are sources of binding positive law according to Article 38(1)(a) of the ICJ statute. Moreover, as noted previously, the UN General Assembly³⁴ and the UN Security Council³⁵ have explicitly recognized the right of the people of Western Sahara to self-

³⁰ In the words of the Court: "As to the principle of self-determination of peoples . . . Article 1 common to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights reaffirms the right of all Peoples to self-determination, and lays upon the States parties the obligation to promote the realization of that right and to respect it, in conformity with the provisions of the United Nations Charter. The Court recalls its previous case law, which emphasized . . . that the right of peoples [in Non-Self-Governing Territories] to self-determination is today a right *erga omnes*." Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, (2004) at 8. This opinion echoed the conclusions of the Court in the *East Timor (Portugal v. Australia) Judgment*, ICJ Reports 1995, p. 102, para. 29, wherein the Court denied Australia's claim that states were under no international law obligation to promote self-determination in territories over which they exercised no control, noting that "Portugal's assertion that the right of peoples to self-determination . . . has an *erga omnes* character, is irreproachable. The principle of self-determination . . . is one of the essential principles of contemporary international law." See also, "The Legal Issues Involved in the Western Sahara Dispute: The Principal of Self-Determination and the Legal Claims of Morocco," United Nations Committee of the New York City Bar Association, June 2012 ("NYCBar Self-Determination Report") at 28 fn 96. ("[N]o one can challenge the fact that, in light of contemporary international realities, the principle of self-determination necessarily possesses the character of *jus cogens*.")

³¹ "The right of self-determination is one of the essential tenets of international law. Since the adoption of the Declaration on the Granting of Independence to Colonial Countries and Peoples, followed by the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, the concept of self-determination as a whole has obtained the characteristic of a fundamental human right, both individual and collective. Some authors classify it as a peremptory norm (*jus cogens*)" J. Crawford, "Opinion on Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories," TUC Org. UK, January 24, 2012 ("Crawford"), citing Ian Brownlie, *supra.*, at 511-512. See also A. Cassese, *INTERNATIONAL LAW* (2nd Ed., OUP: Oxford, 2005) at 65; M. Shaw, *INTERNATIONAL LAW* (6th Ed. CUP: Cambridge, 2008), at 808.

³² Paragraph 26.

³³ See, in particular the International Covenant on Civil and Political Rights which was adopted on December 1966, and entered into force on March 23, 1976, 999 U.N.T.S. 171, and was ratified by Morocco on August 3, 1973 and the United States on September 8, 1992; also the International Covenant on Economic, Social and Cultural Rights, which was adopted on December 16, 1966, and entered into force on January 3, 1976, 993 U.N.T.S. 3, and was ratified by Morocco on August 3, 1973 and the United States on October 6, 1977.

³⁴ Between 1965 and 2010 there were no fewer than 43 General Assembly Resolutions confirming the right to self-determination of the people of Western Sahara.

³⁵ See, for example, Security Council Resolutions 650 (1990), 690 (1991), 1131 (1997), 1122 (1997), and 1495 (2003). In its first resolution on the issue of Western Sahara, in 1975, S/RES/377 (1975), the Security Council reaffirmed the terms of General Assembly Resolution 1514 (XV). In all of its subsequent resolutions,

determination in a consistent series of resolutions, the first of which was issued within a year of its inclusion on the list of Non-Self-Governing Territories.³⁶ The International Court of Justice affirmed this right in the Western Sahara Case. Also, the right of the people of the territory to self-determination under international law has been upheld by numerous legal scholars.³⁷

In the Western Sahara Case the Court confirmed that the right to self-determination requires a free and genuine expression of the will of the peoples concerned. Its essential feature was free choice.³⁸

This freedom of choice necessarily includes the right to choose to constitute an independent state.³⁹ As the Secretary General commented: "It is difficult to envision a political solution that . . . provides for self-determination but that nevertheless precludes the possibility of independence as one of several ballot questions."⁴⁰

It is also clear that the "people of the territory" of Western Sahara entitled to self-determination are the indigenous Sahrawis and not Moroccan settlers.⁴¹

including its most recent resolution in 2021 the Security Council reaffirmed its commitment to the right to self-determination of the people of the Territory. See, S/RES/2602. Between 1975 and 2000 there were no fewer than 58 Security Council Resolutions confirming the right to self-determination of the people of Western Sahara.

³⁶ 19 GAOR, Annexes, Annex No. 8 (Part I), at 290-91, UN Doc. A/5800/Rev.1 (1964).

³⁷ Law Professors who have supported this right include Thomas M. Franck, Sandra Babcock, Karin Arts, Roger Clark, Lauri Hannikainen, Eduardo Trillo de Martin-Pinillos, Catriona Drew, Marcel Beus, Yahia Zoubir, Carlos Ruiz Miguel, Jaume Saura-Estopa, and Christine Chinkin, among others. See also the RFK Center's 2015 Report on the Kingdom of Morocco's Violations of the International Covenant on Economic Social and Cultural Rights in the Western Sahara.

³⁸ See, C. Drew, *The Meaning of Self-Determination: 'The Stealing of the Sahara' Redux?*, INTERNATIONAL LAW AND THE QUESTION OF WESTERN SAHARA, (Karin Arts and Pedro Pinto Leite (eds) IPJET (2007) at 91; A. Cassese, *supra*, at 89.

³⁹ As was noted by one author: "The right to self-determination is a right of peoples to participate in their own governance, free from the undue influence of outside actors. . . . [W]hen a territory is coming out of occupation or colonial domination . . . self-determination means the right of the people . . . to constitute an independent state and determine its own government for itself." A. Cobban, NATIONAL SELF-DETERMINATION, (Oxford U. Press 1945) pps. 45-46.

⁴⁰ S/2002/565 at 10. The General Assembly acknowledged this by reaffirming in Resolution 2983(XXVII) not only the right of the Sahrawi people to self-determination, but also to independence. A/RES/2983, 27 UN GAOR, Supp. 30, at 84, UN Doc. A/8955 (1972). It is possible for the people of a Non-Self-Governing Territory to choose integration with another state, but this choice must be freely made. Professor Franck summarized the position of the United Nations and the AU on this issue as follows: "If a territory wishes to join with one or several neighboring states, it should have the right to manifest that preference in the process of decolonization, but it must be the free choice of the majority in that particular colony, and a territory with recognized boundaries may neither be absorbed nor dismembered against the will of its inhabitants." T. Franck, *The Stealing of the Sahara*, 70 AJIL 694, 703 (1976), at 698.

⁴¹ The United Nations established early on that the "peoples" entitled to exercise the right to self-determination for Western Sahara would be the indigenous inhabitants of the region. See, for instance, the resolutions of the General Assembly, A/RES/2229 (1966), A/RES/3458-A (1975) and A/RES/3458-B (1975). The European Court of Justice, referring to the proclamations of the UN General Assembly and the International Court of Justice, noted that the "people of the territory" must be considered the indigenous people of the territory, i.e., the Sahrawis. Case C-104/16 Council v. Front Polisario, September 13, 2016, para. 91. As was noted in the NYCBar Self-Determination Report at 40: "There are innumerable instances in which citizens of a colonial power or other foreigners have resided in colonies during the period of colonial

There are no rights that Morocco can assert that would deprive the Sahrawis of their right to self-determination. The basis of Morocco's legal claim to Western Sahara rests on the doctrine of territorial integrity, and its claim that Western Sahara was formerly a part of Morocco and should be re-integrated into it. However, it cannot rely on the argument of secession.⁴² And there are limits under international law to the right of states to assert title to territory based upon historic ties.⁴³ In any event, its claim of historic ties was found by the ICJ to be without a factual basis.

In conclusion, as was noted by the New York City Bar Association in a seminal report on the legal issues involved in the dispute over Western Sahara, international legal principles support the right of the Sahrawis to exercise self-determination in the choice of whether

rule and thereafter until self-determination has been rightfully exercised. In almost all instances of decolonization . . . the people entitled to vote on their future have been the indigenous inhabitants of the territory. Indeed, it would be inimical to the principle of self-determination of the peoples of colonies to permit people brought into the colony by the colonial powers to participate in the exercise of this right. It would be even more inimical to the principle of self-determination of the peoples of colonies to grant the right to people brought into the colony by a power occupying the colony illegally by force. Accordingly, . . . there is usually no question that the right should be limited to legitimate members of the indigenous group unless they, themselves, wish to confer this right upon others." This was also the conclusion of Jaume Saura Estapa, Professor of International Law, Barcelona, Spain (" . . . only the [indigenous] people can be asked about its future, and not the inhabitants brought in by the colonizing (or occupying) power. The UN has devoted a huge effort to ascertaining the actual composition of the Saharawi people. . . . It must be reaffirmed that only the individuals identified by MINURSO constitute the Saharawi people and that they are thus the only ones to be legitimately asked about the issue of their political future.") J. Estapa, *Western Sahara: A Solution for the Conflict on the Basis of Full Respect for International Law*, in INTERNATIONAL LAW AND THE QUESTION OF WESTERN SAHARA, *supra*, at 323.

⁴² Western Sahara has never, since the creation of the modern Moroccan state in 1956, been within its official and internationally recognized borders. In particular, Western Sahara was not within the officially recognized borders of Morocco in 1975 when Morocco sent troops to occupy the territory. Accordingly, the rights of the Sahrawis to self-determination cannot be equated with the rights of a subgroup of a recognized state seeking secession against the will of a state asserting its rights of territorial integrity.

⁴³ As was noted by Professor Thomas Franck in his separate concurring opinion in the International Court of Justice *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia) Application by the Philippines for Permission to Intervene*, (Judgment of October 23, 2001): "The point of law is quite simple, but ultimately basic to the international rule of law. It is this: historic title, no matter how persuasively claimed on the basis of old legal instruments and exercises of authority, cannot – except in the most extraordinary circumstances – prevail in law over the rights of non-self-governing people to claim independence and establish their sovereignty through the exercise of bona fide self-determination." at 652. Professor Franck went on to elaborate: "Under traditional international law, the right to territory was vested exclusively in rulers of States. Lands were the property of a sovereign to be defended or conveyed in accordance with the laws relevant to the recognition, exercise, and transfer of sovereign domain. In order to judicially determine a claim to territorial title erga omnes, it was necessary to engage with the forms of international conveyancing, tracing historic title through to a critical date or dates to determine which State exercised territorial sovereignty at that point in time. Under modern international law, however, the enquiry must necessarily be broader, particularly in the context of decolonization. In particular, the infusion of the concept of the rights of a "people" into this traditional legal scheme, notably the right of peoples to self-determination, fundamentally alters the significance of historic title to the determination of sovereign title. . . . Against [the exercise of self-determination] historic claims and feudal pre-colonial titles are mere relics of another international legal era, one that ended with the setting of the sun on the age of colonial imperium." At 655-658.

they wish to be an independent nation or form an alliance with another country, and in the latter case, to determine what type of alliance and with whom.⁴⁴

In light of the above, the declaration of the previous Administration⁴⁵ that the United States would recognize Morocco's sovereignty over the territory is a denial of the right of the people of Western Sahara to self-determination. It also contravenes the duty of states under international law to refrain from policies which recognize the unlawful acquisition of territory by force.⁴⁶ It has ended decades of United States policy and placed the United States at odds with the policy of a majority of its allies and the long standing resolutions of the United Nations Security Council and General Assembly.

This decision was not taken in consultation with members of Congress and was apparently in return for Morocco normalizing relations with Israel. But however laudable such normalization of relations might be, it does not warrant sacrificing the legitimate rights of the people of Western Sahara.

In his Proclamation, former President Trump endorsed Morocco's autonomy proposal. Observers have cited several reasons why this proposal may, in fact, not be an optimal solution to the conflict,⁴⁷ and the President as well as all officials under his direction

⁴⁴ As was stated in the NYCBar Self-Determination Report, *supra*: "[T]he peoples of the disputed territory have a right to exercise self-determination in a free and fair manner . . . there is a credible legal argument . . . that complete independence as a separate sovereign state should remain a viable option without any interference from a third party . . . the peoples of such Non-Self-Governing Territories do not forfeit the opportunity to choose the independence option preferred by Resolution 1514 because of intervening circumstances imposed unilaterally by the administering authority or occupying state." at 66.

⁴⁵ <https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-recognizing-sovereignty-kingdom-morocco-western-sahara/>

⁴⁶ As was noted by Professor Crawford: "As territory cannot be acquired by the unlawful use of force nor where that purported territorial acquisition violates the right to self-determination, States are obliged to not give legal credence – recognition of authority over the territory – to the unlawful acquisition. . . It is, at a minimum, intended to prevent insofar as possible 'the validation of an unlawful situation by seeking to ensure that a fait accompli resulting from serious illegalities do not consolidate and crystallize over time into situations recognized by the international legal order.'" Crawford, *supra* at 18-19, para. 46; quoting Martin Dawidowicz, *The Obligation of Non-Recognition of an Unlawful Situation in THE LAW OF INTERNATIONAL RESPONSIBILITY* (J. Crawford, A. Pellet & S. Olleson, eds.) (OUP: Oxford, 2010) at 678. As was noted by an English court: "unauthorized military occupation cannot found the basis for legitimate territorial claims." *Western Sahara v. HMRC & SSEFRA*, [2015] EWHC 2898 (Admin.) October 19, 2015, Para. 40.

⁴⁷ The Sahrawis would be subject to the Moroccan Constitution. The King would retain the powers he is granted under the Moroccan Constitution, under which he may override or suspend any act of Parliament, governmental body or court decision. The King would retain command of the army and its various installations in the territory. The Moroccan Supreme Court would have the final say in any legal matter. In the opinion of several observers, the plan presented by Morocco in 2007 lacked any actual "autonomy." "Western Sahara would remain firmly subordinated to the powers of the central Moroccan state." See Zunes & Mundy, *supra*, at 244. And Morocco continues to be ruled by a government in which the King and a few of his advisers wield almost absolute power. See, M. Ottaway and M. Riley, *Morocco From Top-down Reform to Democratic Transition?* Carnegie Papers, Middle East Series, Carnegie Endowment for International Peace, No. 71 (September 2006) ("Carnegie Papers") at 3. The United States State Department is fully aware of the lack of true democracy within the Kingdom. In its 2015 Country Report on Human Rights it declared: "The most significant human rights problems were the lack of citizens' ability to change the constitutional provisions establishing the country's monarchical form of government, corruption, and widespread disregard for the rule of law by security forces."

should make it clear that principles of international law concerning the right to self-determination of the people of Western Sahara require that this proposal should not be imposed upon the people of the territory without their consent, and that the people of the territory should be able to reject it in favor of independence.

For all these reasons the declaration recognizing Morocco's sovereignty over Western Sahara should be rescinded and United States recognition of Morocco's sovereignty over the territory withdrawn.

2. (a) Pursuant to the principles of self-determination, the people of the territory should be accorded freedom of choice and expression.

As outlined above, Morocco has steadfastly refused to allow the people of Western Sahara the option of choosing independence for the territory.

Moreover, throughout the period of Moroccan occupation reputable organizations have documented its repression of activities of Sahrawis who advocated for the independence of the territory or for the referendum promised by the United Nations.⁴⁸ In 2006 the Office of the United Nations High Commissioner for Human Rights (OHCHR) sent a mission to both Western Sahara and the refugee camps to investigate allegations of restraints on free speech and assembly and other human rights abuses. In June 2006, it issued its report.⁴⁹

It confirmed that in Western Sahara the sovereignty of Morocco may not be questioned.⁵⁰ It also noted that the freedom to establish associations has also been curtailed.⁵¹ It reported that "Overall, the human rights situation is of serious concern. . . . Currently, the Sahrawi people are not only denied their right to self-determination, but equally are severely restricted from exercising a series of other rights, and specially rights of particular importance to the very right of self-determination, such as the right to express their views about the issue, to create associations defending their right to self-determination and to hold assemblies to make their views known. In order to comply with its international obligations, particularly under the Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, serious changes to both legislation as well as government practice on the issue of Western Sahara are required."⁵²

⁴⁸ As Hodges noted in 1983: "There were periodic waves of arrests, in which known or suspected Polisario sympathizers were rounded up, detained and often tortured, though the number of detainees was difficult to gauge as they were never brought to trial and there were seldom independent journalists in the territory to record or report arrests." Hodges at 281. Morocco's favorite method of handling dissidents was to simply make them "disappear." The International Federation of Human Rights Leagues has claimed that the number of Saharawi "disappeared" may be as high as fifteen hundred. The New York Times in 2005 reported the discovery of mass graves of persons who disappeared during this era and estimated that the number of such persons could be as high as 600. (N.Y. Times, October 9, 2005).

⁴⁹ Report of the OHCHR Mission to Western Sahara and the Refugee Camps in Tindouf May 15-23 and June 19, 2006 (OHCHR Geneva, September 8, 2006)

⁵⁰ Report, para. 28.

⁵¹ *Id.*, para 31

⁵² *Id.* para. 53 The report further noted: "Almost all violations of human rights noted above stem from the non-realization of [the right to self-determination], including civil and political rights as well as economic,

Despite the promulgation in 2016 of a new Press and Publications Code which liberalizes free speech on most topics, according to Human Rights Watch 2020 World Report, the penal code continues to maintain prison as punishment for speech that “causes harm” to Morocco’s “territorial integrity” – a reference to the speech of those who advocate independence for Western Sahara, or even support the idea of a referendum to decide the issue.

2. (b) Use of the natural resources of the territory should be according to international law principles associated with the right to self-determination of people in Non-Self-Governing Territories.

Under United Nations resolutions and covenants, and as affirmed by legal scholars, the right to self-determination necessarily involves the right of the people who have this right to sovereignty over their natural resources.⁵³

Ever since Morocco occupied Western Sahara it has been using the resources of the territory, primarily phosphates and fisheries, and has entered into oil exploration/exploitation contracts with foreign firms.

In November of 2001, the President of the Security Council asked the opinion of the United Nations Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations, Hans Corell, on the legality of the oil exploration contracts.⁵⁴

In his Opinion,⁵⁵ Corell distilled certain legal principles from past practices to be applied to the use of the resources of Non-Self-Governing Territories in general and Morocco’s use of the resources of Western Sahara in particular: when exploitation activities are conducted for the benefit of the peoples of such territories and in consultation with their representatives, they would be considered “in conformity with the General Assembly

social and cultural rights of the people of Western Sahara in all locations where they currently reside. In accordance with international obligations with respect to the question of Western Sahara, the international community should take all necessary measures to ensure the right of self –determination of the people of Western Sahara” para 52.

⁵³ Declaration of Permanent Sovereignty over Natural Resources,” A/RES/1803 (XVI), December 14, 1962; Article 1(2) of the International Covenant on Civil and Political Rights (1976) and Article 1(2) of the International Covenant on Economic, Social and Cultural Rights (1976), United Nations Council for Namibia, “Decree No. 1 for the Protection of Natural Resources of Namibia,” adopted in A/RES/3295, December 13, 1974, and A/RES/57/132, February 25, 2003. See also A/RES/61/123, of December 14, 2006 in which *inter alia*, the General Assembly stated that it “1. Reaffirms the right of peoples of Non-Self-Governing Territories to self-determination . . . as well as their right to the enjoyment of their natural resources and their right to dispose of those resources in their best interest; . . .”

⁵⁴ The Moroccan “Office National de Recherches et d’Exploitations Pétrolières” (ONAREP) concluded two contracts for oil-reconnaissance and evaluation activities in areas of off-shore Western Sahara, one with a subsidiary of the United States oil-company Kerr McGee (Kerr McGee du Maroc, Ltd.) and the other with a subsidiary of the French oil company TotalFinaElf (TotalFinaElf E&P Maroc.).

⁵⁵ Letter dated January 29, 2002, from Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations, Hans Corell to the President of the Security Council, S/2002/161 (February 12, 2002), (“the Corell Opinion”)

resolutions and the principle of ‘permanent sovereignty over natural resources’ enshrined therein.”⁵⁶ On the other hand, when such activities are conducted in disregard of the needs and interests of the people of that territory, they would be considered illegal.⁵⁷

The legal standard established by Corell was relied upon by the EU General and High Courts in various decisions denouncing as against international law the extension of EU agricultural and fishery treaties with Morocco to Western Sahara.⁵⁸ This is likewise the standard that has been endorsed by the African Union.⁵⁹

2. (c) Control over the use of the territory’s resources is being denied to the people of Western Sahara.

Lastly, contrary to the applicable principles of international law discussed above, Morocco has utilized the resources of the territory for its own benefit and not for the principal benefit of the indigenous people of the territory, the Sahrawis, and without their permission.

The fact that Morocco has not obtained the permission of the people of the territory to engage in the trade of products from Western Sahara has been duly recognized by EU courts.⁶⁰ In its decision on joined Cases t-344/19 and T-356/19, issued on September 29, 2021, the General Court of the EU emphasized that international law principles required Morocco to obtain the permission of the people of the territory who enjoy the right to self-determination in order to trade in products from Western Sahara and found that this

⁵⁶ Corell Opinion at 7.

⁵⁷ He concluded “if further exploration and exploitation activities were to proceed in disregard of the interests and wishes of the people of Western Sahara, they would be in violation of the international law principles applicable to mineral resource activities in Non-Self-Governing Territories.” Corell Opinion at 8.

⁵⁸ In *Case C-104/16 Council v. Front Polisario*, the European Court of Justice affirmed the *erga omnes* nature of the right to self-determination by the peoples of a non-self –governing territory, affirmed the fact that Western Sahara was such a non-self-governing territory, and concluded that it would be against international law for the EU-Morocco Agricultural Accord to apply to Western Sahara without the consent of its “people”, which was not given. (paras. 107,123,124) Also, noting that “[T]he UN General Assembly in its various resolutions on Western Sahara repeatedly expressed its concern in respect of ‘enabling the indigenous population of the Territory to exercise freely its rights to self-determination’ as the ICJ noted in paras. 62, 64, and 68 of its Advisory Opinion on Western Sahara, the “people of Western Sahara” must be considered the indigenous people of the territory, i.e., the Sahrawis (para 91.) In *Case C-266/16, Western Sahara Campaign UK, EU:C:2018:11*, the Court held that Western Sahara does not form part of the territory of Morocco and “if the territory of Western Sahara were to be included within the scope of the [EU-Morocco] Fisheries Agreement, that would be contrary to certain rules of general international law . . . [including] the principle of self-determination.” (para. 64). In *Case T-279/19 and joined Cases t-344/19 and T-356/19* the EU General Court rejected the Council’s argument that by “consulting” with certain groups within the territory, Morocco had satisfied the requirement of obtaining the consent of the people of the territory to the EU-Morocco Fisheries Agreement proposed in 2019, reiterating that the representatives of the people of Western Sahara, the Sahrawi, are the Polisario and that without obtaining the consent of the people of the territory the Council infringed the obligation to comply with prior court decisions.

⁵⁹ “Legal opinion on the legality in the context of international law of actions allegedly taken in the exploration and/or exploitation of renewable and non-renewable natural resources or any other economic activity in Western Sahara,” The Office of the Legal Counsel and Directorate for Legal Affairs of the African Union Commission, African Union, October 15, 2015.

⁶⁰ *Case C-104/16 Council v. Front Polisario, Case C-266/16, Western Sahara Campaign UK, EU:C:2018:11, Case T-279/19 and joined Cases t-344/19 and T-356/19.*

condition had not been met and that the “consultations” with certain groups within the territory that did not represent the concerned population as a whole were legally inadequate. The Court also found that the Polisario had the capacity to represent the people of Western Sahara with respect to issues dealing with the right to self-determination of such people, including their rights concerning the resources of the territory.⁶¹ The Polisario, which was acknowledged by the U.N. General Assembly to be “the representative of the people of Western Sahara” (G.A. Res. 35/19 (1980); (G.A. Res. 34/37 (1979) and by the U.N. Security Council in its various resolutions on the conflict, as well as pro-liberation Sahrawi groups within the territory, have consistently opposed Morocco’s use of the resources of the territory.

Moreover, the use of these resources has not principally benefitted the indigenous Sahrawis, but rather Moroccan settlers, Moroccan generals, and the Moroccan King. As was noted by one observer: “Most of the infrastructure development in the occupied territory has not been designed to enhance the standard of living of the Western Saharan people, but has instead involved the elaborate internal security system of military bases, police facilities, prisons, surveillance, and related repressive apparatuses; housing construction, subsidies, and other support for Moroccan settlers; and airport, seaport, and other transportation facilities designed to accelerate resource extraction. More fundamentally, the decision on how to use the proceeds from the mines and fisheries are being made by the Moroccan government in the capital of Rabat, not by the subjugated population.”⁶² The French NGO France Libertés 2002 Report concluded that the Sahrawis “are to a large degree marginalized entirely” from the phosphate industry. Western Sahara Resource Watch, in its December 13, 2015 report, claimed that most of the businesses that operate in the territory are controlled by the state, wealthy Moroccan individuals, or foreign interests, not Sahrawis

3. Products from Western Sahara should be excluded from the FTA Agreement with Morocco.

Previously the United States’ Trade Representative, part of the Executive Office of the President, had declared that products from Western Sahara would be excluded from the FTA with Morocco. However, it is unclear whether that policy will continue now that the U.S. government has recognized Morocco’s sovereignty over Western Sahara. The President should ensure that the United States will continue to exclude products from Western Sahara from the FTA with Morocco.

4. Legislation should be enacted by Congress that is consistent with the above legal principles.

The United States government throughout the years has granted Morocco considerable humanitarian and military aid. However, until fairly recently the funds appropriated for

⁶¹ See General Court of the European Union Press Release No. 166/21 accessible at www.curia.europa.eu. This was in line with its earlier decision, Case C-104/16, para. 105, in which it noted that that the UN had designated the Polisario the representatives of the people of Western Sahara.

⁶² See Stephen Zunes, The National Catholic Reporter, May 12, 2015.

humanitarian aid were separate from those appropriated for Western Sahara and in earlier years this aid was contingent on Morocco improving human rights conditions in Western Sahara. The 2008 Appropriations Bill, for instance,⁶³ made the use of funds for Western Sahara contingent on Morocco making “progress on human rights.” If Morocco wished to use US funds in Western Sahara, the bill stressed, it had to allow “all persons to advocate freely their views regarding the status and future of the Western Sahara through the exercise of their rights to peaceful expression, association and assembly.” The FY2012 Consolidated Appropriations Act required the State Department to report on freedom of expression and the ability of diplomats and independent human rights groups to freely investigate conditions in the Western Sahara prior to obligating Foreign Military Financing funds for Morocco. However, the appropriations legislation passed in recent years has been considerably less concerned about protecting the human rights of the people of Western Sahara. The National Defense Authorization Act of 2022 makes the granting of aid and military financing conditioned on Rabat’s mere commitment to the search for a “mutually acceptable political solution in Western Sahara,” and the FY2022 Consolidated Appropriations Act grants humanitarian aid to Morocco without even mentioning Western Sahara. The United States should re-install, increase and clearly state human rights restrictions on aid granted to Morocco in the future by conditioning any humanitarian or military aid to Morocco on the removal of restrictions on the free speech or movement of the people of Western Sahara, its willingness to permit journalists free access to Western Sahara, and its willingness to accept a solution to the conflict over Western Sahara that would include the option of independence.

Until recently many U.S. firms have been reluctant to invest in projects in Western Sahara because of the unsettled legal status of the territory. However, the Congressional report accompanying the FY 2016 Consolidated Appropriations Act encouraged the Administration to support private sector investment in Western Sahara. Congress should enact legislation that ensures that all importations from Western Sahara as well business between United States entities and Western Sahara comply with the international law principles concerning the use of resources of Non-Self-Governing Territories and should encourage the Administration to adopt the same policy.

5. The mandate of MINURSO should include the monitoring of human rights violations in both Western Sahara and the Polisario camps.

Finally, the United States should support in the UN Security Council the expansion of the mandate of MINURSO to include the monitoring of human rights violations in both Western Sahara and the Polisario camps. For many years there have been reports of human rights violations in both the areas controlled by Morocco and those controlled by the Polisario. It has been impossible to verify whether many of these violations exist, and the extent of them, because reputable organizations have lacked access to these regions. Morocco has restricted the activities of human rights defenders, as well as the press, in

⁶³ According to S. Bennis, “Western Sahara: The Significance of 2022 US Consolidated Appropriations Bill for Morocco.” *Morocco World News*, March 18, 2022.

Western Sahara,⁶⁴ and it is difficult for outside groups to verify whether such violations have occurred in the Tindouf camps.⁶⁵ MINURSO is in a unique position to verify the accuracy of charges of human rights violations committed by both parties. Such a mandate has been approved by the Polisario⁶⁶ but rejected by Morocco.⁶⁷ Despite the fact that a number of NGOs and former officials, such as the NYC Bar Association, the RFK Center, Amnesty International, Human Rights Watch, former Special Representative of the UNSG to Western Sahara Christopher Ross, and a bipartisan number of U.S. Senators, have urged the United States to take this position in UN Security Council resolutions, so far the U.S. has declined.

Respectfully submitted,

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New York City Bar Association

August 2022

⁶⁴ For instance, Amnesty International USA has noted that in 2020 alone, Moroccan authorities barred access to Western Sahara for at least nine lawyers and human rights monitors and urged the Biden Administration to include human rights monitoring in MINURSO's mandate. See, "The Human Rights Crackdown in Western Sahara and the Need for Action by the Biden Administration," September 27, 2021. See also Reporters Without Borders (RSF) "Report: Western Sahara, a News Blackhole," August 12, 2019, citing the research in its publication "Western Sahara: a desert for journalists."

⁶⁵ Human Rights Watch in its Report "Human Rights in Western Sahara and the Tindouf Refugee Camps," December 19, 2008, cited the "isolation of the population" and the "legal limbo in which the camps exist" as factors inhibiting the human rights monitoring by outside groups, and urged such monitoring by the UN.

⁶⁶ Human Rights Monitoring: MINURSO should be no exception, says Polisario," Sahara Press Service, July 11, 2020. <https://www.spsrasd.info/news/en/articles/2020/07/11/26677.html>

⁶⁷ As was stated in the report by the RFK Center and other human rights organizations, "Report on the Kingdom of Morocco's Violations of the International Covenant on Economic Social and Cultural Rights in the Western Sahara," August 2015: "While many argue that [MINURSO] should take a stronger role in rights monitoring, the Kingdom [of Morocco] asserts its only role is to maintain the ceasefire. . . . Attempts by any party to expand MINURSO's mandate to include this monitoring have been met with a strong negative reaction from the Kingdom."

GENERAL INFORMATION FORM

Submitting Entity: New York City Bar Association, Co-Sponsors ABA International Law Section, ABA Center for Human Rights

Submitted By: Sheila S. Boston, President, New York City Bar Association

1. Summary of the Resolution:

The first part of the Resolution urges the President and Congress to support the right of the people of Western Sahara to self-determination under international law by:

(1) Rescinding the decision of the former Administration to have the United States recognize Morocco's sovereignty over Western Sahara;

(2) Calling on Morocco to (a) allow the people of Western Sahara to choose freely whether to establish an independent state or agree to incorporation within Morocco and to freely express their support for independence or a referendum to determine the status of the territory; and (b) use the resources of the territory only with the permission of the people of the territory and if such use principally benefits such people; and

(3) Adopting legislation and policies that are consistent with the above.

The second part of the Resolution urges the President to support the expansion of the mandate of the U.N. Mission for Western Sahara (MINURSO) to monitor human rights violations in both Western Sahara and the Polisario camps.

2. Indicate which of the ABA's Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

The Resolution will address Goal 4 as it advances the Rule of Law. The ABA has historically been at the forefront in creating programs and endorsing resolutions intended to advance the rule of law, both domestically and internationally. One of its organs, ROLI, is specifically charged with advancing adherence to the rule of law internationally. In addition, the ABA has endorsed a number of resolutions intended to uphold adherence to international principles of law, including the right to self-determination, in U.S. policies. In the past it has supported the right to self-determination of Native Hawaiians (06M108B) and the U.N. Declaration on Rights of Indigenous Peoples (21M107D). It has also encouraged adherence to principles of international law by other countries. This is particularly true when it comes to the principles of law the support human rights. For instance, In Resolution 106 adopted by the ABA on February 14, 2005, the ABA asked the United States government to take all necessary and proper actions to end the atrocities being committed in

Darfur. And in Resolution 120B adopted by the ABA on August 8-9, 2006, the ABA urged the United States Congress to enact and the President of the United States to sign into law legislation which would block assets and restrict visas of any individual the President of the United States determined is complicit in, or responsible for, acts of genocide, war crimes, or crimes against humanity in Darfur.

The present Resolution involves the application of legal principles concerning the right to self-determination and human rights to another international conflict. It places the ABA on record as upholding the principles of international law that apply to the conflict over Western Sahara. It encourages the United States to adopt policies and programs consistent with these international law principles and to rescind and reverse current policies that conflict with them. It also requests that the Administration urge one of its allies, Morocco, to do the same, thereby promoting adherence to the rule of law by other countries. Accordingly, it is fully in line with one of the proclaimed missions of the ABA: to “Hold governments accountable under law” and thereby advance the rule of law.

3. Approval by Submitting Entity

On December 10, 2021 the Association of the Bar of the City of New York approved the Resolution and Report. On April 26, 2022 the ABA International Law Section and on April 29, 2022 the ABA Center for Human Rights agreed to co-sponsor the Resolution.

4. Has This or a Similar Resolution Been Submitted to the House or Board Previously?

No.

5. What Existing Association Policies are Relevant to this Resolution and How Would They be Affected by its Adoption?

This Resolution is consistent with the Association’s longstanding commitments to important international human rights issues and the rule of law. As noted above, in the past it has supported the right to self-determination of Native Hawaiians (06M108B) and the U.N. Declaration on Rights of Indigenous Peoples (21M107D), and has championed the human rights of the people of Darfur and other conflict areas, and this Resolution would support and be consistent with these policies.

6. If This Is A Late Report, What Urgency Exists Which Requires Action At This Meeting Of The House?

N/A

7. Status of Legislation (if applicable).

There is no specific legislation currently under consideration to which this Resolution applies. However, it will apply to future legislation concerning foreign assistance to Morocco as well as any proposed legislation prohibiting the importation of products from Western Sahara or including such products in the U.S.- Morocco FTA, as well as prohibiting or regulating U.S. investments in Western Sahara. It will also apply to future resolutions of the United Nations Security Council concerning the renewal of the mandate of MINURSO, the U.N. Peacekeeping Mission in Western Sahara. In addition, it will apply to future policies of the United States with respect to the status of Western Sahara under U.S. law.

8. Brief Explanation Regarding Plans For Implementation Of The Policy, If Adopted By The House Of Delegates

Passage of this Resolution by the ABA will provide much needed recognition of the conflict over Western Sahara and the principles of international law which apply to it and will help to foster solutions. The ABA, in collaboration with other interested organizations and individuals, will urge Congress and the Administration to take the concrete measures proposed in this Resolution.

9. Cost to the Association

None except the minor indirect cost associated with the time and effort of ABA staff who are involved in promoting the measures proposed in the Resolution, which will be part of the general responsibilities of such staff.

10. Disclosure of Interest. (If applicable)

None

11. Referrals

Center for Human Rights
International Law Section
Section of Civil Rights and Social Justice
Representative and Observer to the UN
Senior Legislative Counsel
ROLI
NYS Bar Association
Standing Committee on Law and National Security
Section on Business Law
Section of Environment, Energy and Resources

12. 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.*

Katlyn Thomas
thomkatbus@aol.com
917 684 1446

13. 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.*

Katlyn Thomas
thomkatbus@aol.com
917 684 1446

EXECUTIVE SUMMARY

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(1) Rescinding the decision of the former Administration to have the United States recognize Morocco's sovereignty over Western Sahara;

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(3) Adopting legislation and policies that are consistent with the above.

The second part of the Resolution urges the President to support the expansion of the mandate of the U.N. Mission for Western Sahara (MINURSO) to monitor human rights violations in both Western Sahara and the Polisario camps.

2. Summary of the Issues the Resolution Addresses

The first part of the Resolution addresses the principles of international law and human rights that the United States must adhere to in its policies towards Western Sahara, a Non-Self-Governing Territory. This includes the issue of sovereignty over the territory, Morocco's failure to allow the people of the territory, the Sahrawis, self-determination, Morocco's human rights violations, and Morocco's use of the resources of the territory. The second part of the Resolution addresses the need for monitoring human rights violations in Western Sahara and the Polisario camps by the United Nations peacekeeping force in the area, the U.N. Mission for Western Sahara (MINURSO).

3. Please Explain How the Proposed Policy Positions Will Address These Issues

The ABA will urge the President and Congress to adopt the policies needed to address the various issues raised by the Resolution. The ABA's position on these issues, which to a great extent involve important international law principles and is consistent with the position of a number of other reputable organizations (the NYC Bar Association, Amnesty International, the RFK Center, a number of bi-partisan U.S. Senators, and the Human Rights Clinic of Cornell U. Law School, among others), will likely carry considerable weight.

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

Given the subject matter, we believe Morocco, and its agents, lobbyists, and supporters, may oppose the policies requested by the Resolution. There also may be individuals who are concerned about how the Resolution will affect ABA programs in Morocco. However, so far we have received no formal indication of opposition from any groups.

AMERICAN BAR ASSOCIATION**NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
COMMISSION ON HISPANIC LEGAL RIGHTS AND RESPONSIBILITIES
STANDING COMMITTEE ON PUBLIC EDUCATION
NATIONAL NATIVE AMERICAN BAR ASSOCIATION
COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY
COALITION ON RACIAL AND ETHNIC JUSTICE
SECTION OF STATE AND LOCAL GOVERNMENT LAW****REPORT TO THE HOUSE OF DELEGATES****RESOLUTION**

1 RESOLVED, That the American Bar Association encourages educators and educational
2 institutions to develop K-12 curricula that includes the history and experiences of Asian
3 Americans, Native Hawaiians, and Pacific Islanders;

4 FURTHER RESOLVED, That the American Bar Association urges federal, state, local,
5 territorial, and tribal governments to enact legislation to include and/or provide resources
6 to support the inclusion of Asian American, Native Hawaiian, and Pacific Islander history
7 in the United States, the social, economic, and political environments that contributed to
8 their experiences in the United States, and their contributions to the United States in
9 school curricula; and

10 FURTHER RESOLVED, That the American Bar Association urges Congress to pass the
11 Teaching Asian Pacific American History Act (H.R. 2283—117th Congress).

REPORT

This Resolution specifically promotes the introduction and teaching of Asian American, Native Hawaiian, and Pacific Islander studies as part of inclusive curricula, with a specific focus on inclusion in K-12 schools. Education about Asian Americans, Native Hawaiians, and Pacific Islanders is a powerful tool to combat anti-Asian hate and discrimination. For decades, however, Asian American, Native Hawaiian, and Pacific Islander history in the United States has been either nonexistent or confined to brief mentions in K-12 curricula.

Lack of education about the Asian American, Native Hawaiian, and Pacific Islander experience has rendered these communities invisible for generations of Americans who have often learned little about their contributions or struggles as part of American history. Instead, filling the vacuum have been harmful stereotypes. Asian Americans continue to suffer from prejudice grounded in such portrayals as the “model minority myth” and the “perpetual foreigner syndrome.” Native Hawaiians and Pacific Islanders also suffer from harmful stereotypes. Education can help push back against these stereotypes.

This Resolution also urges the enactment of legislation, including the Teaching Asian Pacific American History Act (H.R. 2283)

I. Anti-Asian Hate

Asian Americans continue to be subject to an increasing number of acts of hate, bias, and intimidation. During the COVID-19 pandemic, the numbers have reached record levels, often motivated by racism and fear of Asian Americans as perpetual foreigners, carriers of disease, and not belonging in the United States.

The Federal Bureau of Investigation (FBI) reports that hate crimes against Asian American rose 73% in 2020.¹ Stop AAPI Hate recorded over 10,000 acts of bias and hate targeting Asian Pacific Americans between March 2020 and December 2021.² Act to Change, a national anti-bullying organization, found that 80% of Asian Pacific American children experienced acts of bullying.³

Unfortunately, this is not the first time that Asian American, Native Hawaiian, and Pacific Islander communities have faced such bias, but the latest iteration in a history of bias that includes the Japanese American incarceration during World War II, attacks on Muslims,

¹ Sakshi Venkatraman, *Anti-Asian hate crimes rose 73% last year, updated FBI data says*, NBC NEWS (Oct. 25, 2021), <https://www.nbcnews.com/news/asian-america/anti-asian-hate-crimes-rose-73-last-year-updated-fbi-data-says-rcna3741>.

² Aggie J. Yellow Horse, Russell Jeung, Ronae Matriano, Stop AAPI Hate National Report: 3/19/20 – 12/31/21, STOP AAPI HATE (Mar. 1, 2022), <https://stopaapihate.org/wp-content/uploads/2022/03/22-SAH-NationalReport-3.1.22-v9.pdf>.

³ Act to Change, ADMERASIA, and NextShark, *2021 Asian American Bullying Survey Report*, ACT TO CHANGE (May 2021), https://acttochange.org/wp-content/uploads/2021/05/Asian-American-Bullying-Report_FINAL.pdf.

Arabs, and South Asians after 9/11, and acts of hate and profiling of Chinese Americans based on fears about the influence of the Chinese government.

II. Impact of Asian American, Native Hawaiian, and Pacific Islander Studies

For decades, Asian American, Native Hawaiian, and Pacific Islander history has been virtually nonexistent in textbooks or cordoned off to a narrow section at best. While the public is just becoming aware of historical injustices including the Chinese Exclusion Act, the Immigration Act of 1924 (which created the “Asiatic Barred Zone”), the incarceration of Japanese Americans during World War II, the brutal murder of Vincent Chin, the murder of Balbir Singh Sodhi, the shooting at the Sikh Temple in Oak Creek, Wisconsin, and other “canonical” events in Asian American, Native American, and Pacific Islander history, even less is known about the overthrow of the Hawaiian monarchy, the devastating environmental destruction of American nuclear testing in the Marshall Islands, or the colonization of the Philippines or Pacific Islands.

As discussed in Section IV below, Congresswoman Grace Meng has introduced the Teaching Asian Pacific American History Act (H.R. 2283). In introducing this bill, she underscored the importance of, the need for, and the impact of promoting Asian American, Native Hawaiian, and Pacific Islander studies:

“Asian Pacific American history has been poorly represented or excluded from our K-12 education system and social studies textbooks, and it’s time for that to change as we work to combat the current rise in anti-Asian attacks related to COVID-19. Asian Pacific American history is an integral part of American history, and this must be reflected in what our children learn in school. Asian Americans have always been seen as invisible or as foreigners. We have grown up with people questioning whether we’re American enough, and we’ve endured slurs and jokes about our appearance and our food. And even if we were raised or born here, many still tell us to ‘go back to our country,’ and make ignorant and xenophobic remarks such as telling us that we speak English well. These types of biases against Asian Americans need to be addressed at its roots, and teaching the future generation about our past, and how those of Asian and Pacific Islander descent helped make America the greatest country on the planet, would help breakdown the stereotypes and negative perceptions that sadly still exist about Asian Pacific Americans.

“But this effort should not be limited to the Asian Pacific American community. All communities of color must be better represented in the history lessons taught to our students, and with much of our nation focused on tackling the increase in anti-Asian sentiment and racial injustice, we must use this moment to put forward this long-term solution of expanding school curriculums. Whether it’s learning about the Chinese laborers who helped build the Transcontinental Railroad, the incarceration of Japanese Americans following the attack on Pearl Harbor, slaves building the U.S. Capitol or the many other important chapters from our nation’s past – whether good, bad or ugly – our classrooms must include ALL of America’s history. Our nation cannot move forward in healing, until we learn from and correct the mistakes of our past. We can’t focus on tearing

down the walls of biases and discrimination until our kids have a full teaching of what American history truly is.”⁴

III. Current State Legislative Landscape

Currently, Asian American, Native Hawaiian, and Pacific Islander studies are offered at college levels at various universities in the country. While not mandated by legislation, many institutions offer these courses and/or include these experiences in their curricula for the benefit of their students. For many students, this is the first time they receive in depth instruction about Asian Americans, Native Hawaiians, and Pacific Islanders in their formal education, which demonstrates the need to include these experiences earlier in their K-12 education.

In contrast, the inclusion of Asian American, Native Hawaiian, and Pacific Islander history greatly varies across the K-12 education system. Some states like California and Oregon already have established ethnic studies curricula that may include Asian American history in primary and secondary schools. More recently, states such as Illinois, New Jersey, and Connecticut have passed legislation to mandate the teaching of Asian American studies in primary and secondary schools.

In July of 2021, Illinois signed the Teaching Equitable Asian American Community History Act (TEAACH Act) into law after the state legislature overwhelmingly passed it. The TEAACH Act requires schools to add a unit to the curriculum studying “events of Asian American history” including contributions of Asian Americans to advancing civil rights, to government, arts, humanities, and to the economic, cultural, social, and political development of the United States.”⁵ According to the law, “the studying of this material shall constitute an affirmation by students of their commitment to respect the dignity of all races and peoples and to forever eschew every form of discrimination in their lives and careers.”⁶ Illinois was the first state to mandate the teaching of Asian American studies specifically in primary and secondary schools.

Also in July of 2021, the Governor of Connecticut incorporated House Bill 6619 into his Governor’s Budget and Implementer bills, which passed both chambers with bipartisan support. The bill mandated the creation of curriculum to include “Native American studies, Asian Pacific American studies, lesbian, gay, bisexual, transgender, queer and other sexual orientations and gender identities studies, climate change, personal financial management and financial literacy, and military service and experience of American veterans.”⁷ A bipartisan bill (H.B. 5282) is pending in the Connecticut Assembly to include

⁴ Congresswoman Grace Meng, *Meng Introduces Legislation To Promote The Teaching Of Asian Pacific American History In Schools; Measure Seeks To Help Combat Bigotry And Discrimination Against Asian Americans*, OFFICE OF CONGRESSWOMAN GRACE MENG (Mar. 4, 2022), <https://meng.house.gov/media-center/press-releases/meng-introduces-legislation-to-promote-the-teaching-of-asian-pacific-0> (“Meng Press Release”).

⁵ H.B. 0376, 102d Gen. Assemb., Reg. Sess. (Ill. 2021).

⁶ See *id.*

⁷ H.B. 6619, 2021 Gen. Assemb., Jan. Sess. (Conn. 2021).

Asian American studies in the curriculum.⁸ The bill is modeled after a 2019 bill that included Black and Hispanic history in the curriculum.⁹

And in December 2021, the New Jersey Legislature passed legislation requiring Asian American history to be taught in social studies classes in New Jersey public schools.¹⁰ Governor Phil Murphy signed the law in January 2022.¹¹

IV. Pending Federal Legislation – H.R. 2283

There is also movement at the federal level for greater inclusion of Asian American, Native Hawaiian, and Pacific Islander studies. In March of 2021, Rep. Grace Meng introduced the Teaching Asian Pacific American History Act (H.R. 2283), which would require grant applications from Presidential and Congressional Academies to include Asian American, Native Hawaiian, and Pacific Islander history as part of their American history and civics programs offered to students and teachers.¹² Every year, hundreds of teachers and students attend these academies, which are funded by the U.S. Department of Education, for an in-depth study in American history and civics. Presidential Academies are designed for teachers seeking to strengthen their knowledge of American history, and Congressional Academies are for students who aim to enrich their understanding of the subject.

The legislation would also encourage the inclusion of Asian American, Native Hawaiian, and Pacific Islander history in national and state tests administered through the National Assessment of Educational Progress and promote collaboration with the Smithsonian Institution's Asian Pacific American Center to develop innovative programming regarding Asian American, Native Hawaiian, and Pacific Islander history. As of the date of this report, the bill is pending before the House Committee on Education and Labor.

The National Asian Pacific American Bar Association (NAPABA)¹³, which is an affiliated organization represented in the American Bar Association's House of Delegates, has already officially endorsed efforts such as H.R. 2283. "We're grateful for Congresswoman

⁸ H.B. 5282, 2022 Gen. Assemb. (Conn. 2022).

⁹ **Error! Hyperlink reference not valid.** Tat Bellamy-Walker, Connecticut joins growing list of states pushing for Asian American studies, NBC NEWS (Mar. 24, 2022), <https://www.nbcnews.com/news/asian-america/connecticut-joins-growing-list-states-pushing-asian-american-studies-rcna21274>.

¹⁰ S.B. 4021, 219th Leg., 2020-21 Sess. (N.J. 1999).

¹¹ **Error! Hyperlink reference not valid.** Nicole Chavez, New Jersey becomes second state to require Asian American history to be taught in schools, CNN (Jan. 18, 2022), <https://www.cnn.com/2022/01/18/us/new-jersey-schools-asian-american-history/index.html>.

¹² H.R. 2283, 117th Cong. (2021).

¹³ NAPABA is the national association of Asian Pacific American attorneys, judges, law professors, and law students, representing the interests of over 60,000 attorneys and approximately 90 national, state, and local Asian Pacific American bar associations. NAPABA members include solo practitioners, large firm lawyers, corporate counsel, legal service and non-profit attorneys, and lawyers serving at all levels of government. NAPABA is committed to addressing civil rights issues confronting Asian Pacific American communities and people of color.

Meng's tireless work to showcase the rich and broad history of Asian Americans and Pacific Islanders (APIs)," said A.B. Cruz III, then-President of NAPABA in May 2021.¹⁴ "For far too long, APIs have been ignored in national dialogue, and the struggles and hate our community faced have been minimized. In fact, NAPABA members have directly been affected by hate crimes and the pernicious nature of these incidents have shaped our organization. The inclusion of API history in curriculum is necessary to shine a light on the significant contributions, diversity of experience, and unique voices that have shaped the fabric of our society."¹⁵

V. This Resolution Does Not Promote the Teaching of Critical Race Theory

Recent debates over diversity and inclusion in K-12 schools often include concerns that students are being taught "critical race theory". Critical race theory is a system of legal analysis that examines the ways in which institutions and law incorporate societal views on race and how they may lead to different outcomes.¹⁶ In short, critical race theory is focused on the systems that create differential outcomes based on race rather than on individual actions.¹⁷

The purpose of this Resolution is to recognize the need to acknowledge the economic, cultural, and social impact of Asian Americans, Native Hawaiians, and Pacific Islanders in this country and their contributions to arts, humanities and sciences. Education is a vital tool to combat anti-Asian bias and prevent acts of anti-Asian hate.

Neither H.R. 2283 nor the previously mentioned state bills define the specific content of the curricula adopted by each educational institution; those decisions are made by the appropriate state or local educational authority. Their goal and purpose are to ensure that teachers and students have access to the resources they need to include and learn about the experiences and contributions of Asian American, Native Hawaiian, and Pacific Islander communities to the United States in an appropriate manner.

H.R. 2283 simply acknowledges for the limited purposes of the federally established academies and grant programs discussed above, that American history includes Asian American, Native Hawaiian, and Pacific Islander history, and should be taught as such. It makes resources available to educators and institutions, including those already produced by federal agencies, such as the Smithsonian Institution and the National Park Service.

¹⁴ Meng Press Release.

¹⁵ *Id.*

¹⁶ See, e.g., Rashawn Ray and Alexandra Gibbons, "Why are states banning critical race theory?", *The Brookings Institution* (Nov. 2021), available at <https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/>.

¹⁷ *Id.*

Conclusion

Inclusion of the stories of persons of all backgrounds is a key means of combating hate, dispelling bias, and ensuring that individuals are valued. The current epidemic of hate and bias directed towards the Asian American, Native Hawaiian, and Pacific Islander community underscores the need to include their history and recognize their contributions as part of the American narrative. By encouraging educators to include Asian American, Native Hawaiian, and Pacific Islander history in curricula at all levels of education, as a profession, we are stating that the community and their experiences are worthy of recognition, understanding, and inclusion.

Respectfully submitted,

A.B. Cruz III
Acting President, National Asian Pacific American Bar Association

August 2022

GENERAL INFORMATION FORM

Submitting Entity: National Asian Pacific American Bar Association (NAPABA)

Submitted By: A.B. Cruz III, Acting President

1. Summary of the Resolution(s). This Resolution promotes the introduction and teaching of Asian American, Native Hawaiian, and Pacific Islander studies in K-12 schools as a powerful tool to combat anti-Asian hate and discrimination. Specifically, this Resolution encourages action by educators and educational institutions and urges the enactment of legislation, including the Teaching Asian Pacific American History Act.
2. Indicate which of the ABA's Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this. This Resolution eliminates bias, enhances diversity, and advances the Rule of Law (Goals 3 and 4) by urging education as a means of combatting anti-Asian hate and discrimination.
3. Approval by Submitting Entity. The Board of Governors of NAPABA approved the resolution on February 23, 2022
4. Has this or a similar resolution been submitted to the House or Board previously? No
5. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? This Resolution is consistent with the following existing ABA policy: ABA 02A104B, ABA 21A514
6. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A
7. Status of Legislation. (If applicable) This Resolution will allow the ABA to lobby in favor of the Teaching Asian Pacific American History Act (H.R. 2283–117th Congress), currently pending before the House Committee on Education and Labor.
8. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. NAPABA will work with the co-sponsors and other relevant stakeholders within and outside of the ABA and the Governmental Affairs Office to implement the policy.
9. Cost to the Association. (Both direct and indirect costs) The adoption of this 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.
10. Disclosure of Interest. (If applicable) N/A

11. Referrals. A version of this Resolution was sent to the following entities on April 26, 2022:

Center for Diversity and Inclusion
Coalition on Racial and Ethnic Justice
Commission on Immigration
Council for Diversity in the Educational Pipeline
Criminal Justice Section
International Law Section
Senior Lawyers Division
State and Local Government Law Section
Young Lawyers Division
Commission on Women
Commission on Racial and Ethnic Diversity in the Profession

12. 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.*)

Wendy C. Shiba, NAPABA Delegate
Tel.: 818.257.1260 (mobile)
Email: wendy.shiba@me.com

13. 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.*

Wendy C. Shiba, NAPABA Delegate
Tel.: 818.257.1260 (mobile)
Email: wendy.shiba@me.com

EXECUTIVE SUMMARY1. Summary of the Resolution.

This Resolution promotes the introduction and teaching of Asian American, Native Hawaiian, and Pacific Islander studies in K-12 schools as a powerful tool to combat anti-Asian hate and discrimination. Specifically, this Resolution encourages action by educators and educational institutions and urges the enactment of legislation, including the Teaching Asian Pacific American History Act.

2. Summary of the issue that the resolution addresses.

Asian Pacific Americans have been subject to an increasing number of acts of hate, bias, and intimidation. Lack of education about the Asian American experience has rendered AAPIs invisible for generations of Americans who have learned nothing about their contributions or struggles as part of American history.

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

This Resolution promotes the introduction and teaching of Asian American, Native Hawaiian, and Pacific Islander studies in K-12 schools by (1) encouraging action by educators and educational institutions, and (2) urging the enactment of legislation, including the Teaching Asian Pacific American History Act. The current epidemic of hate and bias directed towards the Asian Pacific American community underscores the need to include their history and recognize their contributions as part of the American narrative.

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

None identified

**AMERICAN BAR ASSOCIATION
SECTION OF DISPUTE RESOLUTION
SECTION OF INFRASTRUCTURE AND REGULATED INDUSTRIES**

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, that the American Bar Association adopts the *American Bar Association*
- 2 *Rules for Non-Administered Arbitrations*, dated August 2022.

REPORT

In the almost one hundred years since the adoption of the Federal Arbitration Act, the use of arbitration to resolve disputes of nearly every type has grown rapidly. Since the Uniform Arbitration Act was first adopted by the National Conference of Commissioners on Uniform State Laws, forty-nine states have adopted that law, the Revised Uniform Arbitration Act, or substantially similar legislation. For many litigants, arbitration is no longer an “alternative” to the judicial process for resolving disputes, but a preferred path to resolution.

To accommodate this growth in arbitration, several providers of arbitration services have adopted rules for arbitrations conducted and administered through those organizations. The rules adopted by provider organizations vary in length and complexity, and often feature special rules for particular kinds of cases. The common element in these rules is that most apply only to cases administered by those providers.¹

Arbitration administrators, such as the American Arbitration Association (“AAA”), JAMS, International Institute for Conflict Prevention & Resolution (“CPR”), and Construction Dispute Resolution Services, LLC (“CDRS”), play an important and valuable role in the administration of arbitrations, including but not limited to providing rules for the conduct of various types of arbitration proceedings, assisting in the selection of arbitrators, and acting as a buffer between arbitrators on the one hand and parties and their counsel on the other hand.

Many litigants, however, may wish a less formal, and less costly, procedure than that provided by such organizations. The ABA has never adopted rules to assist persons seeking a non-administered arbitration. The Resolution addresses that by adopting a simple set of rules that parties may choose to employ to govern their own arbitration proceeding.² In this way, the ABA not only furthers its repeated statements of support for arbitration in a variety of circumstances, but also furthers the ready and economical access to such proceedings.

Recognizing this history and the need for a set of rules to guide both arbitrators and parties in the efficient, economic, and professional conduct of a non-administered arbitration, the ABA Section of Dispute Resolution, through its Arbitration Committee and Arbitration Rules Subcommittee, has developed a set of non-administrated arbitration rules and procedures. Over the course of four years, three work groups comprised of

¹ The International Institute for Conflict Prevention and Resolution (“CPR”) is the only major provider that has issued rules for non-administered arbitrations. Those rules, however, apply only in cases where the arbitration agreement specifies the applicability of those rules. Further limitations on the use of CPR’s rules are discussed below.

² The proposed “American Bar Association Rules for Non-Administered Arbitrations,” dated August 8, 2022, is attached as Appendix A.

dozens of arbitrators and advocates crafted rules adapted from rules for administered cases, informed by extensive arbitration experience and best practices.

THE RESOLUTION ADDRESSES A GAP IN EXISTING ARBITRATION RULES.

Arbitration has drawn increasing numbers of adherents as a preferred means to resolve disputes. AAA reports that in the first eight months of 2021, more than 310,000 cases submitted to it were resolved.³ In the commercial area alone, AAA handled more than 9,500 business-to-business cases in 2020, with total claims and counterclaims exceeding \$21.6 billion.⁴ This growth has occurred for sound reasons that are addressed below, and it has happened without publicity or fanfare.

Arbitration is increasingly preferred and valuable in the commercial realm even while there is debate about pre-dispute arbitration agreements in the employment and consumer arenas. The Resolution has no bearing on that debate. It does, however, address a gap in the rules governing arbitration proceedings regardless of the nature of the dispute.

The objective of any arbitration proceeding is, at a minimum, an efficient, simple, and economical resolution of a dispute. There may be other advantages as well, not least among them the right to choose decision-makers who may bring considerable expertise in the area of law or commerce at issue; the opportunity to control the case schedule; frequently more latitude in the kind of evidence that may be presented; and a degree of confidentiality not always available in judicial fora.

There are many provider organizations who maintain rosters of arbitrators they deem qualified to decide cases filed with the provider organization. AAA is the oldest and perhaps best-known non-profit provider group. JAMS is a national for-profit provider, and there are many similar organizations that operate more regionally, as well as a few other non-profit providers that tend to focus on particular kinds of disputes, such as CPR. There are also for-profit national provider organizations that specialize in certain areas of expertise, such as CDRS.

All of the major provider organizations administer arbitration cases submitted to them. That administration provides some benefits of value to both disputants and arbitrators. Most basically, in a so-called “administered” case, the provider will offer a slate of potential arbitrators for the parties to select; provide a docket file for pleadings and other case records; manage collection and payment of arbitrator fees; and provide a neutral mechanism to address any concerns or complaints a party may have about the ethical disclosure by or conduct of the arbitrator. In addition, the administering organization provides the opportunity to obtain information on the arbitration process without any *ex-parte* discussions being necessary. These proposed non-administered rules greatly minimize the possibility of *ex-parte* discussions with the arbitrator.

³ <https://www.adr.org>.

⁴ https://www.adr.org/sites/default/files/document_repository/AAA333_2020_B2B_Infographic_0.pdf

These administrative services, however, come at a price. That price may be paid in the form of filing fees based on the size of the claim, or reflected in billing rates of the arbitrator who may “share” his fee with the provider. For many disputants, case administration is a cost that may be material to the case.

For cases they administer, providers have published rules to govern procedure in the case. Those rules apply to cases brought before the provider for administration.⁵

Sometimes, there is a gap between the full cost of an administered arbitration case and the willingness of the disputants to incur those administrative costs. The Resolution, and the Rules it proposes, address that gap.

One common criticism of arbitration is that it can be costly, and the structures and processes associated with a provider-administered case may add complexity that some parties to a dispute may see as unnecessary. Some may feel that their interests in efficiency and economy will be better served by avoiding an administrative layer entirely. On the other hand, it is readily appreciated that proceeding in the absence of any rules or agreed procedures would quickly frustrate the parties’ goals of efficiency, predictability, fairness, and economy in their arbitration.

The Resolution addresses those paired objectives of eschewing an administrative framework while assuring an agreed set of rules to govern the course of the arbitration. The Resolution thus advances the core principle of party autonomy in arbitration by providing the parties a carefully crafted set of procedures that they may use as they see fit.

The proposed Rules will apply “where the parties have agreed in writing that the disputes between them shall be resolved by the American Bar Association Arbitration Rules for Non-Administered Arbitrations.” (Proposed Rules, R-1.1.) Under these Rules, neither the ABA nor any other organization administers the arbitration. The extent and means for that are left entirely to the judgment and discretion of the parties.

Use of these Rules is entirely voluntary. Like other model rules and codes offered to the legal community, these Rules reflect the considered judgment of a diverse drafting committee. In a real sense, the Rules reflect the “best of the best” concepts drawn from rules offered by many provider groups, informed and modified by the experience of a

⁵ For example, “*The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules.*” (AAA Commercial Rule R-1(a));

“*The JAMS Comprehensive Arbitration Rules and Procedures (“Rules”) govern binding Arbitrations of disputes or claims that are administered by JAMS and in which the Parties agree to use these Rules*” (JAMS Comprehensive Arbitration Rules and Procedures Rule 1(a));

“*Where the parties to a contract have provided for arbitration under the International Institute for Conflict Prevention and Resolution (“CPR”) Rules for Administered Arbitration (the “Rules”), they shall be deemed to have made these Rules a part of their arbitration agreement*” (CPR Administered Arbitration Rules, Rule 1.1).

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cross-section of experienced arbitrators and advocates. The result is a set of Rules parties may use for any case.

Finally, why should the ABA publish a set of rules for non-administered arbitration cases? The short answer is that there is a need. Provider groups understandably do not focus on procedures for cases they do not administer.⁶ The proposed Rules advance a key element of the ABA's core mission: to assure meaningful access to justice for all persons. In arbitration as in a judicial forum, well-developed procedures are critical to a fair resolution. The proposed Rules enable parties who wish to manage the arbitration themselves to do so without sacrificing the access to justice that they need and expect. Serving the needs of such litigants and their counsel is squarely in the center of ABA's mission.

Neither do these proposed Rules conflict with the Federal Arbitration Act or the Uniform Arbitration Act or the Revised Uniform Arbitration Act. These Acts provide a minimal structure for procedures to be implemented in an arbitration. Just as the rules of major providers such as AAA, JAMS, CPR and CDRS supplement these Acts, so do the proposed Rules.

Respectfully submitted,

David Allen Larson, Chair
Section of Dispute Resolution

August 2022

⁶ As previously noted, CPR has published a set of rules for non-administered cases. CPR Procedures & Clauses, Non-Administered Arbitration Rules (2018). As the commentary for those Rules makes clear, however, CPR's mission is focused on "global business and their lawyers," and its Rules "are intended in particular for the complex case."

GENERAL INFORMATION FORM

Submitting Entity: Section of Dispute Resolution

Submitted By: David Allen Larson, Chair, ABA Section of Dispute Resolution

1. Summary of Resolution. Adopts and authorizes the publication of the “American Bar Association Rules for Non-Administered Arbitrations,” dated [month] 2022, and encourages parties to consider use of the ABA rules in those cases in which they choose to utilize non-administered arbitration. The proposed Rules are attached as Appendix A.

2. Approval by Submitting Entity.

The ABA Section of Dispute Resolution voted its approval on April 16, 2022.

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 several existing ABA resolutions relevant to the issue of arbitration summarized as follows:

Resolutions Addressing Commercial, International, and Government Arbitration: The ABA has adopted numerous resolutions endorsing or facilitating arbitration. The current Resolution will not affect these other ABA policies which relate to arbitration between or among individual, commercial, international, and governmental parties.

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

N/A

6. Status of Legislation.

N/A

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

The Section plans to publicize the adoption of the resolution and publicize and publish these Rules in a manner similar to its efforts regarding the Code of Ethics for Arbitrators in Commercial Disputes.

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

No cost is expected to be incurred by the Association.

9. Disclosure of Interest. (If applicable)

N/A.

10. Referrals.

The Section has sought comments from various ABA groups including:

Section of Litigation
Section of Infrastructure and Regulated Industries
Section of Business law

The Section also referred the Resolution and Report to additional ABA groups for comment as follows:

Section of Administrative Law and Regulatory Practice
Section of Antitrust
Section of Civil Rights and Social Justice
Section of Criminal Justice
Section of Environment, Energy, and Resources
Section of Family Law
Section of Government and Public Sector Lawyers
Section of Health Law
Section of Intellectual Property Law
Section of International Law
Judicial Division
Appellate Judges Conference
National Conference of the Administrative Law Judiciary
National Conference of Federal Trial Judges
National Conference of Specialized Court Judges
National Conference of State Trial Judges
Section of Labor and Employment Law
Law Practice Division
Law Student Division
Section of Public Contract Law
Section of Real Property, Trust, and Estate Law
Section of Science and Technology
Senior Lawyers Division
Section of Solo, Small Firm and General Practice

Section of State and Local Government Law
 Section of Taxation Law
 Section of Tort Trial and Insurance Practice
 Young Lawyers Division
 Forum on Affordable Housing and Community Development Law
 Forum on Air and Space Law
 Forum on Construction Law
 Forum on Communications Law
 Forum on Entertainment and Sports Industries
 Forum on Franchising Law.

11. Contact Name and Address Information. (Prior to Meeting)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution supports the use of arbitration as an efficient and cost-effective means of resolving disputes; supports both administered arbitration and non-administered arbitration, and encourages parties to utilize the form of arbitration that is best suited to their particular dispute and situation; supports the use of rules developed and adopted by the administrator in those cases in which the parties choose to utilize administered arbitration; and adopts and authorizes the publication of the “American Bar Association Rules for Non-Administered Arbitrations,” dated [month] 2022, and encourages parties to consider use of the ABA rules in those cases in which they choose to utilize non-administered arbitration. The proposed Rules are attached as Appendix A.

2. Summary of the Issue that the Resolution Addresses

Arbitration has become commonplace in the resolution of legal disputes. In most cases, parties will agree to have a provider organization administer the case, i.e., provide management of the process, a repository for pleadings and other communications, provide candidates for the role of arbitrator chosen from the provider’s roster of neutrals, and often provide hearing rooms and technical support services. In addition, parties are generally bound by the provider’s arbitration rules.

While this “administered” case structure and procedure offers many advantages, they come at a cost that may deter many parties from gaining the efficiency and economy advantages of arbitration. For such disputants, the non-administered arbitration case poses its own serious problems. Arbitrating in the absence of any agreed and vetted rules of procedure poses risks that the process will be regarded as unfair and chaotic, rife with opportunities for inequity. Ultimately, the absence of rules for the non-administered arbitration case undermines the integrity of the process and respect for the rule of law.

The Resolution addresses the absence of rules in these “non-administered” cases. The proposed Rules are the result of a three-year effort to craft simple rules drawn on the best features of rules used by many non-profit and for-profit arbitration provider organizations, specifically adapted to the unique needs of non-administered arbitrations. The Rules provide, for parties who regard as unnecessary the added cost and complexity of an administered case, the opportunity to proceed to an arbitration that can meet the goals of fairness, efficiency, and economy.

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

The ABA has a long history of supporting arbitration. It also has a long history of promulgating model rules and codes for various issues that arise in the administration of law. The Resolution confirms that commitment by reiterating the ABA's support for arbitration as an efficient and cost-effective means of resolving disputes; expressing support for both administered arbitration and non-administered arbitration; encouraging parties to utilize the form of arbitration that works best for them in each case; supporting the use of rules developed and adopted by the administrator in those cases in which the parties choose to utilize administered arbitration; and offering a well-crafted set of Rules for non-administered arbitration cases and encouraging parties to use the ABA Rules in those cases.

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

None have been identified.

APPENDIX A

**AMERICAN BAR ASSOCIATION RULES FOR
NON-ADMINISTERED ARBITRATIONS**

August 8, 2022

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**AMERICAN BAR ASSOCIATION RULES FOR NON-ADMINISTERED
ARBITRATIONS**

R-1. APPLICATION OF RULES.

1.1. These rules shall apply where the parties have agreed in writing that the disputes between them shall be resolved by the American Bar Association Arbitration Rules for Non-Administered Arbitrations (“Rules”).

1.2. The parties may enter into an agreement requiring the parties and/or other persons involved in the arbitration to maintain confidentiality of any or all matters relating to the proceedings, or any party may seek a protective order from the arbitrator requiring confidentiality. The arbitrator, however, is obligated to maintain confidentiality of all matters relating to the proceedings, unless such confidentiality has been expressly or impliedly waived by the parties. The arbitrator’s duty of confidentiality shall survive termination of the arbitration proceeding.

1.3. For purposes of these Rules:

(a) “Party” shall include a party’s counsel or other representative.

(b) “Claimant” shall include a third-party claimant, and shall include multiple claimants and third-party claimants.

(c) “Respondent” shall include a third-party respondent, and shall include multiple respondents and third-party respondents.

R-2. NO WAIVER OF STATUTORY RIGHTS. These Rules do not preempt or waive any rights under any statute, treaty, or other law that governs arbitration procedures or enforcement of arbitration awards in the applicable jurisdiction, including but not limited to the Federal Arbitration Act, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (“New York Convention”), and state arbitration acts (collectively “Arbitration Laws”).

R-3. INITIATION OF ARBITRATION PROCEEDINGS.

3.1. By Written Submission. Arbitration under these Rules may be commenced by a written submission agreement signed by all parties setting forth the claims subject to the arbitration and that these Rules shall apply to the arbitration.

3.2. By Request of a Party. Any party seeking to initiate arbitration under these Rules (the “Claimant”) may do so by sending a written request to the other party or parties (the “Respondent”) that identifies the parties to the dispute, their contact information, the arbitration agreement, provision or clause, and the factual and legal basis of the claim. The request shall also provide the amount/relief/remedy sought, and a demand that the arbitration be conducted in accordance with these Rules.

3.3. Commencement Date.

(a) Arbitration initiated by written submission will be deemed commenced on the last date the submission is signed by all parties (the “Commencement Date”).

(b) If these Rules are specified in the arbitration agreement, the Commencement Date will be the date the request for arbitration is transmitted to the Respondent.

(c) If these Rules are not specified in the arbitration agreement, each Respondent shall notify the Claimant within 20 calendar days whether it consents to arbitration under these Rules. If all parties consent to arbitration under these Rules, the Commencement Date will be the date the last Respondent notifies Claimant of its consent. If any party does not consent, the Commencement Date will not be set until further agreement of the parties or order of a court of competent jurisdiction.

R-4. RESPONSES TO CLAIMS AND COUNTERCLAIMS.

4.1. Response to Request for Arbitration. Within 20 calendar days after the Commencement Date, or on a date agreed to by the parties, a Respondent (or a Third-Party Respondent) may submit to Claimant (or a Third-Party Claimant) and the arbitrator, if one has already been chosen, a response setting forth all defenses to the claims, any counterclaims, and any objection to the arbitration proceedings.

4.2. Counterclaims. Unless otherwise permitted by the arbitrator, any counterclaims shall be submitted in the response to the request for arbitration or, if no response is submitted, within 20 calendar days of the Commencement Date or on a date agreed to by the parties. All counterclaims shall state the factual and legal bases of such counterclaim and the amount/relief/remedy sought. Claimant may file a response to the counterclaims within 20 calendar days of receipt of the counterclaim or on a date agreed to by the parties.

4.3. Manner of Submission and Service. All submissions in the arbitration shall be served electronically on each party, with a copy to the arbitrator.

4.4. Amendment of Claims and Counterclaims. Any amendment to a claim or counterclaim or the addition of a new claim or counterclaim may only be submitted either: (a) based on stipulation of the parties; or (b) absent stipulation of the parties, with approval of the arbitrator.

R-5. APPOINTMENT OF ARBITRATOR.

5.1. Sole Arbitrator.

(a) Where a sole arbitrator is to be appointed and not designated in the arbitration agreement or clause, the parties shall have 10 calendar days after receipt by all other parties of a proposal for the appointment of a sole arbitrator to agree upon the selection of the arbitrator, including the arbitrator’s fees and related costs.

(b) If the parties are unable to reach agreement on the arbitrator, either party may request that a court of competent jurisdiction appoint a sole arbitrator

(c) Unless all parties have agreed that multiple arbitrators are to be appointed, a single arbitrator shall be appointed pursuant to this Rule.

5.2. Multiple Arbitrators.

(a) If three arbitrators are to be appointed, each principal party shall appoint one impartial arbitrator based on their experience and arbitrator fees and expenses. The two party-appointed arbitrators shall choose a third impartial arbitrator who will act as the presiding arbitrator of the arbitral panel. If the two party-appointed arbitrators cannot agree on an impartial third-party arbitrator, any party may request that a court of competent jurisdiction appoint the third arbitrator.

(b) Each party will have 10 calendar days from the filing of the Respondent's response, or Claimant's response if a counterclaim is filed, to notify the other party of its selection of arbitrator. If a party fails to appoint an arbitrator within the time provided under these Rules, then the one party-appointed arbitrator will select an impartial arbitrator to serve as the second arbitrator, and the two arbitrators will appoint a third, impartial, arbitrator who will act as the presiding arbitrator of the arbitral panel. The time period for selection of arbitrators may be extended by agreement of the parties.

(c) All references to "arbitrator" in these Rules shall include the arbitral panel if there is more than one arbitrator, unless otherwise specified.

5.3. Disclosures, Challenges, and Replacement of Arbitrator.

(a) The parties shall provide a list of potential witnesses, experts, parties, and party representatives, including attorneys, to any person approached in connection with his or her possible appointment as an arbitrator. The parties have an ongoing obligation to disclose to the arbitrator all additional potential witnesses, experts, parties, and party representatives, including attorneys, as soon as possible after their potential participation in the arbitration has been determined.

(b) The arbitrator or potential arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence or that would potentially provide a basis for removal or disqualification under the governing Arbitration Laws and codes of ethics. This disclosure obligation is continuing. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances.

(c) Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence or would potentially provide a

basis for removal or disqualification under the governing Arbitration Laws and codes of ethics. A party may challenge its party-appointed arbitrator only for reasons of which it becomes aware after the appointment has been made or because the party-appointed arbitrator is unable to perform his or her functions as arbitrator.

(d) Any challenge to an arbitrator shall be made by written notice within 15 calendar days after a party has been notified of the appointment of the challenged arbitrator, or within 15 calendar days after the circumstances for the challenge became known to that party. If a party fails to give notice within 15 calendar days after the circumstances became known to the party, the party waives any such challenge. The notice of challenge shall be in writing and set forth the reasons for the challenge. If all parties agree that the challenged arbitrator should be removed, or if the arbitrator withdraws based on the challenge, the arbitrator shall be removed, and the parties will proceed to select a replacement arbitrator in accordance with the provisions of Rules R-5.1 or R-5.2. If an arbitrator is removed or withdraws, the arbitrator shall be compensated for services rendered.

(e) If, within 10 calendar days from the date of the notice of challenge, all parties do not agree to the challenge or the challenged arbitrator does not withdraw, the party making the challenge may elect to pursue the challenge before a court of competent jurisdiction within 20 calendar days or it is deemed waived. Should the court disqualify the arbitrator, a replacement arbitrator shall be selected as per the procedures specified in Rules R-5.1 or R-5.2, as applicable.

5.4. Liability of Arbitrator. The arbitrator and any administrative assistant shall have the same immunity from civil liability as is afforded a judge of the court. This arbitral immunity supersedes and supplements any immunity under any other law.

5.5. Compensation of the Arbitrator and Deposits.

(a) Within 10 calendar days after the arbitrator has been selected, the parties and the arbitrator may execute a written engagement agreement setting forth the arbitrator's compensation based on the arbitrator's prior submission of arbitrator fees and expenses. Any oral or written agreement as to compensation and expenses for each arbitrator shall be fully disclosed to all arbitrators and the parties.

(b) The arbitrator may request that the parties deposit in advance amounts to pay administrative costs and arbitrator compensation in accordance with Rule R-36. If such deposits are not made within the time required, the arbitrator may cancel any scheduled hearings or proceedings or take other action in accordance with Rule R-40.

5.6. Acknowledgment of Arbitrator. By accepting appointment as arbitrator, the arbitrator acknowledges that he or she has made all necessary disclosures and will conduct the arbitration in a fair and equitable manner and in accordance with these Rules.

R-6. AUTHORITY OF THE ARBITRATOR.

6.1. The arbitrator shall have the power to hear and rule on his or her jurisdiction, including hearing and ruling on any objection to or the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.

6.2. The arbitrator shall have the power to determine the existence, validity, or scope of the contract of which the arbitration clause is a part. The arbitration clause shall be treated as an agreement independent of and separable from the agreement of which such clause is a part. A decision by the arbitrator that the contract is null and void shall not, for that reason alone, render the arbitration clause invalid or deprive the arbitrator of jurisdiction.

6.3. Any objection to the jurisdiction of the arbitrator or to the arbitrability of any claim or counterclaim (including any amended claim or counterclaim) must be made no later than the filing of a response to the claim or counterclaim giving rise to the objection. Where no response is filed, any such objection must be made within 30 calendar days from the submission of such claim or counterclaim, the next scheduled conference with the arbitrator, or the next written submission to the arbitrator by the objecting party, whichever is first.

6.4. Unless otherwise provided for in the arbitration agreement of the parties, the arbitrator shall also have the authority to conduct the arbitration process and arbitration hearing in any manner that will afford the parties with a fair opportunity to present evidence in an expeditious and efficient manner, including the authority to act in accordance with these Rules.

6.5. The arbitrator may extend any deadline in the arbitration agreement or set by the arbitrator for good cause.

R-7. CONSOLIDATION OF ARBITRATION PROCEEDINGS AND JOINDER OF PARTIES.

7.1. Two or more arbitration proceedings arising from the same or a related legal relationship may be consolidated by:

(a) Order of a court of competent jurisdiction; or

(b) Agreement of all parties, either in the arbitration agreement or subsequently, and approval of all arbitrators appointed in the proceedings, provided that all parties agree on the arbitrator to be appointed in the consolidated proceeding and that these Rules will govern the consolidated proceeding.

7.2. Any person or entity involved in a dispute arising from the same or a related legal relationship that is the subject of the arbitration may be joined as a party upon agreement of all parties, including the person or entity to be joined, and approval of the arbitrator.

R-8. REPRESENTATION OF PARTIES. To the extent permitted by applicable law, each party may be represented by persons chosen by that party or may participate without

representation (*pro se*). The names, addresses, and email addresses of any party representative, including attorneys, must be communicated to all parties and the arbitrator in accordance with Rule R-5.3(a), but in no event later than seven calendar days prior to the date set for the hearing at which that representative is first to appear, provided that no additional notice is required if the representative initiates an arbitration or files an initial response for a party. The arbitrator may set an earlier date by which such notice must be provided prior to the hearing. If a party fails to submit timely notice of a party representative, the arbitrator may continue the hearing, assess costs, or take any other action that the arbitrator deems appropriate and beneficial to the process.

R-9. COMMUNICATION WITH AND SUBMISSIONS TO THE ARBITRATOR. Communication with, including submissions to, the arbitrator by a party, representative, or witness without the presence of all other parties (*ex parte* communications) is prohibited, except as is necessary to secure or obtain payment for the arbitrator's services or assure the absence of conflicts, or for any other administrative matter the arbitrator deems necessary or appropriate. The parties may communicate directly with the arbitrator by email or other written means as long as copies are simultaneously forwarded to all other parties or their representatives.

R-10. DELEGATION OF AUTHORITY TO ADMINISTRATIVE ASSISTANT. The arbitrator may, in his or her discretion, delegate administrative tasks to an administrative assistant. Such tasks may include communication between the arbitrator and the parties regarding scheduling or the form of submission of documents, secretarial tasks such as organizing and maintaining the arbitrator's file, booking of hearing facilities, organizational tasks relating to the hearing, word processing, proofreading, or editing any scheduling order or award issued by the arbitrator, and invoicing and collection of payment for the services of the arbitrator. An individual acting as administrative assistant or case manager must disclose any relationships that would impede his or her ability to handle the administrative tasks impartially. *Ex parte* communications regarding administrative matters between a party and the administrative assistant shall be permitted.

R-11. CASE MANAGEMENT CONFERENCES AND SCHEDULING ORDERS.

11.1. After the appointment of the arbitrator, a preliminary case management conference, in person or by video or phone conference call, shall be held if requested by a party, or may be held in the arbitrator's discretion. The matters to be discussed at such conference may include a case schedule, applicable rules and law, the scope and schedule of discovery, joinder or consolidation of additional parties or claims, and other preliminary matters. The arbitrator shall give proper notice to the parties of the date and time of the conference. The arbitrator may request short submissions from the parties in advance of the case management conference in order to streamline the discussion.

11.2. Upon completion of the preliminary conference, the arbitrator shall issue a scheduling order setting forth the matters agreed to and ordered during the preliminary conference. If the parties have agreed to a proposed scheduling order in the absence of a preliminary conference, the parties shall submit such proposed order for the arbitrator's approval.

11.3. The arbitrator may schedule other case management conferences on his or her own initiative or at the request of one or more of the parties if the arbitrator deems it reasonably necessary and beneficial to the process.

R-12. LOCATION, DATE, AND TIME OF THE ARBITRATION HEARING.

12.1 Unless the arbitration agreement specifies a locale for the arbitration hearing, the arbitrator shall have the authority to make a final determination regarding the location, date, and time of the arbitration hearing, subject to any contractual requirements. If the hearing is held at more than one location and the seat of the arbitration is not specified in the arbitration agreement, the hearing and award shall be deemed to have been made at the location designated by the arbitrator. In either case, the arbitrator will endeavor to set the hearing at locations, dates and times that are convenient for all parties, and will attempt to accommodate any reasonable request by a party.

12.2 The arbitrator may conduct special hearings at other locations for document production, to hear a third-party witness, or for the convenience of the parties and witnesses, if the arbitrator deems it reasonably necessary and beneficial to the process.

R-13. DISCOVERY.

13.1. Scope of Discovery.

(a) Unless otherwise provided by the parties' agreement, the arbitrator may permit discovery as he or she determines appropriate in the circumstances and reasonably necessary and beneficial to the process.

(b) In determining the appropriate scope of discovery, the arbitrator shall ensure that permitted discovery is proportional to the issues at stake and the relief sought in the arbitration.

(c) The arbitrator may allocate the cost of discovery between or among the parties.

(d) In the event a party commits any discovery abuse or spoliation of evidence, the arbitrator may impose such sanctions as he or she deems appropriate, including making negative inferences, refusing to admit evidence, and imposing monetary sanctions.

13.2. Discovery Disputes. If the parties cannot, after conferring, eliminate disputes concerning discovery, the dispute shall be presented to the arbitrator for determination.

R-14. SITE AND PROPERTY INSPECTIONS.

14.1.If any party or the arbitrator believes a site or property inspection is necessary, the party shall inform the parties. If agreement cannot be reached on the procedure for the inspection, the arbitrator may convene a status conference to determine the procedure. All parties have a right to be present at any site or property inspection unless otherwise determined by the arbitrator, and the arbitrator may permit experts or others to attend and for video recording of the inspection upon good cause shown.

14.2.At the arbitrator's discretion, a site or property inspection may include testimony to the extent the arbitrator determines such procedure is reasonably necessary and beneficial to the process, subject to any contractual requirements.

14.3.The parties shall ensure that the site or location of the property is safe and properly marked, identifying all safety and/or health hazards.

R-15. NON-DISPOSITIVE MOTIONS. The arbitrator may hear motions that will assist in the resolution of the dispute or narrow the issues in dispute. A party who wishes to file a motion must first confer with the other party, and the moving party must certify such conference has occurred. The arbitrator may direct the parties to address specific issues in their motion papers. The arbitrator may allow the opposing party to file a response to the motion, and may, in the arbitrator's discretion, schedule a hearing on the motion. The arbitrator has the sole discretion to hear or not hear any non-dispositive motion.

R-16. DISPOSITIVE MOTIONS. The arbitrator may allow the submission of and rule upon motions that dispose of some or all of the issues, provided that the submission of and potential ruling on such motions reduces rather than adds to the time and cost of an ultimate resolution of the entire case. Before a party may submit such a motion, that party must submit a short statement demonstrating why such motion is appropriate under the circumstances and that its submission will reduce rather than add to the time and costs of the proceeding. If the arbitrator grants leave to file the dispositive motion, the arbitrator shall set a briefing schedule and may, in the arbitrator's discretion, schedule a hearing on the motion. Any ruling on such a motion that does not dispose of all claims and counterclaims shall not be deemed a final award, but rather an interim order. The arbitrator has the sole discretion to hear or not hear any dispositive motion.

R-17. EMERGENCY MEASURES.

17.1.Where emergency relief is necessary before the arbitrator is selected, the party seeking relief may do so in a court of competent jurisdiction unless otherwise provided in the parties' agreement.

17.2 Once the arbitrator is selected, any request for emergency relief shall be decided by the arbitrator. The arbitrator shall assume jurisdiction over any request for emergency relief then pending in any court upon order of the court referring the matter to arbitration.

17.3 A request for emergency relief made to a court shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

R-18. INTERIM MEASURES.

18.1. At any time after the arbitrator is confirmed, any party may apply to the arbitrator for interim relief, including injunctive relief, measures for the protection or conservation of property or evidence, or disposition of perishable goods.

18.2. Relief sought on an interim basis before the final award must be requested in a separate motion from the request for arbitration, stating with particularity the relief sought, the reason such relief is needed before the final award, and the proposed security to be posted for such relief, if appropriate.

18.3 The arbitrator may enter a partial final award granting or denying the motion for interim relief, which would be subject to immediate review by a court of competent jurisdiction.

18.4. Unless entered as a partial final award, any interim relief ordered shall be in the form of an interim order. The arbitrator shall retain jurisdiction over an interim order for all purposes, and may modify or vacate the interim order, until such time as the final award is issued. Upon issuance of the final award, any interim orders shall be merged into and become part of the final award unless vacated by the arbitrator prior to the final award.

18.5. The arbitrator may require security for a partial final award or an interim order in such form and amount as the arbitrator deems appropriate.

R-19. PREHEARING SUBMISSIONS.

19.1. Unless the arbitrator directs otherwise, parties shall exchange exhibit lists and the documents identified herein at least 14 calendar days prior to the arbitration hearing.

(a) Exhibit lists shall include a list of all exhibits intended to be offered at the arbitration hearing, distinguished by common identifier (e.g., Bates range), and copies shall be submitted of all anticipated exhibits that were not previously disclosed to the opposing party.

(b) The parties are required to confer and pre-mark as many exhibits as possible to avoid duplication and minimize evidentiary disputes during the arbitration hearing.

(c) The arbitrator may require the parties to confer and submit any stipulated statements of fact.

19.2. Unless the arbitrator directs otherwise, parties shall submit witness disclosures and expert reports to be offered into evidence as soon as possible, but not less than 14 calendar days prior to the arbitration hearing. Nothing in the preceding sentence prevents

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the arbitrator from ordering earlier disclosures or otherwise affects the parties' disclosure obligations pursuant to R-5.3.

(a) Witness disclosures shall include the following for each witness a party intends to call at the arbitration hearing: name, address, and a short description of the witness's anticipated testimony. A party may only complain that a fact witness disclosed is not called if that party has cross-designated the fact witness within seven calendar days of the designation.

(b) Expert reports shall include each expert witness's name, address, qualifications, and a detailed statement of all opinions and bases therefor.

19.3. The arbitrator may request that each party submit a concise, written prehearing brief setting forth the position of the parties and any other matters identified by the arbitrator. Unless the arbitrator directs otherwise, the prehearing brief shall be submitted at least seven calendar days prior to the arbitration hearing and shall include the facts the party intends to prove at the arbitration hearing, a presentation of law applicable to the dispute, and the party's bases for the relief requested.

19.4 The arbitrator has the discretion to require any additional prehearing submissions not identified in this rule if the arbitrator determines that such submissions will assist in the resolution of the dispute.

R-20. ARBITRATION HEARING. The arbitrator shall conduct a fair hearing during which the parties are treated equitably. Each party shall be given a reasonable opportunity to present its case and has the right to be heard. The arbitrator shall conduct the proceedings in such a way as to expedite resolution of the dispute. It is within the arbitrator's discretion to vary any procedure set forth in Rules R-21 through R-31 so long as the foregoing requirements are satisfied.

R-21. ATTENDANCE OF PARTIES, EXPERTS, AND WITNESSES AT HEARING. Subject to the arbitrator's discretion, arbitration hearings shall be private unless required by applicable law to be made public. Only those persons with a direct interest in the arbitration and their representatives are entitled to attend hearings, along with witnesses to the extent permitted by the arbitrator. Objection to the attendance of any person, including any fact or expert witnesses, shall be made promptly, and the arbitrator has the authority to decide such objection.

R-22. PRESENTATION OF EVIDENCE.

22.1. The parties may offer evidence that is relevant and material to the dispute to be decided. All evidence shall be submitted in the presence of the arbitrator and the parties unless a party has waived its right to be present.

22.2. The arbitrator shall decide the admissibility and the weight of the evidence, taking into consideration applicable rules of privilege. Absent agreement of the parties, courtroom rules of evidence are not applicable."

22.3. All documentation, discovery evidence, pictures, video, and other physical testimony that a party intends to use during witness examinations shall have been disclosed prior to the hearing, with the exception of material used solely for impeachment or demonstrative purposes. For good cause, the arbitrator may allow testimony or evidence that has not been previously disclosed to be admitted, provided that the opposing party has a fair opportunity to respond to such testimony or evidence. In allowing the admission of previously undisclosed testimony or documentary evidence, the arbitrator may continue the hearing, impose sanctions, or take such other action as the arbitrator deems necessary and appropriate.

22.4. Testimony may be accepted through any means approved by the arbitrator, so long as each party is given the opportunity to present relevant and material evidence and no party's right to cross-examine is impinged, subject to Rule R-23.3.

R-23. WITNESS EXAMINATION.

23.1. The arbitrator shall determine the manner in which witnesses are to be examined, and may require witnesses to testify under oath. The arbitrator may direct that witnesses submit to questions from the arbitrator.

23.2. Each party shall be permitted to cross-examine witnesses called by another party, subject to Rule R-23.3.

23.3. The arbitrator may receive and consider the evidence of witnesses by declaration or affidavit, and shall give it such weight as the arbitrator deems appropriate. If the arbitrator accepts evidence by declaration or affidavit, the party presenting the declaration or affidavit must, at the request of any other party, make the witness available for cross-examination, unless the arbitrator determines it is not necessary under all the circumstances.

23.4. The scope of re-direct and re-cross examination is within the discretion of the arbitrator and may be limited by the arbitrator to promote efficiency, provided that each party has a fair opportunity to present its case.

R-24. SUBPOENAS FOR DOCUMENTS AND WITNESSES. Upon request of a party, the arbitrator may issue a subpoena for documents or witnesses in conformity with applicable law if the arbitrator deems it appropriate. The parties are responsible to prepare, serve, and enforce the subpoena.

R-25. ARBITRATION HEARING IN CASES OF FAILURE TO ATTEND. The arbitrator may proceed with the arbitration hearing if one of the parties to the arbitration fails to attend the arbitration, so long as the arbitrator is satisfied and makes a finding that the absent party received adequate notice of the arbitration hearing pursuant to these Rules. The arbitrator may not render an award on the basis of the default alone, but instead must require the attending party to submit evidence demonstrating that the attending party is entitled to the relief sought.

R-26. RECORDING OF DEPOSITIONS AND HEARING.

26.1. Any party who wishes to have an audio or stenographic recording transcript of a deposition or hearing may, at the party's own expense, make arrangement for such recording and notify the other party and the arbitrator at least three calendar days in advance of the deposition or hearing. If any other party wishes to have a copy of the recording, that party must share equally in the cost thereof.

26.2. If the recording is agreed by the parties or determined by the arbitrator to be the official record of the proceeding, no other recordings will be permitted. The cost of the official record shall be shared equally by the parties, and the arbitrator shall receive a copy of the recording at no charge.

26.3. Video recording and photographing of a hearing is not permitted unless otherwise agreed by the parties and the arbitrator. The arbitrator may conduct an audio recording of a conference or hearing for the arbitrator's own use, provided that the arbitrator notifies the parties at least three calendar days in advance of the conference or hearing. Any party may object to such audio recording, and the arbitrator will determine whether to conduct the recording after considering the objection

R-27. INTERPRETERS. Any party wishing to introduce evidence which is in a language other than that of the proceeding shall initially bear the cost of translation, subject to apportionment in the final award. If a party or the arbitrator objects to the accuracy of a translation, the arbitrator may retain its own translator, determine which party or parties shall initially pay the cost thereof, and apportion the cost thereof in its award.

R-28. POST-HEARING SUBMISSIONS. The arbitrator shall determine whether post-hearing submissions shall be permitted or required and, if so, the timing, length, and content of such submissions.

R-29. INTERIM ORDERS.

(a) The arbitrator may issue interim orders at any time prior to the final award, and such order shall not affect the arbitrator's continuing jurisdiction over the matter. The arbitrator shall have the authority to modify or vacate any interim order; provided, however, that if such order is not vacated or modified, the interim order shall be addressed in or incorporated into the final award.

(b) If, after the hearing, an interim order on the merits is issued which leaves open any claim of entitlement to and/or the amount of any costs or attorneys' fees that may be awarded, the parties shall follow the procedure set forth in Rule R-31.

R-30. THE FINAL ARBITRATION AWARD. The final award shall be dated and signed by the arbitrator, and shall include the following as the arbitrator deems appropriate:

(a) The identity of the parties, any party representatives, and the arbitrator;

(b) The date(s) and location of the hearing, and the identity of the persons attending the hearing;

(c) A description of the claims and any counterclaims of the parties;

(d) The type of award, which shall be a standard award, unless the parties agreed to or the arbitrator orders upon request of a party either a reasoned award (which must include the reasoning supporting the award), or findings of fact and conclusions of law;

(e) The relief awarded and, if requested by either party, an itemized statement of any damages awarded, along with the date(s) by when payment must be made or other action must be taken;

(f) The amount of any costs or attorneys' fees awarded;

(g) Whether pre- and/or post-award interest is awarded and, if so, the basis for the award, the method of computation, and the amount awarded; and

(h) The award shall include a statement that it is a final award that resolves all claims, counterclaims, and defenses that were or could have been raised in the arbitration, and that all other relief sought in the arbitration is denied.

R-31. PROCEDURE FOR AWARD OF COSTS, ATTORNEYS' FEES, AND INTEREST.

(a) If the arbitrator allows evidence to be presented during the hearing on any claims for entitlement to and the amount of any costs, attorneys' fees, and/or the imposition of pre-award or post-award interest, the arbitrator shall rule on the claims and include any amount of such costs, attorneys' fees, and/or interest in the final award.

(b) If the arbitrator issues an interim order on the merits which leaves open any claims of entitlement to an award of costs, attorneys' fees, and/or interest, or finds entitlement but does not determine the amount of such award, the arbitrator shall set the procedure for determining those claims. The final award, including any award of costs, attorneys' fees, and/or interest, shall be issued within a reasonable time after disposition of these claims.

R-32. ISSUANCE OF AWARD.

32.1. The arbitrator shall close the hearing at such time as all evidence, arguments, and post-hearing submissions on all issues, including costs, attorneys' fees, and interest, have been submitted for decision. Nothing submitted after the arbitrator has closed the arbitration hearing shall be considered by the arbitrator, provided, however, that the arbitrator may re-open the hearing for good cause.

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32.2. The final arbitration award shall issue within 30 calendar days after the hearing is closed. The arbitrator may extend the deadline by 30 calendar days so long as no previous extensions have been granted.

R-33. CORRECTION OR CLARIFICATION OF AWARD. A party may file a motion to correct the award solely based upon a computational, typographical, or similar error, or to clarify an award, within 10 calendar days after receipt of the award. Any response to such motion is due within 10 calendar days after receipt of the motion, and the arbitrator shall rule on the motion within 14 calendar days of receipt of the response. Upon resolution of such motion, a corrected or clarified final award shall be issued if appropriate.

R-34. ARBITRATION AWARD APPEALS AND VACATING. There shall be no appeals to the arbitrator of any final arbitration award. A partial final or final arbitration award may be modified, confirmed, or vacated by a court of competent jurisdiction in accordance with the process set forth in the applicable Arbitration Laws.

R-35. ARBITRATION COSTS.

35.1. Arbitration Costs include the following:

- (a) Arbitrator compensation and expenses;
- (b) The costs of the arbitrator's administrative assistant, if any;
- (c) The costs of expert advice and other assistance engaged by the arbitrator;
- (d) The costs of stenographers and transcripts or recordings;
- (e) The costs of depositions;
- (f) The costs of producing electronically stored information;
- (g) The costs of interpreters;
- (h) The costs of meeting and hearing rooms; and
- (i) Other costs associated with conducting any proceeding relating to the arbitration.

35.2. The allocation of Arbitration Costs is set forth in Rule R-37.

35.3. The term "Arbitration Costs" does not include the fees and expenses of attorneys and experts or others retained by the parties ("Attorneys' Fees and Expenses"). The allocation of Attorneys' Fees and Expenses is set forth in Rule R-38.

R-36. DEPOSITS.

(a) Any deposits paid to the arbitrator pursuant to Rule R-5.5(b) shall be held in an account other than the arbitrator's personal or general business operating account until payable to the arbitrator in accordance with the parties' compensation arrangement with the arbitrator.

(b) Upon request of any party submitted not more often than quarterly, the arbitrator shall provide the parties with an itemization of all disbursements of deposits. Remedies for nonpayment of deposits are set forth in Rule R-40.

(c) The arbitrator shall return any unexpended or unearned balance of deposits to the parties within 15 calendar days after the conclusion of the arbitration process.

R-37. ALLOCATION OF ARBITRATION COSTS. If authorized by applicable law or the parties' agreement, the arbitrator may allocate the costs of arbitration between or among the parties in the final award, including the return of any unexpended or unearned deposits, in such manner as the arbitrator deems reasonable, unless prohibited by the parties' agreement or otherwise specified in these Rules.

R-38. ALLOCATION OF ATTORNEYS' FEES AND EXPENSES. If authorized by applicable law or the parties' agreement, the arbitrator may allocate attorney's fees between or among the parties in the final award.

R-39. INTEREST. The arbitrator may, consistent with applicable law and the parties' agreement, award pre-award and/or post-award interest, simple or compound, as deemed appropriate.

R-40. REMEDIES FOR NONPAYMENT. If any deposit or other payment required by the arbitrator is not made when required, the arbitrator shall inform the parties of the nonpayment and may take one or more of the following actions:

- (a) Suspend the proceedings until all payments are received;
- (b) Accept payment from any other party of the non-paying party's payment obligations;
- (c) Allow the proceedings to go forward upon such terms as the arbitrator deems reasonable;
- (d) Terminate the proceedings after continuing nonpayment; and/or
- (e) Withhold issuance of the final award until full payment has been made by any party.

**AMERICAN BAR ASSOCIATION
CRIMINAL JUSTICE SECTION
REPORT TO THE HOUSE OF DELEGATES**

RESOLUTION

- 1 RESOLVED, that the American Bar Association adopts the *ABA Criminal Justice*
- 2 *Standards on Diversion*, dated August 2022.

CRIMINAL JUSTICE STANDARDS
on DIVERSION

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PART I. INTRODUCTION

Standard 1.1 Summary

These Standards:

(a) Provide guidance on the development, implementation, and evaluation of diversion programs. They are consistent with efforts to: reduce collateral consequences; address over-criminalization; reduce incarceration; curtail the burden on and investment in the criminal legal system; and, eradicate racial disparities in arrests, charging, sentencing, and incarceration. These Standards encourage jurisdictions to consider providing for diversion in the absence of additional criminal consequences and to dismiss cases where appropriate. The Standards also encourage jurisdictions, in the absence of the threat of criminal sanctions, to refer individuals to alternative care provided either by the community or the diversion program itself.

(b) Are organized into three categories: Early Diversion, Pre-plea Diversion, and Post-plea Diversion. These categories recognize that diversion can occur throughout the criminal process. The Standards urge jurisdictions to adopt earlier diversion opportunities to mitigate economic, familial, voting-related, and social harms that result from criminal interventions, especially in communities of color, while also mitigating systemic harms, like over-criminalization and over-incarceration. To that end, the Standards follow a procedural progression. As collateral consequences become more severe and program requirements become more burdensome, the Standards identify additional due process considerations.

(c) Recognize that any intervention by the criminal legal system, including diversion programs, is coercive and imposes on a participant's liberty.

(d) Favor early diversion programs even though the prosecution may be left with weaker cases against participants who fail to successfully complete the program. These burdens are outweighed by the benefits to individual participants, and to public safety, the incarceration of fewer people, and the reduction of harms to communities, especially communities of color.

(e) Recognize that a jurisdiction may have local needs that call for a particular approach to program design. These Standards recognize that there are many stakeholders in diversion including prosecutors, defense attorneys, judges, law enforcement officers, service providers, pretrial services personnel, corrections personnel, probation and parole officers, community group representatives, and victim advocates, as well as former, current, and potential program participants.

(f) Provide guidance in the development, implementation, and evaluation of a diversion program. Programs may utilize a variety of interventions, such as crisis response, referrals to community service providers, peer-to-peer contacts, assistance with basic needs, medical care, restorative justice, or community service.

(g) Recognize that many types of alleged unlawful behavior do not present a public safety threat or can be addressed without criminal legal system involvement or a formal diversion program. A stakeholder may arrange for a person to apologize, or to stay out of trouble, or simply provide a release with no further criminal consequences. For any of these informal approaches, stakeholders are still encouraged to consult the Standards for guidance, especially with regard to the mitigation of bias and discrimination based on

race, as well as ethnicity, national origin, gender identity, sexual orientation, age, disability, or religion.

(h) Provide guidance to jurisdictions as to the protection of the privacy of the individual participants and the information shared during participation in a program. The protection of this information encourages participation in the program and makes successful completion more likely. Recognizing that sharing information helps to provide appropriate and effective service, these Standards provide guidance as to information sharing with public and private service providers consistent with the overarching principle of protecting the participant's privacy.

(i) Are in seven parts. Part I defines essential terms and articulates the principles and purposes that should guide diversion programs. Part II identifies general attributes of diversion and includes guidance as to how programs should be developed, monitored, and evaluated. Parts III-V identifies early diversion opportunities, including community-first programs (Part III), law enforcement programs (Part IV), and pre-filing programs (Part V). Subsequent parts identify operational and due process attributes unique to pre-plea programs (Part VI), and post-plea programs (Part VII).

Standard 1.2 Definitions

For the purposes of these Standards:

(a) “Diversion” refers to any opportunity for a person to avoid arrest, to decline or reduce charges, to avoid a conviction, or to reduce a sentence, by fulfilling a prescribed set of conditions, by agreeing to a referral to services, or by receiving assistance or release with no further criminal consequences. “Diversion” also refers to efforts to bring a public health approach to incidents traditionally addressed by the criminal legal system, or formalized efforts to identify circumstances in which further criminal legal system intervention is outweighed by concerns regarding over-incarceration and other harms.

(b) “Program” refers to any formalized process for diversion designed in response to alleged unlawful conduct. A program may utilize various levels of responses in the form of community service, restorative justice, mediation, counseling, treatment, or any other appropriate arrangement. “Program” also refers to any formalized process designed to replace or supplement criminal legal system responses with a non-punitive, public health approach.

(c) “Early Diversion” is diversion that occurs before the prosecutor initiates prosecution. Such diversion may include: “community-first programs,” “law enforcement diversion,” and “pre-filing diversion programs.”

(1) “Community-first programs” are programs that adopt a public health approach by redirecting incidents typically subject to criminal legal system interventions to community service providers, community resources, and peer-to-peer contacts.

(2) “Law enforcement diversion programs” are programs that include diversion opportunities such as “pre-arrest,” “pre-bookings,” “deflection,” and “post-arrest” programs in which alleged unlawful conduct is intercepted and addressed before referral to prosecution.

(3) “Pre-filing diversion programs” are programs that occur prior to the initiation of prosecution, but after a person has been referred for prosecution.

(d) “Pre-plea diversion programs” are programs that occur after a prosecutor initiates prosecution but before any adjudication of guilt. These programs carry heightened collateral consequences and risk of incarceration. In such a program, the prosecutor agrees to dismiss or file lesser charges in exchange for the accused’s successful participation.

(e) “Post-plea diversion programs” are programs in which, upon acceptance of a plea or prior to the imposition of a sentence, a court dismisses or vacates the conviction, reduces charges, or reduces the sentence in exchange for an accused’s successful participation in a program. Post-plea diversion programs are commonly administered by problem-solving courts, treatment courts, and specialized courts. Post-plea diversion does not deviate significantly from the traditional criminal legal system. As a result, these programs tend to build in features of the criminal legal system that are often contrary to the objectives of diversion, and which lead to significant collateral consequences. For example, empirical study of post-plea diversion reveals a significant number of participants are subject to more severe penalties than similarly situated individuals who are not subject to diversion, particularly when the participant is a person of color.

(f) “Service provider” is an umbrella term that includes treatment providers who provide medical, therapeutic or rehabilitative services, as well as those who provide mediation, wrap-around, recovery support, or collateral services.

(g) “Program contract” is a written agreement that prescribes the conditions a participant must satisfy to complete a program.

(h) “Net-widening” occurs when the introduction of a diversion program causes criminal legal system interventions to increase in number and intensity than would have occurred in the absence of the program.

Standard 1.3 Purposes

Diversion programs promote jurisdictions’ efforts to:

(a) Formalize and invest in public health and therapeutic alternatives to traditional criminal legal system interventions;

(b) Facilitate and develop appropriate public health approaches to incidents that are traditionally criminalized;

(c) Recognize incidents in which traditional criminal legal system interventions cause trauma and destabilization, increase harm to individuals and communities, and undermine public safety;

(d) Shift investment of resources from the criminal legal system to community and public health systems to address structural injustices;

(e) Encourage and fund engagement with existing community resources as well as developing new resources tailored for diversion;

(f) Offer options at every intercept point to improve individual outcomes in order to minimize community harm, and where possible, to strengthen communities;

(g) Avoid interventions by the criminal legal system that damage social networks and social norms, especially in communities of color;

(h) Prevent or mitigate social, educational, economic, voting-related, and legal collateral consequences of traditional criminal legal system interventions;

- (i) Respond in a constructive and reconstructive manner to the effects of economic, educational, housing, and social segregation and exclusion based on race or poverty;
- (j) Restore communities affected by the alleged unlawful conduct;
- (k) Ensure justice and public safety while reducing the stigma and collateral consequences that result from the criminal legal system interventions;
- (l) Reduce reoffending through access to services;
- (m) Reduce reliance on arrest, prosecution, courts, detention, incarceration, and probation;
- (n) Reinforce and restore the legitimacy of the criminal legal system; and,
- (o) Ease the financial and workload burdens on prosecutor and public defender offices, law enforcement, courts, and other criminal legal system stakeholders.

Standard 1.4 General principles

- (a) The availability of a diversion program should never be the basis for involving an individual in the criminal legal system.
- (b) Diversion programs should impose the least restrictive conditions for participants to facilitate success in the program.
 - (1) At a minimum, jurisdictions should not impose conditions of diversion that are more onerous than the burden imposed by a sentence that similarly situated individuals would receive in the absence of participating in diversion.
 - (2) Jurisdictions should work to be aware of, avoid, and mitigate where possible, the coercive nature of diversion.
- (c) Diversion programs should be developed according to evidence-informed or evidence-based practices.
- (d) Diversion programs should establish eligibility criteria for participation. Diversion should be offered to the broadest pool of potential participants, including consideration of individuals a jurisdiction determines to be medium and high risk, as well as individuals who are high utilizers. Jurisdictions should refrain from imposing eligibility requirements that disqualify potential participants who would otherwise benefit from the diversion program.
- (e) Any individual eligible for a program should have the opportunity to participate. Any program costs or fees, or financial burdens related to any aspect of a diversion program, should not affect a person's ability or decision to participate.
- (f) A person's decision to decline to participate in a program should not result in the imposition of additional charges or a more severe charge or sentence than would otherwise be imposed for the underlying conduct.
- (g) Programs should promote and respect the dignity and agency of participants.
- (h) The decision to participate in a program should be informed.
- (i) An identified victim should be notified of any program participation as required by the jurisdiction.
- (j) Once a person is admitted, a program should consider accommodating a person's employment schedule, and eliminating, offsetting, or reimbursing costs associated with program participation, such as transportation and childcare, to facilitate successful completion.

(k) Programs should be designed according to evidence-informed or evidence-based practices to anticipate violations of program conditions and provide for graduated responses tied to evidence-informed or evidence-based practices before considering termination from the program.

(l) Programs should be developed and monitored in collaboration between criminal legal system stakeholders, including prosecutors, defense attorneys, judges, law enforcement officers, service providers, pretrial services personnel, corrections personnel, probation and parole officers, community groups, victim advocates, and former, current, and potential program participants.

(m) Programs should be adequately funded to ensure optimal implementation, including adherence to evidence-informed or evidence-based practices and models.

(n) Parties that participate in the administration and operation of programs should be appropriately recruited and receive periodic training.

(o) All program policies and practices should be evaluated to ensure a program is fair and effective.

(p) Policies and practices should be evaluated to ensure they are being developed, implemented, and enforced in a way that is free of bias or discrimination based on race, as well as ethnicity, national origin, gender identity, sexual orientation, age, disability, and religion.

(q) Policies and practices should be published and readily available to assure that they are administered transparently.

PART II. GENERAL ATTRIBUTES OF DIVERSION

Standard 2.1 Summary

Part II describes general attributes that apply to the development, implementation, operation, monitoring, and evaluation of diversion programs.

(a) Some guidance in this Part may not apply to community-first and law enforcement programs that are discussed in Parts III and IV, but it is instructive for implementation of these programs.

(b) For all other program types, this Part should be read in conjunction with the appropriate subsequent Part: Part V (for pre-filing diversion programs), Part VI (for pre-plea diversion programs); or Part VII (for post-plea diversion programs).

Standard 2.2 Developing a program

(a) Federal, tribal, state, and local governments should encourage the development and adequate funding of diversion. Jurisdictions should develop diversion programs that meet the needs of local communities, comply with due process, use evidence-informed or evidence-based methods, and implement best practices.

(b) Stakeholders should collaborate as a committee in the development of a program, and should include prosecutors, defense attorneys, judges, law enforcement officers, service providers, pretrial services personnel, corrections personnel, probation and parole officers, community group representatives, and victim advocates, as well as former, current, and potential program participants. Membership in the committee should reflect the jurisdiction's demographics based on race, sex, religion, national origin, disability, age, sexual orientation, gender identity, and socioeconomic status. The committee should host presentations on societal issues that impact the implementation and operation of diversion programs, including but not limited to: the social construction of race, biological racism, national and any local studies of racial segregation and exclusion, structural racism, the criminal legal system's role in perpetuating racial harm, and critical accounts of how race-neutral policies can reproduce racial harm. Committee members should participate in crisis intervention training. The committee should host presentations from representatives of early diversion programs in other jurisdictions. Committees should host presentations on restorative justice principles and trauma-informed approaches to healing.

(c) Jurisdictions should view diversion as an alternative to traditional criminal legal system interventions and should seek opportunities to integrate or expand existing community resources.

(d) Jurisdictions should consider diversion a proportionate and appropriate response to alleged unlawful conduct, and that any intervention by the criminal legal system, including diversion programs, is of a coercive nature that should be understood as an imposition on a participant's liberty.

(e) To promote participant and stakeholder buy-in, programs should undertake outreach to diverse and underrepresented groups in the community, include community providers in discussions of program design, and engage in leadership that demonstrates institutional investment and commitment.

(f) Programs should be designed to avoid or mitigate collateral consequences. Stakeholders should identify and assess the collateral consequences of participating in a program and provide appropriate resources to assist participants in reducing, mitigating or otherwise addressing these consequences.

(g) Programs should be governed by publicly available and easily accessible written policies and procedures that:

- (1) Describe the program's objectives and interventions;
- (2) Identify roles in the program, such as who will determine whether eligibility criteria are met, administer the program, provide services, evaluate the program, establish the expectations of each role, including a demonstrated commitment to participant success, with care to build a team that represents the demographics of the community, including race, language spoken, ethnicity, disability, gender identity, and/or sexual orientation;
- (3) Provide for periodic training that reinforces program objectives, promotes cultural competency, discusses racial disparities and structural racism, facilitates awareness of implicit bias and stereotype threat, promotes crisis intervention, and improves communication techniques designed to elicit the most positive outcomes from participants;
- (4) Require that treatment and service providers have the appropriate certification, licensing, and training;
- (5) Specify the eligibility criteria for the broadest pool of potential participants possible and the efforts required to ensure all those eligible will have the opportunity to participate, regardless of class, race, gender identity, and sexual orientation;
- (6) Explain and guard against net-widening;
- (7) Add to and enhance, rather than replace, any existing community resources and services;
- (8) Assess the needs of the population to be served by the program, providing outreach measures designed to ensure feedback from community members, with special care to include underserved groups;
- (9) Provide adequate funding to ensure that financial burdens related to any aspect of a diversion program do not affect a person's ability or decision to participate, as well as funding to offset or reimburse costs associated with program participation, such as transportation and childcare, to facilitate successful completion of the program;
- (10) Implement screening mechanisms to determine whether it is appropriate to give eligible participants the opportunity for behavioral health services or other social services in the absence of any further threat of criminal sanctions;
- (11) Design the program so that its duration is reasonable in light of its objectives, the severity of the alleged underlying conduct, and the participant's needs;
- (12) Delineate the potential levels of intervention or services to be offered, and provide for protocols that give due weight to any expert recommendations about an individual;
- (13) Provide a flexible and appropriate level of monitoring, treatment, and contact;

(14) Set procedures for determining what constitutes a violation of the conditions of a program contract, how the program or service provider should exercise discretion including the use of graduated sanctions to modify the terms of participation and, as a last resort, what violations will justify termination from the program;

(15) Determine the process by which a participant and any defense attorney will be notified and may challenge an allegation that a participant violated the program contract;

(16) Clearly state criteria for successful participation in and fulfillment of the program contract;

(17) Determine the intended benefits to be accorded to those who successfully participate in the program; and,

(18) Provide for ongoing program monitoring and periodic evaluation for program performance and require record-keeping and the collection of de-identified data that will aid in the determination of whether the program is fairly administered and effective, including demographic information such as race, sex, religion, national origin, disability, age, sexual orientation, gender identity, and socioeconomic status of both the program participant and an identified victim.

Standard 2.3 Determining eligibility

(a) Jurisdictions should consider eligibility criteria for the broadest possible pool of potential participants and the efforts required to ensure that all those eligible can participate.

(1) All people who are eligible should have the opportunity to participate regardless of race, ethnicity, national origin, socioeconomic status, disability, gender identity, or sexual orientation.

(2) Jurisdictions should make affirmative efforts to determine whether an individual with behavioral health needs qualifies for the program, including screening for undiagnosed conditions that may trigger eligibility. Jurisdictions should also consider diversion for individuals who are high utilizers in need of therapeutic intervention.

(3) Jurisdictions should provide guidelines to ensure that an individual is not declining to participate based on the person's ability to pay for costs related to program participation.

(b) Eligibility criteria should seek to include evidence-informed or evidence-based requirements.

(c) The opportunity to participate should not be denied because of discriminatory or arbitrary reasons.

(1) Eligibility criteria should be designed to prevent and eradicate racial disparities between arrest rates and admission rates to a program.

(2) Jurisdictions should not limit diversion to first-time offenders, given that racial and socioeconomic discrimination often impacts an individual's criminal history.

(3) Jurisdictions that utilize risk-assessment tools should provide guidelines to identify and disregard any portion of an individual's risk assessment that likely

reflects racial harm, racial or economic discrimination,, or conscious or unconscious bias before assessing an individual's eligibility for diversion. For similar reasons, jurisdictions should consider diversion for an individual whether or not the individual is assessed low, medium, or high risk.

Standard 2.4 Admission into a program

(a) Jurisdictions should offer admission into a program as soon as practicable.

(b) Before making a decision to participate, an individual should be informed of the basis for the allegation that the person has engaged in unlawful conduct, the anticipated conditions of participation in the program; the potential benefits of participating in the program; the likely consequences of not participating in the program, and the likely consequences of violating program conditions.

(c) A person's decision not to participate in a program should not result in the imposition of additional charges or a more severe charge or sentence than would otherwise be imposed.

Standard 2.5 Entering into a program contract

(a) The terms of a proposed program contract should be acceptable to the program participant and all relevant parties.

(b) The program contract should be in writing and in the participant's primary language. The program should utilize any services that are necessary to effectively communicate with a participant.

(c) Participation should not be made contingent on the waiver of rights unrelated to effective treatment or successful participation in the program. Participants should be notified of specific rights that may be waived by participation in a program, such as the right to a speedy trial. An individual should have the assistance of counsel before waiving any rights.

(d) The program contract should:

(1) Afford the least restrictive conditions consistent with the needs of the participant and public safety;

(2) Identify clearly defined, attainable conditions that the program participant must satisfy;

(3) Estimate the length of the program;

(4) Identify the types of modifications that may be made to program participation;

(5) Specify violations that must be reported, who reports violations, who receives notice of the violations, what steps will be taken upon the reporting of a violation, the sanctions available for various types of violations, who determines the imposition of any sanction, and procedures that govern any modification or termination of the program contract;

(6) Explain the likely consequences of being terminated from the program;

(7) Identify the benefits afforded upon completion of the program; and,

(8) Explain any permissible use of and any limitations on the use of information the program participant provides during programming.

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Standard 2.6 Monitoring progress and compliance in a program

Guidelines should encourage appropriate communication between stakeholders and provide for appropriate discretion to deviate from the program's sanctions to account for individual circumstances. If a participant is assigned to a service provider, the service provider should provide adequate support to ensure compliance with the terms of the program contract and communicate progress with other stakeholders.

Standard 2.7 Confidentiality of information obtained in relation to a program

(a) Information related to the treatment process, including intake, should be confidential.

(b) Information divulged in the course of program intake and participation should not be used in any criminal proceedings against the participant.

Standard 2.8 Completing a program

(a) A participant's fulfillment of the terms of the program contract should trigger a determination that the participant has successfully completed the program. Upon successfully completing the program, the participant should receive written confirmation that all conditions of the program have been met, and the participant should receive the benefits promised in the program contract.

(b) An exit interview should be conducted to gather data for evaluation of the program's strengths and areas for improvement.

(c) Upon notification of the individual's successful completion, stakeholders should initiate the appropriate processes to expunge, seal, vacate, or otherwise shield from public view criminal records related to the underlying conduct.

Standard 2.9 Violating conditions of a program

(a) Only a clearly defined and serious violation should trigger an assessment of whether the contract should be modified to address the violation or the contract should be terminated. Any sanction short of termination should be used when possible. Before deciding to terminate a program contract, the program should consider the participant's particular needs, whether therapeutic, financial, or logistical, that once addressed may facilitate successful participation.

(b) The participant and any defense counsel should be promptly informed of any violations of the program contract. The participant should receive a documented and reviewable decision that provides a basis for any decision to terminate a program contract.

(c) A decision to terminate participation in a program should be subject to administrative or judicial review with assistance of counsel. The process should permit the participant the opportunity to initiate a timely review of the decision to terminate the contract, which may include the opportunity to interview any person involved in monitoring the participant's program participation and the opportunity to review non-privileged

documentation relevant to program participation. Administrative or judicial review should determine whether the alleged violation of the contract was clearly defined and serious, taking into account whether the participant's alternative or mitigating interpretation of the underlying basis for the termination is reasonable.

(d) A participant's failure to complete a program should not result in the imposition of additional charges or a more severe charge or sentence than would otherwise be imposed for the underlying conduct.

(e) Because of the burdens associated with diversion programs, jurisdictions should consider sentence credit for any time spent in a diversion program at any sentencing.

Standard 2.10 Evaluating a program

(a) The program should be subject to ongoing monitoring conducted by a group of diverse stakeholders, including an evaluation of compliance with the program's stated objectives and methods.

(b) The program should also be evaluated periodically by independent reviewers, to ensure fidelity to the objectives of the program. Reviewers should include but not be limited to subject-matter experts.

(c) The evaluation process should:

(1) Collect and review data (excising personal identifying information), consider relevant research and evidence-informed or evidence-based practices, and engage stakeholders in the collection of any additional data;

(2) Review the needs, resources, and objectives of the program and the community, as well as review recidivism rates and public safety metrics;

(3) Assess the number of program participants, the participation rate of those eligible for the program and admitted to the program, the success rate of those participating in the program, and whether eligibility, admission, and success rates are fairly distributed along race, ethnicity, age, sex, gender identity, and economic status; and,

(4) Summarize the information reviewed and the methodology employed, identify program accomplishments and needs, identify program shortcomings, justify any policy proposals, and ensure the use and dissemination of any lessons learned.

(d) Jurisdictions should ensure that the data and the resulting reports are available to courts, prosecutors, the defense bar, probation, corrections, law enforcement, pretrial services, and the public. The evaluation data should be disaggregated so that it may be used by independent researchers.

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PART III. EARLY DIVERSION: COMMUNITY-FIRST PROGRAMS

Standard 3.1 Summary

(a) Community-first diversion programs adopt a public health approach by redirecting incidents typically subject to criminal legal system interventions to community service providers, community resources, and peer-to-peer contacts.

(b) Many police encounters involve contact with individuals with behavioral health episodes or substance use disorders that are better treated by those with relevant expertise, training, or lived experience.

(c) Community-first diversion programs strengthen partnerships across first-responder agencies and behavioral health, housing, medical, advocacy, charitable, and food services.

(d) Community-first diversion programs recognize that community interventions and support can address needs that, when unmet, often lead to repeated contacts with the criminal legal system.

(e) This Part provides guidance in developing and implementing a community-first program. This Part should be read in conjunction with Part II.

Standard 3.2 Developing a community-first program

(a) Jurisdictions should design a program that is best suited to address the community's needs and reflects the diversity of the community. Programmatic approaches may include:

(1) Mobile crisis responders. Mobile crisis responders provide immediate on-site crisis management through de-escalation, assessment, intervention, consultation, referral, and transport to community services. Mobile crisis response teams may be comprised of specially trained police responders, an officer and a behavioral health specialist, or community responders who are not police officers.

(2) Crisis-line assistance. A crisis-line program provides remote counseling to people in crisis and provides support to officers responding to a behavioral health or substance use crisis.

(3) Peer-to-peer program. Peer-to-peer programs link persons with responders who have relevant lived experience, for example, those with behavioral health issues or substance use disorder.

(b) Jurisdictions should ensure community-first diversion programs receive adequate funding.

(c) Jurisdictions should develop criteria for identifying incidents appropriate for community-first response and programming, taking into consideration existing funding and community resources, program design, and concerns over responder safety.

(d) Jurisdictions should provide for communication protocols and support that assist in the coordination of resources and services. Such protocols and support may include:

(1) Guidance to dispatchers in diverting eligible calls to community-first teams.

(2) An independent call line for anyone in the need of a community-first responder.

(3) Training and equipment to ensure effective communication between community-first teams and law enforcement personnel.

(4) Training on and access to information relevant to assisting a person in crisis, with appropriate considerations for health information privacy.

(5) Coordination between community-first teams and police for assisting persons suffering acute behavioral health episodes where they may be a danger to themselves.

(e) Jurisdictions should implement training protocols related to community-first programming. Training should be focused on crisis intervention and safety for all, communication, and coordination, and should reach community responders, government personnel, and others involved in the program.

(f) Jurisdictions should provide protocols for the handling of contraband and other physical items collected in connection with an incident referred to the community-first program.

Standard 3.3 Monitoring progress and compliance in a community-first program

(a) A committee, alliance, or coalition should periodically assess program strengths, needs, and opportunities to improve coordination with community providers. Membership should reflect the demographics of the jurisdiction.

(b) Community-first responders should internally hold regularly scheduled meetings to provide opportunities to debrief, share information, and assess program needs.

Standard 3.4 Confidentiality of information obtained in relation to a community-first program

(a) Jurisdictions should develop guidelines on the confidentiality of information obtained in relation to a community-first program. Guidelines should balance sharing information to increase successful outcomes and the sensitivity of information, especially about an individual's health and social history. Jurisdictions should consider:

(1) Developing training for community providers and responders in a community-first program regarding what information should be shared and what should be kept confidential.

(2) Determining what information should be accessed by only essential program personnel.

(3) Considering how information obtained during a first contact is shared with law enforcement, prosecutors, and other members of the criminal legal system.

(b) Any health information should be treated as confidential, with access limited to only necessary personnel.

PART IV. EARLY DIVERSION: LAW ENFORCEMENT PROGRAMS

Standard 4.1 Summary

(a) A law enforcement diversion program corresponds to diversion opportunities known as “pre-arrest,” “pre-bookings,” “deflection,” and “post-arrest” programs, in which unlawful conduct is addressed before referral for charging. Law enforcement officers typically act as a referral source for a program.

(b) Issuing citations in lieu of arrests, when those citations can be converted into criminal warrants for non-appearance and non-payment, should not be considered diversion. This practice results in net-widening as well as racially disparate burdens and social harms, including trauma and harassment from law enforcement detentions, as well as collateral consequences stemming from arrest warrants and potential arrest. Jurisdictions should instead consider de-criminalization or non-enforcement policies.

(c) These Standards recognize that additional frameworks of law enforcement diversion programs exist, including programs in which individuals voluntarily seek aid from law enforcement. These Standards, however, provide guidance only in circumstances in which there is probable cause to arrest.

(d) This Part covers development of a law enforcement program, admission into the program, program contracts, program participation, and termination of a contract. This Part should be read in conjunction with Part II.

Standard 4.2 Developing a law enforcement program

(a) Law enforcement should play an integral role in the development of the program.

(b) Program guidelines should respond to the needs of particular neighborhoods and individuals, permitting for both moderate and intensive case management and supervision. Efforts should be made to make the provider as easily accessible as possible.

(c) Programs should train and guide officers, as well as institute policies, to ensure uniform application of the criteria for admission into the program.

(d) A program should provide for:

(1) A program manager who serves as a point of contact for all program partners including the public, line officers, and program staff to identify resources, facilitate program referrals, collect data, and ensure proper program planning and operations;

(2) Eligibility requirements that provide clear guidance for officer decision-making in light of the limited information available to an officer through dispatch, observation, a brief encounter, a criminal record check and/or statements of a potential program participant, and the opportunity to consult with the prosecutor’s office;

(3) The conditions of the program that participants would be expected to complete;

(4) Formalization and management of agreements with service providers;

(5) Guidance as to the deployment of law enforcement resources, overtime approval processes, and shift-scheduling issues arising from program demands;

(6) Coordination with the prosecutor and the defense counsel, and any court where appropriate, particularly when a participant has cases pending before or after they are admitted to a law enforcement diversion program; and,

(7) On-going training that:

(i) Facilitates an understanding of diversion objectives, harm reduction, addiction science, crisis intervention training, behavioral health, and evidence-informed or evidence-based practices;

(ii) Reviews program policies and guidelines;

(iii) Introduces officers to service providers, facilitates communication techniques critical to fostering trust and cooperation, and provides protocols necessary to assess treatment needs; and,

(iv) Demonstrates how implicit bias undermines the diversion process while cultural competency improves it.

(e) Programs should consider connecting participants to additional community services to address their needs.

Standard 4.3 Admission into a law enforcement program

(a) The officer and/or program manager should ensure that participation is offered to anyone who is eligible to participate in the program.

(b) Before referring a person to a program, an officer should provide the person with the written information that forms the officer's basis for the probable cause that a crime has occurred. No referral to a program should occur in the absence of probable cause that a crime has been committed.

(c) Consent to participate in the program should be informed. Programs should allow the person reasonable time to consult with outside resources, including legal assistance, before making a decision.

(d) Any officer referral to diversion should provide for a short deadline for the program participant to report to the service provider.

Standard 4.4 Entering into a law enforcement program

(a) Upon entry in the program, the service provider should review conditions of the program with the participant.

(b) The service provider should have the flexibility to accommodate any particular needs of the participant.

(c) The service provider should notify the program participant that being terminated from diversion for the failure to satisfy program conditions may result in prosecution or may impact future eligibility determinations for participation in law enforcement diversion programs.

Standard 4.5 Violating conditions of a law enforcement program

(a) The service provider should make a preliminary decision as to whether a participant has violated the conditions of the program.

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(b) The service provider should notify the participant of the preliminary decision, providing the participant with a reasonable chance to fulfill the conditions of the program.

(c) If failure to complete the program impacts future eligibility determinations for law enforcement diversion programs or triggers further action by the criminal legal system, the service provider should provide the participant with a written confirmation of the decision, which should explain the basis for and consequences of the decision. The service provider should forward this report to any program manager or designated stakeholder.

Standard 4.6 Completing a law enforcement program

(a) Upon successful completion of a program, the service provider should provide the participant with a written confirmation of the decision and should forward this report to any program manager or designated stakeholder.

(b) To the extent that the underlying police contact was recorded as an arrest or otherwise, the police department upon notice of successful completion should take steps under applicable law to expunge the participant's record.

PART V. EARLY DIVERSION: PRE-FILING PROGRAMS

Standard 5.1 Summary

(a) This Part identifies attributes unique to a pre-filing diversion program, which are programs that occur prior to the initiation of prosecution, but after a person has been referred for prosecution.

(b) This Part should be read in conjunction with Part II.

Standard 5.2 Developing a pre-filing program

(a) Jurisdictions should develop a pre-filing diversion program best suited to address community needs within funding constraints.

(b) Programmatic approaches vary and may include:

(1) Prosecutorial-managed diversion. In these pre-filing diversion programs, the prosecutor's office issues a declination, a deferral of prosecution, or dismisses the case in exchange for the participant's successful participation in a program. Such programs may include:

(i) Restorative justice programs. Restorative justice programs involve community-based programming to repair harm to people, relationships, and the community and to address individual and systemwide accountability. Jurisdictions should broadly consider the application of restorative justice programming to a broad scope of unlawful conduct, and potential participants.

(ii) Counseling programs. These are programs in which a person participates in pre-filing counseling related to behavioral health issues, a substance use disorder, or trauma.

(iii) Community service programs. These are programs in which a person engages in community service for a mandated number of hours within a particular time period. Prosecutor offices should not impose obligations that the person will likely not fulfill, due to a person's physical or intellectual abilities, logistical challenges, or lack of social network.

(2) Diversion through declination. Prosecutor offices should consider formalized efforts to identify circumstances in which further criminal legal system intervention is outweighed by concerns regarding public health, over-incarceration, or disparities in referral and declination rates for communities of color. Such programs may include:

(i) Behavioral health hand-off programs. In these programs, a prosecutor office partners with a community provider to identify and refer to services those individuals who have behavioral health issues or substance use disorders.

(ii) New efforts to create default categories for declination or deferral. Prosecutorial offices should consider expanding office-wide criteria for issuing declinations.

(c) Jurisdictions should consider making pre-filing diversion broadly available, including persons accused of felonies, who have prior criminal records, or are categorized as high risk. Jurisdictions should proceed with caution in imposing restrictions that have

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disproportionate racial effects, such as criminal history, employment status, education-enrollment status, or the presence of stable family or community ties.

(d) Prosecutor offices should consult with public health and clinical experts to shape a program to respond to participant needs. Prosecutor offices should build partnerships with community groups to expand program opportunities.

(e) Prosecutor offices should work with participants and community providers to provide assistance in proper placement and to secure any financial assistance necessary to cover the costs of counseling. Prosecutors who are involved in screening referrals for prosecution should receive crisis intervention training, and should seek guidance and information from experts in behavioral health issues and substance use disorders.

Standard 5.3 Entering into a pre-filing contract

For pre-filing programs managed by the prosecutor:

(a) Jurisdictions should exercise special care to avoid a program's net-widening potential. Admission should not occur in cases that are legally or factually insufficient for prosecution; such cases should be declined.

(b) Participants should have the opportunity to consult with defense counsel. Jurisdictions should develop criteria for identifying potential participants who cannot afford representation and should provide access to an attorney to individuals who meet those criteria.

(c) Defense counsel should assist in the decision of the person to accept or reject an offer to participate in the program. Before agreeing to participate in a program, the potential participant should be given adequate time to consult with defense counsel, who should discuss issues regarding the decision to participate in the program, including:

(1) The direct and collateral consequences of declining to participate in the program including any immigration issues, the likelihood of conviction, and the potential sentence;

(2) The requirements of the program contract, any potential negative consequences of participation, even if participation is successful, the potential consequences of violating the contract or of failing to meet its requirements, and the potential benefits of meeting its requirements;

(3) How statements the accused makes during the program may be used in any legal proceedings and/or subsequent investigations; and,

(4) How a decision to participate (or not to participate) in a program may be a factor in a pretrial release decision, the severity of charges, in any sentence that might be imposed and any other negative consequences.

(d) Any further contacts relating to the program that occur between the person and the prosecutor should involve the participation of defense counsel.

Standard 5.4 Monitoring progress and compliance in a pre-filing program

Communication of participation progress and program compliance from the service provider to the prosecutor should be in writing and provided to the program participant and any defense counsel. Oral contacts between the prosecutor and service provider should be memorialized and distributed to the participant and any defense counsel.

814 PART VI. PRE-PLEA PROGRAMS

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816 Standard 6.1 Summary

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818 (a) Pre-plea diversion programs occur when charges have been filed, but before any
819 adjudication of guilt. In these programs, the prosecutor agrees to dismiss charges in
820 exchange for the accused's successful participation in a program. Although the
821 prosecutor will typically authorize admission into such a program, the type of program will
822 also determine who plays this role. This Part must be read in conjunction with Part II.

823 (b) This Part addresses entering into a program contract, monitoring program
824 participation, and decisions to modify or terminate program participation.

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826 Standard 6.2 Entering into a pre-plea contract

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828 (a) The prosecutor should make available to the accused and counsel sufficient
829 information to enable the accused to make an informed decision to participate.

830 (b) Participation in a program should not be contingent on waiving the right to counsel.

831 (c) The accused should have the opportunity to consult with defense counsel before
832 waiving any constitutional or statutory right or accepting or rejecting an offer to participate
833 in a program. Jurisdictions should develop criteria for identifying potential participants who
834 cannot afford representation and should provide an attorney to individuals who meet
835 those criteria.

836 (d) Defense counsel should consult with the potential participant to discuss issues
837 regarding the decision to participate in the program, including:

838 (1) The direct and collateral consequences of declining to participate in the
839 program including loss of fundamental rights, immigration issues, the likelihood of
840 conviction, and the potential sentence;

841 (2) The requirements of the program contract, any potential negative
842 consequences of participation, even if participation is successful the potential
843 consequences of violating the contract or of failing to meet its requirements, and
844 the potential benefits of meeting its requirements;

845 (3) The rights the accused will waive by participating in the program;

846 (4) The availability of any pretrial motions and the likelihood and
847 consequences of prevailing, and whether participating in the program would waive
848 the right to file the motions or whether failing to successfully participate in the
849 program would preclude raising these motions at a later date;

850 (5) How statements the accused makes during the program may be used in
851 any legal proceedings and/or subsequent investigations; and,

852 (6) How a decision to participate, or not to participate, in a program may be a
853 factor in a pretrial release decision, the severity of charges, in any sentence that
854 might be imposed and any other negative consequences.

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856 Standard 6.3 Monitoring progress and compliance in a pre-plea program

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858 (a) All contacts between the prosecutor and the accused should be made with the
859 participation of defense counsel.

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(b) Any information furnished to the prosecutor or the court relating to the accused's participation in the program, including any reports by a service provider, should be distributed to the parties, including the defense counsel.

(c) Program teams should accommodate the accused's needs, including logistical needs, such as childcare, work schedules, and transportation.

Standard 6.4 Violating conditions of a pre-plea program

(a) In a program that does not involve judicial oversight, any determination that the accused has violated a condition of the program contract is subject to administrative or judicial review at the accused's request.

(b) If a program is subject to judicial oversight or judicial review, unless accused waives a hearing, the court should determine whether any violation has occurred. At this hearing:

(1) The accused should have the right to written notice of the allegations, to be present, and to subpoena witnesses;

(2) The burden of proof should be by a preponderance of the evidence that the accused violated a condition of the contract;

(3) If the court finds the allegation proven, the prosecutor should determine whether the contract should be maintained without change, modified with the agreement of the parties, or terminated. The prosecutor should not terminate the contract unless no modification is likely to enable the defendant to successfully complete it.

PART VII. POST-PLEA PROGRAMS

Standard 7.1 Summary

(a) This Part identifies attributes unique to programs in which accused has accepted a guilty plea. In a traditional forum, the accused proceeds to sentencing once the accused has entered a guilty plea. A jurisdiction, however, may consider a post-plea diversion program. A post-plea program may result in the dismissal or vacation of the conviction, in reduced charges, or in a sentence that is modified or reduced. This Part must be read in conjunction with Part II.

(b) Post-plea programs are often developed as problem-solving courts, treatment courts, specialized courts, and collaborative courts, though any court may develop a post-plea diversion program. Prosecutor offices also have developed such programs in conjunction with courts.

(c) The Standards strongly encourage early diversion programming. Post-plea diversion programs, where the case is so close to the issuance of a final judgment, do not deviate significantly from the traditional criminal legal system. As a result, these programs occur in the presence of features of the criminal legal system that are often contrary to the objectives of diversion. For example, empirical study of post-plea diversion reveals a significant number of participants are subject to more severe penalties than similarly situated individuals who are not subject to diversion, particularly when the participant is a person of color. Post-plea diversion programs should be carefully developed and assessed to avoid the risk of producing highly coercive conditions and outcomes that are more punitive than the traditional criminal legal system. This Part addresses post-plea diversion program attributes that respond to the increased stakes and significant collateral consequences for the accused, and the subsequent due process considerations.

(d) This Part provides guidance to program design, program contracts, participant progress and compliance, program completion, and modification or termination of program participation.

Standard 7.2 Entering into a post-plea program contract

(a) The offer to participate in a program should be made prior to stipulation to facts sufficient to support guilt.

(b) Accused and defense counsel should be provided a copy of the proposed program contract before being asked to make a decision to participate in the program.

(c) Accused should be entitled to counsel during the decision to participate and throughout participation in a post-plea program. Participation in a program should not be contingent on waiving the right to counsel. Any waiver of the right to counsel should only occur on the record. The accused should have the opportunity to consult with defense counsel before waiving any constitutional or statutory right or deciding whether to participate in a program.

(d) Accused should be provided with all available information to which accused is entitled to prior to trial before being asked to make a decision to participate, or otherwise entering a plea.

(e) Defense counsel should discuss all implications of program participation with the accused, including but not limited to:

(1) The direct and collateral consequences of declining to participate in the program including any immigration issues, the likelihood of conviction, and the potential sentence;

(2) The requirements of the program contract;

(3) Any potential negative consequences of participation even if participation is successful, and the potential consequences of violating the contract or of failing to meet its requirements, including sentencing consequences following any program termination;

(4) The potential benefits of meeting its requirements;

(5) The rights the accused will waive in accepting participation in the program;

(6) The pretrial motions, including the likelihood and consequences of prevailing on those motions, that the accused will forego the opportunity to file by participation in a program;

(7) What disclosures are required by program participation, and how those statements the accused makes during the program may be used to modify program requirements, and may lead to sanctions or termination;

(8) How statements the accused makes during the program may be used in legal proceedings or subsequent criminal investigations;

(9) How a decision to participate (or not to participate) may factor in the severity of charges, in any sentence that might be imposed, and any other negative consequences; and,

(10) How information relevant to program participation may become part of the public record.

Standard 7.3 Monitoring progress and compliance in a post-plea program

(a) All contacts between the prosecutor or the court and the accused should be made with the participation of defense counsel.

(b) Any information furnished to the court, prosecutor, or supervised release officer relating to the monitoring of the program, including any report by a service provider, should be distributed to the parties, including defense counsel.

(c) Courts and program teams should accommodate the accused's needs, including logistical needs, such as childcare, work schedules, and transportation.

Standard 7.4 Completing a post-plea program

(a) Successful completion of a program should trigger the appropriate jurisdictional processes to expunge, seal, or otherwise shield from public view records related to the conviction or underlying conduct.

(b) Any post-diversion supervision should be coordinated with the diversion program to ensure continuity and appropriateness of services.

Standard 7.5 Violating conditions of a post-plea program

Any allegations that the accused has violated the conditions of a contract is subject to judicial review and a court hearing at the accused's request to determine whether a violation has occurred. At this hearing:

(a) The court should act as a neutral arbitrator of the allegations.

(b) The accused should have the right to written notice of the allegations, to be present, to present evidence, to subpoena witnesses, to question adverse witnesses, and to make a statement and present any information for mitigation;

(c) The burden of proof should be at least a preponderance of the evidence that the accused violated a condition of the contract;

(d) If the court finds the allegation proven, the court should determine whether the contract should be maintained without change, modified consistent with the program contract or with the agreement of the parties, or terminated. The court should not terminate the contract unless no modification is likely to enable the accused to successfully complete it.

(e) In any subsequent sentencing, a participant's failure to complete a program should not result in the imposition of a more severe sentence than would otherwise be imposed for the underlying conduct.

REPORT

The idea of developing the *ABA Standards for Criminal Justice* was formulated in 1963. The ABA House of Delegates approved various chapters in the first edition of the Standards between 1968 and 1973. Chief Justice Warren Burger described them as the “single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history”.

Almost sixty years later, the Standards are in their fourth edition and continue to expand with new subjects. The Diversion Standards are the result of the widespread growth of programs that serve as an alternative to a traditional prosecution that culminates in a sentence. Diversion can begin prior to arrest so that a person who might otherwise go to jail is instead referred to a program that can address that person's underlying condition, for example, substance addiction or mental illness. Diversion is often used in lieu of charging an individual with an offense for the same reason. It has existed for many years in the criminal legal system when a person has been charged but has not entered a plea. Finally, diversion is utilized in cases where a plea is entered and a person then enters a program, often a specialized court program, where intensive treatment and supervision occurs. The goal of diversion, regardless of when it happens, is to enable the person to receive appropriate treatment for their underlying condition or circumstances and keep them out of jail or prison, thereby avoiding the collateral consequences of a conviction and reducing recidivism.

The Diversion Standards are divided into seven parts, as follows:

Part I Introduction

This section summarizes the Standards, defines terms used throughout the Standards, explains the many purposes of the Standards and sets out general principles that should govern diversion programs.

Part II General Attributes of Diversion

This section explains the characteristics applicable to the development, implementation, operation, monitoring, and evaluation of diversion programs. This section is intended to be used regardless of when a diversion program begins, whether prior to the filing of criminal charges, prior to the entry of a plea in a criminal case or after the entry of a plea but before sentencing in a criminal case. Additional characteristics of early diversion programs, post-charge programs and post-plea programs are described in Parts III through VI.

Part III Early Diversion: Community-First Programs

Community-first diversion programs adopt a public health approach by redirecting incidents typically subject to criminal legal system interventions to community service providers, community resources, and peer-to-peer contacts. These programs exist for persons who may or may not have had contact with the criminal legal system and are responsive to the needs of a community they serve.

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Part IV Early Diversion: Law Enforcement Programs

Another form of early diversion exists with law enforcement agencies, and may be better known as “pre-arrest”, “pre-booking”, or “post arrest” programs. In all of these programs, unlawful conduct is addressed before there is a referral for charging. This part emphasizes that issuing citations in lieu of arrest is not considered diversion because those citations can be converted into criminal warrants for non-appearance and non-payment, causing disparate burdens and collateral consequences.

Part V Early Diversion: Pre-Filing Programs

Early diversion also occurs when individuals are referred to programs prior to the filing of criminal charges. Like law enforcement diversion, people should not be referred to diversion when there is no probable cause for arrest or charges.

Part VI Pre-Plea Programs

Once an individual enters the criminal legal system because charges have been filed, entry into a diversion program must be weighed against the legal rights that the individual will waive. Pre-plea diversion programs occur when charges have been filed but before any adjudication of guilt. Typically, a prosecutor authorizes admission into such a program and agrees to dismiss charges in exchange for the accused's successful participation in the program.

Part VII Post Plea Programs

Post-plea programs may result in the dismissal or vacation of a conviction, in a conviction for lesser charges or in a sentence that is modified. These programs are often developed as problem-solving courts, treatment courts, specialized courts, or other collaborative programs. The Standards warn that post-plea programs should be carefully developed and assessed to avoid the risk of producing highly coercive conditions. An individual's entry into a post-plea program may cause them to forego a meaningful review of the charges and subject them, if they do not successfully complete the program, to a sentence that may be greater than the one they would have received prior to entry into the diversion program.

Respectfully submitted,

Wayne S. McKenzie
Chair, Criminal Justice Section

August 2022

GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: Wayne S. McKenzie, Chair

1. Summary of Resolution(s).

This resolution adopts the *ABA Criminal Justice Standards on Diversion*.

2. Indicate which of the ABA's Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

The Diversion Standards create aspirational standards of practice for all types of diversion programs used in the criminal and juvenile justice systems. While some programs have existed for years and others are newer creations, diversion has become a alternative means of handling cases in the system that attempts to create greater equity among the program participants and foster better outcomes for those who come into contact with the criminal and youth legal systems. Therefore, the standards advance both Goal 3 to eliminate bias in the criminal and juvenile justice systems and Goal 4 to advance the rule of law.

3. Approval by Submitting Entity.

This resolution was passed by the Criminal Justice Council at the Spring Council meeting in Savannah, Georgia on April 9, 2022.

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

No. This is the first set of standards specifically devoted to diversion.

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

To the best of my knowledge, these ABA policies have previously been enacted on diversion:

2002AM104B concerning use of diversion for juveniles re: hate offenses

2003MY116 concerning Homeless Court Programs re: adoption of diversion programs that would result in the dismissal of charges;

2003AM101B re: police awareness of diversionary programs for youth;

2004MY116 re: diversion programs for adults and youth with mental illness;

2004AM121A Kennedy Commission recommendations to adopt diversion programs;

2007AM103A to develop, support, and fund diversion programs;

2008MY300 diversion for "dual jurisdiction" youth in foster care;

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2009MY101B re: use of mediation in the criminal justice system including diversion programs;

2009AM111B re: study whether diversion would be more effective in addressing wrongs, preventing records/collateral consequences;

2010MY105A re: adoption of veterans treatment courts, etc.

2012AM107B supporting the development of evidence-based diversion, et al., programs;

2013AM113B re: balancing privacy vs informed cooperation between agencies for programs that divert from the juvenile justice system.

All of these resolutions support the use of diversion, have been incorporated into the standards, and will be referenced or discussed in commentary to the Standards that will be written once the Standards are enacted.

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

N/A

7. Status of Legislation. (If applicable)

There is legislation, both at the federal and state level, that references diversion programs, but these standards are intended to create uniformity in the creation and development of programs, and to protect individual rights in these programs.

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

These standards will be used to educate all stakeholders in the criminal justice system, support ABA Governmental Affairs Office lobbying efforts and amicus briefs.

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

None.

10. Disclosure of Interest. (If applicable)

None.

11. Referrals

Center on Children and the Law

Center for Human Rights

Civil Rights and Social Justice

Commission on Disability Rights

Commission on Homelessness and Poverty

Commission on Immigration
 Commission on Sexual Orientation and Gender Identity
 Commission on Youth at Risk
 Government and Public Sector Lawyers Division
 Family Law Section
 Health Law Section
 Judicial Division
 Law Practice Division
 Racial and Ethnic Diversity
 Racial and Ethnic Justice
 Science and Technology
 Section on International Law
 Section on Litigation
 Special Committee on Hispanic Legal Rights & Responsibilities
 Standing Committee on Legal Aid & Indigent Defense
 Young Lawyers Division

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

Linda Britton
 ABA Criminal Justice Section
 1050 Connecticut Avenue NW, Suite 400
 Washington, D.C. 20036
 T: (202) 662-1730
 E: Linda.Britton@americanbar.org

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution adopts the *ABA Criminal Justice Standards on Diversion*.

2. Summary of the Issue that the Resolution Addresses

This resolution adopts the ABA Criminal Justice Standards on Diversion, creating the first ABA CJS standards to address the creation, application, makeup, monitoring and evaluation of all types of diversion programs, from those that are created to respond to community needs, contacts with law enforcement, and cases referred to the criminal justice system. These Standards provide guidance for judges, prosecutors, defense attorneys and other personnel as to best practices in these situations.

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

The resolution adopts the standards as ABA policy, allowing the standards to be used as training and guides for practitioners, and for lobbying efforts or in amicus briefs.

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

None.

AMERICAN BAR ASSOCIATION
CRIMINAL JUSTICE SECTION
SECTION ON CIVIL RIGHTS AND SOCIAL JUSTICE
COMMISSION ON YOUTH AT RISK

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association urges federal, state, local, territorial, and
2 tribal governments to authorize judicial decision-makers to hear petitions for *de novo*
3 “second look” resentencing brought by any incarcerated person who has served at least
4 ten continuous years of a custodial sentence; and
5
6 FURTHER RESOLVED, That the American Bar Association urges federal, state, local,
7 territorial, and tribal governments to: (a) create guidelines specific to “second look”
8 decisions; (b) ensure that incarcerated persons are notified of their rights under this
9 provision and are provided with adequate assistance of counsel; and (c) develop
10 procedures that guarantee fair process throughout second look proceedings.

REPORT

Introduction

Agreement exists across ideological and party lines that there is an American crisis of mass incarceration.¹ Since 1970, the incarcerated population has grown by 700%.² By now, many are familiar with the bleak numbers – the United States is home to less than 5% of the world's population but holds almost 25% of the world's prisoners.³ And incarceration disproportionately impacts people of color. Blacks are incarcerated in state prisons across the country at almost five times the rate of whites, and Latinx are imprisoned at 1.3 times the rate of non-Latinx whites.⁴

Society's emerging recognition that it is over-using imprisonment is exemplified in a wide range of new statutes, rollbacks of mandatory minimums, changes to sentencing guidelines, and updated charging and plea-bargaining policies in prosecutors' offices. Changes have so far been most prevalent at the front end by reducing the potential for individuals to enter the criminal legal system and/or reducing their potential sentence (i.e., diversion programs; reconsidering various three strikes laws and other sentencing enhancement laws, reducing sentences for drug crimes, etc.).

However, at the current pace of decarceration, it will still take 75 years to cut the total U.S. prison population by half, raising questions about what additional solutions should be pursued to accelerate reform.⁵ To tackle the problem of mass incarceration at its core, reforms must also target the present living embodiment of the crisis -- all the people currently experiencing incarceration. Second Look legislation works to do just that by addressing the decades of harsh sentences that fueled mass incarceration and providing all individuals with an opportunity for resentencing or a sentence reduction after they have served a designated amount of time in prison.⁶

¹ Maggie Astor, *Left and Right Agree on Criminal Justice: They Were Both Wrong Before*, NY Times, May 16, 2019. Available at <https://nyti.ms/3nys6EE>.

² See, e.g., ACLU <https://bit.ly/3cxz8TH>. Some of the recognized causes for the explosion in the jail and prison population include the 1994 federal crime bill, the war on drugs, "get tough on crime" policies, and fear-mongering slogans like the racist trope of the super-predator. Scholars like John Pfaff also place blame on prosecutorial practices. See generally JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* (2017) (arguing that prosecutors bear responsibility for mass incarceration); Eli Hager & Bill Keller, *Everything You Think You Know About Mass Incarceration Is Wrong*, MARSHALL PROJECT, Feb. 9, 2017, <https://www.themarshallproject.org/2017/02/09/everything-you-think-you-know-about-mass-incarceration-is-wrong> [<https://perma.cc/5E95-HRQY>].

³ See, ACLU supra n.2.

⁴ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, The Sentencing Project, October 13, 2021. Available at <https://bit.ly/3ctXNZs>.

⁵ Nazgol Ghandnoosh, *Can We Wait 75 Years to Cut the Prison Population in Half?* The Sentencing Project, March 8, 2018. Available at <https://bit.ly/3cyRpju>.

⁶ In its recent revisions to the Model Penal Code, the American Law Institute (ALI) urges legislatures to authorize a judicial panel or other judicial decisionmaker to hear and rule upon applications for resentencing from prisoners who have served fifteen years of any sentence. See, <https://bit.ly/3xtZaRs>. ALI chose not to recommend a specific legislative scheme for implementing "second looks" and instead drafted principles that a legislature should seek to effectuate through enactment of such a provision. In addition to ALI, comprehensive reports, including with model legislation, urging second looks have recently been issued by the National Association of Criminal Defense Lawyers, *Second Look = Second Chance: Turning the Tide Through NACDL's Mode; "Second Look" Legislation*, December 10, 2020 (available at

Lengthy sentences

While many individuals are behind bars for only a short time, the backbone of mass incarceration is people serving very lengthy sentences – often decades-long, and far longer than they would serve for comparable crimes in other western, industrialized nations.⁷ Many scholars believe that the dramatic increase in the prison population is ultimately the result of policies that have sent more people to prison for much longer periods of time.⁸

At the federal level, almost 22,000 people are serving sentences of twenty years or more, and almost 4,000 people are serving a life sentence.⁹ Overall, the number of people in the United States serving life sentences (162,000) is at an all-time high, and an additional 44,000 people are serving “virtual life” sentences of fifty or more years.¹⁰ All told, one out of seven people behind bars is serving a life sentence.¹¹ The racial disparity in these draconian sentences is massive – two-thirds of those serving life sentences are people of color.¹²

Long sentences do not fulfill the goals of sentencing; there is no evidence of general deterrence, and, as for specific deterrence, ten years according to data is more than sufficient as people age out of crime. Scholars posit that deterrence is primarily a function of the certainty of punishment, not the severity.¹³ Bruce Western, one of the country's leading experts on incarceration, argues that lengthy prison terms keep individuals behind bars long after they present a significant risk to public safety.¹⁴ People serving draconian sentences merit second looks.

Aging prison population

A report from the Office of the Inspector General found that people fifty or over were the fastest growing segment of the federal prison population.¹⁵ Presently, people over forty

<https://bit.ly/3cWjMbG>) and The Sentencing Project, Nazgol Ghandnoosh, *A Second Look at Injustice*, May 12, 2021 (available at <https://bit.ly/3E1IdjI>).

⁷ Adam Liptak, *U.S. prison population dwarfs that of other nations*, NY Times, April 23, 2008. Available at <https://nyti.ms/3HKRQpw>.

⁸ Pew Center on the States, Pew Public Safety Performance Project, *One in 100: Behind Bars in America*, 2008.

⁹ See Federal Bureau of Prisons, *Sentences Imposed*. Available at <https://bit.ly/3xcOnuL>.

¹⁰ Ashley Nellis, *Still Life: America's Increasing Use of Life and Long-Term Sentences*, The Sentencing Project, May 3, 2017. Available at <https://bit.ly/3x5NPHa>.

¹¹ Id.

¹² Ashley Nellis, *No End in Sight: America's Enduring Reliance on Life Imprisonment*, The Sentencing Project, February 17, 2021. Available at <https://bit.ly/3HzIsES>.

¹³ Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. Rev. 113, 123 (2018); Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 Crime & Just. 199, 201 (2013) (research suggests that increasing already long prison sentences has little to no deterrent effect on violent crime).

¹⁴ Bruce Western, *Punishment and Inequality in America* 187-188 (2006).

¹⁵ *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons*, Office of the Inspector General, U.S. Department of Justice, February 2016 (the population of federal prisoners fifty or over increased by 25% from 2009 to 20013).

years old make up almost 50% of the federal prison population,¹⁶ and more than 18,000 people in federal prison are over fifty-five.¹⁷

Across the country, from 1999-2016, the number of incarcerated people 55 years old or older increased by 280%.¹⁸ According to a 2017 report from the Bureau of Justice Statistics, there were 200,000 people 55 years old or older behind bars in the United States.¹⁹ These numbers are particularly significant given that the National Institute of Corrections considers prisoners age 50 or older to be elderly²⁰ because the lack of access to adequate healthcare prior to incarceration plus, *inter alia*, the stress and inadequate medical care inside prison, accelerates the aging process of prisoners.²¹

Some scholars estimate that a person's life expectancy is decreased by one year for each two years behind bars.²² Reports from the New York State Department of Corrections from 2003-2012 found that the average age of death from natural causes for people in New York's state prisons was between ages 53 and 57.²³ And more people are dying of old age in prison than ever before.²⁴ In just one six-year period from 2001-2007, 8,486 people over 55 years old died behind bars.²⁵

Not only have lengthy sentences been shown to have little impact on an individual's tendency to reoffend,²⁶ there is compelling evidence indicating that individuals "age out" of criminal behavior.²⁷ A team of scholars addressed the intersection of aging and crime this way:

The relationship between age and crime is one of the most solid within the field of criminology. It is understood that crime increases throughout adolescence and then peaks at age 17 (slightly earlier for property crime than for violent crime) and then begins to decrease over the life course moving forward. This trend has, over the years, withstood stringent testing

¹⁶ See Federal Bureau of Prisons, *Inmate Age*. Available at <https://bit.ly/3oN93WD>.

¹⁷ *Id.*

¹⁸ Matt McKillop & Alex Boucher, *Aging Prison Populations Drive Up Costs*, Pew, [DATE]. Available at <https://bit.ly/3nCMW5F>.

¹⁹ See [interrogatingjustice.org](https://www.interrogatingjustice.org), *A Look at the United States' Aging Prison Population Problem*, April 7, 2021. Available at <https://bit.ly/3x7c9bL>.

²⁰ ACLU, *At America's Expense: The Mass Incarceration of the Elderly*, June 2012. Available at <https://bit.ly/3HD1MRT>.

²¹ *Id.*; see also Brie Williams & Rita Abrales, *Growing Older: Challenges of Prison and Reentry for the Aging Population*.

²² Evelyn J. Patterson, *The Dose-Response of Time Served in Prison on Mortality: New York State, 1989-2003*, *Am. J. Public Health*, 2013 March, 103(3): 523-28.

²³ See, e.g., <https://on.ny.gov/3lgHCDA>.

²⁴ Hope Reese, *What Should We Do about Our Aging Prison Population?* Jstor.org., July 17, 2019. Available at <https://bit.ly/3xglTjR>.

²⁵ Hrw.org, *Old Behind Bars: The Aging Prison Population in the United States*, January 2012. Available at <https://bit.ly/3CKCHkk>.

²⁶ Pew Center on the States, *Time Served: The High Cost, Low Return of Longer Prison Terms*, June 2012. Available at <https://bit.ly/3DErrar>.

²⁷ See, e.g., Dana Goldstein, *Too Old to Commit Crime?* The Marshall Project, March 20, 2015. Available at <https://bit.ly/3cB3m8s>.

and examination across time periods and maintains consistent results regardless of race/ethnicity, education level, or income.²⁸

More specifically, researchers suggest that even among so-called “chronic offenders,” the vast majority will cease committing crime by their forties.²⁹ Yet prisons are filled with people well-beyond their forties who pose no evidence-based threat to public safety. Older prisoners certainly merit second looks.

People convicted of violent crimes

Any sincere effort to confront mass incarceration will need to address people serving time for violent crime as at least 55% of people in state prisons were convicted of violent crimes.³⁰ However, one objection to “second looks” for all incarcerated people is the belief that people convicted of violent crime present a unique threat to public safety. The evidence belies that notion.

In a recent law review article, researchers found that the evidence suggests that people convicted of violent offenses, even including homicide offenses, who are older at release, have lower overall recidivism rates relative to other released offenders.³¹ In *A New Lease on Life*, Ashley Nellis’s comprehensive analysis of recidivism rates shows that people convicted of homicide and other crimes of violence rarely commit new crimes of violence after release from long-term incarceration.³² Nellis quotes John Carner, former spokesperson for the New York State Division of Criminal Justice Services: “Individuals who are released on parole after serving sentences for murder consistently have the lowest recidivism rate of any offenders.”³³

While recidivism rates are already low for people convicted of violent crime, it is also the case that according to the Bureau of Justice Statistics, two out of every three people serving a prison sentence for violent crime are at least 55 years old, making them even

²⁸ Caitlin Cornelius et al, *Aging Out of Crime: Exploring the Relationship Between Age and Crime with Agent Based Modeling*, 2017. Available at <https://bit.ly/3Fy1Wbe>.

²⁹ Robert Sampson & John Laub, *Shared Beginnings, Divergent Lives: Delinquent Boys to Age 70*, Harvard University press (2006).

³⁰ See, e.g., J.J. Prescott et al, *Understanding Violent-Crime Recidivism*, 95 Notre Dame L. Rev. 1643, 1643-44 (2020) (“reform will need to extend to the incarceration of violent offenders if the United States hopes to substantially reduce the large footprint of its prisons”); Danielle Sered, *To End Mass Incarceration, U.S. needs Alternatives to Prison for Violent Crimes*, USA Today, January 22, 2020; Nazgol Ghandnoosh, *The Next Step: Ending Excessive Punishment for Violent Crimes*, The Sentencing Project, April 2, 2019; New York City Bar, *A Pathway Out of Mass Incarceration and Towards a New Criminal Justice System: Recommendations for the New York State Legislature*, May 13, 2021; John Pfaff, *Five Myths About Prisons*, Washington Post, May 17, 2019; Jamiles Larty, *Can We Fix Mass Incarceration Without Including Violent Offenders?*, The Marshall Project, December 12, 2019.

³¹ J.J. Prescott et al, *Understanding Violent-Crime Recidivism*, 95 Notre Dame L. Rev. 1643, 1643-44 (2020).

³² Ashley Nellis, *A New Lease on Life*, The Sentencing Project, June 30, 2021.

³³ Id. citing The Crime Report, *Low Recidivism Rate Reported for Paroled New York Murderers*, January 7, 2011. Available at <https://thecrimereport.org/2011/01/07/low-recidivism-rate-reported-for-paroled-ny-murderers/>. Of 368 convicted murderers granted parole in New York between 199 and 2003, six, or 1.6%, were returned to prison within three years for a new felony conviction – none of them a violent offense.

more unlikely to commit future crime.³⁴ Second looks should not carve out people convicted of violent crime.³⁵

People sentenced when they were young

Countless young people were sentenced to draconian terms of imprisonment during the 1980s and 1990s when racist tropes like “wilding,” “wolfpack,” and “super predator” were abundant in the media and in courtrooms.³⁶ In a line of cases beginning with *Roper v. Simmons*,³⁷ the Supreme Court has recognized that children are constitutionally different than adults for purposes of sentencing – they are less culpable and have greater capacity for reform and change. As a result, the Court banned use of capital punishment for juveniles, limited life without parole (LWOP) to homicide offenses, banned use of mandatory LWOP, and applied the decisions retroactively.³⁸

Central to the Court’s decisions were what it termed the distinctive attributes of youth, including immaturity, underdeveloped sense of responsibility, vulnerability to negative influences, and limited control of their environment.³⁹ Recent studies reveal that certain brain systems and development of the prefrontal cortex that are involved in self-regulation and higher-order cognition, continue to develop into the mid-20s.⁴⁰

As a result of the Supreme Court’s decisions in *Roper*, *Graham*, *Miller* and *Montgomery*, the courts had to resentence a number of people. When the Court decided *Miller*, the city of Philadelphia had the largest number of juveniles (325) serving LWOP in the country.⁴¹ In a comprehensive study of the Philadelphia cohort of juvenile lifers, researchers found that of the 174 people who had been resentedenced and released, only 2 had new convictions, adding to the evidence that people convicted of violent crime, and

³⁴ Nellis, *supra* note 31, at n.19.

³⁵ National Association of Criminal Defense Lawyers, *Second Look = Second Chance: Turning the Tide Through NACDL’s Mode; “Second Look” Legislation*, December 10, 2020 (available at <https://bit.ly/3cWjMbG>) (“If second look legislation is truly meant as an antidote for mass incarceration, it must not categorically exclude any potential petitioner based on their underlying crime of conviction.”). To be clear, providing a “second look” does not guarantee that the applicant will be resentedenced. A second look process should afford each applicant a fair, objective, and holistic consideration pursuant to applicable law, rules, and guidelines, taking into account the totality of all relevant circumstances including, but not limited to, length of time served, sincere remorse, impact to the victims and their loved ones, rehabilitation, humanitarian considerations (i.e., health, current age, and age at time of arrest), and public safety.

³⁶ See, e.g., Carroll Bogert & Lynnell Hancock, *The Media Myth that Demonized a Generation of Black Youth*, The Marshall Project (finding nearly three hundred uses of “superpredator” in forty leading newspapers and magazines from 1995-2000); Perry L. Moriearty & William Carson, *Cognitive Warfare and Young Black Males in America*, 15 J. Gender Race & Just. 281 (2012).

³⁷ 543 U.S. 551 (2005).

³⁸ *Roper v. Simmons*, 534 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 132 S.Ct. 2455 (2012); and *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016). See Josh Rovner, *Juvenile Life Without Parole: An Overview*, The Sentencing Project, May 24, 2021.

³⁹ *Miller*, at 2464.

⁴⁰ *State v. O’Dell*, 358 P.3d 359, 364 n.5 (Wash. 2015).

⁴¹ Tarika Daftary-Kapur & Tina Zottoli, *Juvenile Lifers: The Philadelphia Experience*. Available at <https://bit.ly/30KP4zI>.

who had already served substantial prison terms, were unlikely to reoffend.⁴² Those sentenced while young merit second looks.

Significant Racial Disparities in Sentencing

Serious racial disparities in sentencing are overwhelmingly clear when it comes to life or long-term sentences. In 2017, 48% of the approximately 206,000 individuals serving life and ‘virtual life’ sentences were African American.⁴³ Racial disparities are most pronounced among sentences for LWOP, with African Americans making up at least two-thirds of the LWOP population in nine states.⁴⁴ These trends impact youth as well, with people of color making up over 80% of youth sentenced to life- and virtual-life, over half of them African Americans.⁴⁵ Second look processes can address the prevalence of racial disparities in sentencing, in particular for people serving life and long-term sentences.

Financial Costs of Incarceration

State and federal governments bear the financial burden of overincarceration. On average, states spend \$33,274 to incarcerate one person annually, ranging from a low of \$14,780 in Alabama to a high of \$69,355 in New York.⁴⁶ These costs only grow as those incarcerated age, increasing their need for specialized medical attention and support services.⁴⁷

Parole and clemency

Parole and clemency are “back-end” processes that, in theory, could address the crisis of mass incarceration. Yet, as stated by Margaret Love and Cecelia Klingele: “The severity of American prison sentences is magnified by the atrophy of back-end release mechanisms like parole and clemency.”⁴⁸

⁴² Id.

⁴³ Ashley Nellis, *Still Life: America’s Increasing Use of Life and Long-Term Sentences*, The Sentencing Project, May 3, 2017.

⁴⁴ Id.

⁴⁵ The Sentencing Project, *Youth Sentenced to Life Imprisonment*, October 8, 2019.

⁴⁶ Chris Mai & Ram Subramanian, *The Price of Prisons: Examining State Spending Trends, 2010-2015*, Vera Institute of Justice, May 2017. Available at <https://www.vera.org/downloads/publications/the-price-of-prisons-2015-state-spending-trends.pdf>.

⁴⁷ See, e.g., Matt McKillop & Alex Boucher, *Aging Prison Populations Drive Up Costs*, Pew Trusts, February 20, 2018; Office of Inspector General, U.S. Department of Justice, *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons*, 2016 (BOP spent \$881 million or 19% of its total budget to incarcerate aging prisoners in 2013).

⁴⁸ Margaret Colgate Love & Cecelia M. Klingele, *First Thoughts About ‘Second Look’ and Other Sentence Reduction Provisions of the Model Penal Code: Sentencing Revision*, 42 U. Tol. L. Rev. 859 (2011) (“The severity of American prison sentences is magnified by the atrophy of back-end release mechanisms like parole and clemency.”).

Current parole boards are risk averse and reluctant to release people incarcerated for violent crime out of concerns about reappointment or of being vilified in the local press.⁴⁹ Further, many parole boards are populated by political appointees and people with little to no background in criminal justice, let alone with clinical or therapeutic experience and at least some ability to assess someone's efforts at rehabilitation.⁵⁰ For these and other reasons, the American Law Institute in recent revisions to the Model Penal Code has referred to parole as a "failed institution."⁵¹

Clemency, although a vast and often unfettered power vested in the executive, is also of limited value when it comes to redressing the crisis of mass incarceration.⁵² At the federal level, one glaring problem is that clemency is housed in the Department of Justice and dependent on prosecutors who focus on the conviction as opposed to who the person has become while in prison.⁵³ At the state level, to the extent governors grant clemency applications, they tend to confine themselves to the so-called non-violent, low-level drug offender.⁵⁴

Procedures do exist for elderly and infirm prisoners at the state and federal level for medical or geriatric parole and compassionate release, but those mechanisms are seldom used.⁵⁵ In any event, those statutes, by limiting release to a segment of the prison population, fail to fully address the problem of over-punishment that fed mass incarceration.

⁴⁹ Beth Schwartzapfel, *Nine Things You Probably Didn't Know About Parole*, The Marshall Project, July 10, 2015 (most parole boards will not even think about giving parole to lifers); German Lopez, *Prisoners Rarely Get Released on Parole, Even When They're No longer a Threat. Here's Why*, Vox, July 13, 2015 ("States know that older prisoners pose little threat, but it's usually not enough to overcome politics").

⁵⁰ Id.

⁵¹ Beth Schwartzapfel, *How Parole Boards Keep Prisoners in the Dark and Behind Bars*, Washington Post, July 11, 2015. See also, Kevin R. Reitz & Cecelia M. Klingele, *Model Penal Code: Sentencing – Workable Limits on Mass Punishment*, 48 Crime & Just. 255, 285 (2019).

⁵² Paul L. Larkin, Jr., *Revitalizing the Clemency Process*, 39 Harvard J. Law & Public Policy 833 (2016) ("Presidents and governors have recently abandoned any serious use of their clemency powers"); Cara H. Drinan, *Clemency in a Time of Crisis*, 28 Georgia St. L. Rev. 1121, 1122 (2012) (in the last four decades state clemency grants have declined significantly; in some states, clemency seems to have disappeared altogether).

⁵³ Rachel E. Barkow & Mark Osler, *We Know How to Fix the Clemency Process. So Why Don't We?* NY Times, July 13, 2021.

⁵⁴ Katie Rose Quandt, *The Largest Commutation in U.S. History*, Slate, November 8, 2019. Available at <https://bit.ly/3lbuoba>.

⁵⁵ National Conference of State Legislatures, *State Medical and Geriatric Parole Laws*, August 27, 2018 ("While the vast majority of states have medical parole laws and a number of states have a geriatric parole law, they are rarely used."). See also, Keri Blakinger & Joseph Neff, *31,000 Prisoners Sought Compassionate Release During COVID-19. The Bureau of Prisons Approved 36*, The Marshall Project, June 11, 2021; Human Rights Watch & Families Against Mandatory Minimums, *The Answer is No: Too Little Compassionate Release in U.S. Federal Prisons*, November 30, 2012; Robin Waters, *Federal Compassionate Release in the Era of COVID-19: Practice Tips*, American Bar Association, December 11, 2020 (prior to the passage of the First Step Act, few prisoners were granted compassionate release – on average, just twenty-four people per year).

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Current “Second Look” Efforts

At the federal level, U.S. Senator Cory Booker and Rep. Karen Bass introduced the *Second Look Act* in 2019. The bill allows any individual who has served at least ten years in federal prison to petition a court to take a “second look” at their sentence to see if they are eligible for a sentence reduction or release.⁵⁶

In the District of Columbia, the *Second Look Amendment Act of 2019*, now known as the *Omnibus Public Safety and Justice Act of 2020*, is an expansion of the *Incarceration Reduction Amendment Act of 2016*. The new bill allows a person who committed a crime before the age of twenty-five, and who has served at least fifteen years in prison, to apply to a court to have their sentence reduced.⁵⁷

Legislators in twenty-five states have recently introduced second look bills, and various states have passed or are considering bills focused on people who were emerging adults at the time of crime or conviction.⁵⁸

Some states are considering bills that provide opportunities for older prisoners to seek resentencing. In New York, the *Elder Parole Bill* provides that anyone who is fifty-five or older and who has served at least fifteen years in prison, is eligible for parole regardless of their original sentence or crime of conviction.⁵⁹

There are also legislative efforts that provide prosecutors with the legal authority to seek resentencing.⁶⁰ For example, California’s 2018 law allows prosecutors to initiate resentencing proceedings.⁶¹ Over sixty elected prosecutors and law enforcement leaders have called for second look legislation,⁶² and some prosecutors are also utilizing internal, non-legislative efforts to review sentences by creating Sentencing Review Units.⁶³

Conclusion

Second look efforts recognize, value, and encourage redemption and transformation, and not surprisingly have the vast support of the faith-based community. Pope Francis’s call for the Jubilee Year of Mercy from December 2015 to November 2016 emphasized mercy, forgiveness, and reconciliation.⁶⁴ It is also appropriate, if not imperative, to re-

⁵⁶ See <https://bit.ly/3cXm1LQ>.

⁵⁷ See <https://bit.ly/3p7xcHr>.

⁵⁸ Nazgol Ghandnoosh, *A Second Look at Injustice*, The Sentencing Project, May 12, 2012. See also, the Campaign for the Fair Sentencing of Youth available at <https://cfsy.org/>.

⁵⁹ See <https://bit.ly/3lgFE5X>.

⁶⁰ See <https://bit.ly/3p68OG3>.

⁶¹ *CA Assembly Bill 2942*. Nazgol Ghandnoosh, *A Second Look at Injustice*, The Sentencing Project, May 12, 2012.

⁶² *Id.*

⁶³ See James Forman, Jr. & Sarah Lustbader, *Every D.A. in America Should Open a Sentence Review Unit*, NY Times, August 1, 2019.

⁶⁴ United States Conference of Catholic Bishops. Available at <https://bit.ly/3xswDMh>; Courtney Mares, *Life Imprisonment Forgoes the ‘Right to Start Over,’* Catholic News Agency, September 16, 2019 (speaking to prison staff and chaplains, Pope Francis urged that we should “[N]ever deprive one of the right to start over.”).

examine sentences because it is illogical to think that a sentence once imposed remains just, necessary, and appropriate in perpetuity: people convicted of even serious crime can and do transform; public attitudes about crime can and do change (i.e., about narcotics, marijuana); and our knowledge of behavior is ever-changing (i.e., the science around brain development).

It is also becoming increasingly clear that not all victims or family members of a victim demand lengthy prison terms for the person who caused harm.⁶⁵ The restorative justice movement is shining light on new approaches to harm and trauma and the needs and desires of those who have been harmed by violence.⁶⁶ Second looks can amplify the burgeoning restorative justice movement by promoting conversation about alternatives to relentless punishment.

And second looks are not just about beneficence or mercy. There is much wasted talent behind bars; people languishing on the inside when they could be contributing on the outside as mentors and helping repair families and communities that have been devastated by the draconian sentencing of the past several decades. More directly, second look sentencing can return fathers and mothers to support their sons and daughters, and sons and daughters to act as caregivers to aging parents. Returning citizens can serve as credible messengers to guide at-risk youth, serve as violence interrupters, and in myriad other ways help promote public safety, and can also be entrepreneurs revitalizing communities and becoming taxpaying contributors to society.

Respectfully submitted,

Wayne S. McKenzie
Chair, Criminal Justice Section

August 2022

⁶⁵ Campbell Robertson, *Would You Let the Man Who Killed Your Sister Out of Prison?* NY Times, July 19, 2019.

⁶⁶ Michelle Alexander, *Reckoning with Violence*, NY Times, March 3, 2019 (90% of survivors of violent crime chose restorative justice when given the chance to choose between incarceration for the person who caused them harm or to engage in a restorative justice process).

GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: Wayne S. McKenzie, Chair

1. Summary of Resolution(s).

This resolution urges all jurisdictions to enact legislation permitting courts to hear petitions that allow *de novo* hearings to take a “second look” at criminal sentences where individuals have been incarcerated for ten years, to create guidelines for these hearings that allow petitioners to receive notice and obtain the assistance of counsel, and to develop due process procedures.

2. Indicate which of the ABA’s Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

The resolution advances both Goal 3 and Goal 4; it advances the rule of law to promote rational review into the sentencing process and it seeks to treat all persons who are sentenced to confinement in a more equitable manner.

3. Approval by Submitting Entity.

This resolution was passed by the Criminal Justice Council at the Spring Council meeting in Savannah, Georgia on April 9, 2022.

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

No.

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

None.

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

N/A

7. Status of Legislation. (If applicable)

N/A

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

This Resolution will be used to educate all stakeholders in the criminal justice system, support ABA Governmental Affairs Office lobbying efforts and amicus briefs.

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

None.

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

11. Referrals

Center on Children and the Law
 Center for Human Rights
 Center on Racial and Ethnic Diversity
 Center on Racial and Ethnic Justice
 Commission on Disability Rights
 Commission on Homelessness and Poverty
 Commission on Immigration
 Commission on Sexual Orientation and Gender Identity
 Commission on Youth at Risk
 Family Law Section
 Government and Public Sector Lawyers Division
 Health Law Section
 International Law Section
 Judicial Division
 Law Practice Division
 Section on Civil Rights and Social Justice
 Section on Litigation
 Section on Science and Technology
 Special Committee on Hispanic Legal Rights & Responsibilities
 Standing Committee on Legal Aid & Indigent Defense
 Young Lawyers

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

Linda Britton
 ABA Criminal Justice Section
 1050 Connecticut Avenue NW, Suite 400
 Washington, D.C. 20036
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 E: Linda.Britton@americanbar.org

13. 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.)

502

Stephen Saltzburg
2000 H Street, NW
Washington, D. C. 20052
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E: ssaltz@law.gwu.edu

Neal Sonnett
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Cell: 305-333-54

EXECUTIVE SUMMARY1. Summary of the Resolution

This resolution urges all jurisdictions to enact legislation permitting courts to hear petitions that allow *de novo* hearings to take a “second look” at criminal sentences where individuals have been incarcerated for at least ten years, to create guidelines for these hearings that allow petitioners to receive notice and obtain the assistance of counsel, and to develop due process procedures.

2. Summary of the Issue that the Resolution Addresses

This resolution addresses the American crisis of mass incarceration. Since 1970, the incarcerated population has grown by 700%. Incarceration is disproportionately inflicted on people of color. Many individuals in prison are serving long sentences for offenses where shorter sentences now exist, where mandatory minimum sentences and habitual offender laws have been repealed, and where there is no ability for those individuals to present the rehabilitative steps they have taken to successfully re-enter society.

3. Please Explain How the Proposed Policy Position Will Address the Issue4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

None

AMERICAN BAR ASSOCIATION
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
COALITION ON RACIAL AND ETHNIC JUSTICE
COMMISSION ON HISPANIC LEGAL RIGHTS AND RESPONSIBILITIES
COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY
COUNCIL FOR DIVERSITY IN THE EDUCATIONAL PIPELINE
SECTION OF STATE AND LOCAL GOVERNMENT LAW

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association urges the federal government and
2 each state to establish, expand and adequately fund Offices of Equity within its
3 agencies or departments, either by legislation or Executive Order, that will be
4 responsible for functions (a) through (d) below;

5
6 FURTHER RESOLVED, That the American Bar Association urges cities and
7 counties with populations of at least 200,000 to enact legislation establishing,
8 expanding and adequately funding Offices of Equity that will be responsible for the
9 following functions (a) through (d):

10
11 (a) Conduct periodic evaluations of the effects of government programs,
12 services, and policy to assess whether they discriminate against or adversely
13 affect individuals based on race, color, religion, sex, sexual orientation, gender
14 identity, gender expression, national origin, age, disability or other basis protected
15 by law (collectively, "Protected Classes");

16
17 (b) Develop plans to reduce or eliminate discrimination against Protected
18 Classes;

19
20 (c) Perform equity impact assessments of proposed legislative, regulatory and
21 budgetary actions to determine their effect on Protected Classes; and

22
23 (d) Consult with, and solicit input from, organizations whose mission is to serve
24 and represent Protected Classes and other stakeholders, in performing the above
25 functions.
26

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27 FURTHER RESOLVED, That the American Bar Association urges federal, state,
28 territorial and local governments to ensure that such Offices of Equity operate
29 independently by including and enforcing provisions in such legislation that (i)
30 prohibits retaliation against any director or staff member of an Office of Equity on
31 the basis of their recommendations or actions taken in the good faith performance
32 of their job duties; and (2) prohibits termination of any director or other leader of
33 an Office of Equity prior to the expiration of their term of office, except for good
34 cause.

REPORT

I. Practical Issues Addressed by Offices Of Equity

A growing number of cities have established offices tasked with identifying adverse effects on People of Color that result, whether inadvertently or deliberately, from government programs and policies, including without limitation, those addressing public transportation, housing, food insecurity, health care and poverty. Each office's specific areas of concern vary somewhat, and may also include the interests of LGBTQ+ individuals, persons with disabilities, and other vulnerable communities. The majority are housed within offices of the mayor or city council, such as Atlanta's Office of Equity, Diversity, and Inclusion.¹ Some others, such as the District of Columbia's Council Office of Racial Equity ("CORE"), are housed within the legislative branch. This model derives from the establishment of Chief Equity Officers at scores of major corporations. These governmental and private industry offices or programs have different titles, but are widely known generically as a term of art as equity offices or offices of equity ("Offices of Equity").

In 2004, the city of Seattle developed its Race and Social Justice Initiative ("RSJI"), the nation's first citywide entity explicitly designed to address systemic racism.² While initially internally concerned with employee training and accountability, the office later expanded and began partnering with community organizations to examine broader systemic impact. Ten years after its founding, on April 3, 2014, Seattle Mayor Edward Murray signed an Executive Order affirming and expanding RSJI. Today, the RSJI develops toolkits, collects data, and issues reports to further its goals.

Seattle's RSJI served as a model for subsequent offices of racial equity across the country. The responsibilities of these offices include, but are not limited to, oversight of government affairs and producing policy recommendations and equity impact assessments. Many collect and publicly report relevant data. Others offer grant programs to enable community organizations to improve access to government programs and services. The specific scope and responsibilities of individual equity offices vary significantly by jurisdiction.

As of May 2019, there were at least 32 city-level Offices of Equity across the United States.³ The prevalence of such offices has increased following the murder of George Floyd and resurgence of the Black Lives Matter movement in 2020. These jurisdictions seek to understand where and how their policies and actions treat different populations inequitably or unfairly.

Offices of Equity are notably distinct from issue-driven task forces or commissions that are temporary in nature. An example of the latter is New York City's recently introduced Racial Justice Commission, for example, which is limited by a two-year mandate to identify and remedy structural racism. Its task is to examine the New York City Charter

¹<https://www.atlantaga.gov/government/mayor-s-office/office-of-equity-diversity-and-inclusion>.

²<https://www.seattle.gov/Documents/Departments/RSJI/rsji-2015-2017-plan.pdf>.

³<http://www.citymayors.com/society/usa-city-equity-offices-list.html>.

and city agencies, then introduce ballot proposals to remedy systemic issues.⁴ Offices of Equity, by contrast, are permanent government entities and possess a designated staff and long-term assessment mechanisms to improve departmental conduct and policy.

To date, only two Offices of Equity have been created at the state level. In April 2020, Washington state established the country's first statewide Office of Equity, which is housed within the office of the governor.⁵ The office's duties include oversight, training, and best practices. Virginia's Office of Diversity, Equity, similarly housed within the governor's office, is the only other statewide Office of Equity in the nation.

Offices of Equity provide a critically important set of skills to identify discriminatory laws and policies that are not often recognized. Laws and policies, even those that are well-intentioned and apparently neutral, can have discriminatory effects that harm segments of the population, most often Protected Classes.⁶ A growing body of evidence demonstrates their broad reach and long term consequences, known as structural racism or systemic inequities.⁷ Harmful effects are not necessarily recognized unless and until a dedicated effort is made to identify them. Data collection and analysis can provide the information needed to assess whether laws and policies are producing otherwise undetected harms or modeling best practices that prevent such harms. Input from communities likely to be affected ensures more accurate and productive information. That information can be used to develop changes to reduce or eliminate such harms and provide equal protection of the laws, as well as encourage policies that avoid such harms. For these reasons, all levels of government can benefit from establishing Offices of Equity.

In order for Offices of Equity to be effective and independent, their leadership and staff should be free to conduct objective research and develop recommendations without

⁴<https://www1.nyc.gov/site/racialjustice/about/mission.page>.

⁵<https://housedemocrats.wa.gov/gregerson/2020/03/06/senate-passes-nations-first-statewide-office-of-equity/>.

⁶See, e.g., Richard Rothstein, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017); Mathew Desmond, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2016), Urban Institute, *Structural Racism in America* (collected reports), <https://www.urban.org/features/structural-racism-america>; Michelle Alexander, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); Joseph E. Stiglitz, *The American Economy Is Rigged*, *SCIENTIFIC AMERICAN* (Nov 1, 2008), <https://www.scientificamerican.com/article/the-american-economy-is-rigged/>.

⁷ See, e.g., Zinzi D. Bailey, Justin M. Feldman & Mary T Bassett, *How Structural Racism Works – Racist Policies as a Root Cause of U.S. Racial Health Inequities*, 384 N. ENGL. J. MED. 768-773 (Feb. 25, 2021); Kriston McIntosh, Emily Moss, Ryan Nunn & Jay Shambaugh, *Examining the Black-White Wealth Gap*, The Brookings Institution (Feb 27, 2020), <https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/>; Jennifer Richmond-Bryant, Ihab Mikati, Adam F. Benson, Thomas J. Luben & Jason D. Sacks, *Disparities in Distribution of Particulate Matter Emissions From US Coal-Fired Power Plants by Race and Poverty Status After Accounting for Reductions in Operations Between 2015 and 2017*, 110(5) AM. J. PUBLIC HEALTH 655-661 (2020); Ruqaiyah Yearby, *Racial Disparities in Health Status and Access to Healthcare: The Continuation of Inequality in the United States Due to Structural Racism*, 77 AM. J. ECONOMICS AND SOCIOLOGY 1113-1152 (2018); Danyelle Solomon & Christian E. Weller, *When a Job Is Not Enough: The Latinx-White Wealth Gap*, Center for American Progress (Dec. 5, 2018), <https://www.americanprogress.org/article/job-not-enough/>.

partisan influence or interference. This requires protection against arbitrary dismissal or retaliation for good faith performance of their duties. It is critical that the legislation include provisions prohibiting retaliation against the directors of the Office of Equity for their recommendations or other action taken in good faith, and protecting such directors from termination without good cause prior to expiration of their term.

II. Equity Assessment Tools

Nearly all Offices of Equity have developed some sort of equity assessment tool which makes credible determinations regarding equity impact of policy, budgetary affairs, or departmental conduct.⁸

Seattle's RSJI makes determinations on all budget requests according to its Racial Equity Toolkit, an assessment of racial impact.⁹ The assessment requires all budgetary proposals to report community stakeholders and demographics of populations affected, assess benefit or burden as it regards racial equity, and outline strategies to advance opportunity and minimize harm.¹⁰

The District of Columbia's CORE produces a Racial Equity Impact Assessment (REIA) for nearly all proposed legislation—with a few specifically outlined exceptions, such as revenue bond resolutions. An REIA determines whether the bill is likely to increase or decrease racial inequity, and is conducted after a bill's public hearing but prior to committee markup.¹¹

Austin's Equity Office's Equity Assessment Tool is a self-assessment completed by departments, which makes determinations on a department's policies, programs, and budgeting through the lens of equity impact.¹² The office subsequently releases a public report of the EAT's findings.

While not housed within explicit Offices of Equity, nine states—Iowa, Colorado, Connecticut, Florida, Oregon, Maryland, New Jersey, Maine, and Virginia—have additionally implemented requirements that certain proposed legislation receive racial impact statements.¹³

In 2007, Iowa became the first state to implement minority impact statements as a precondition to legislation regarding criminal justice. Iowa's HF 2393 requires a “minority impact statement” be made for any grant applications and a “correctional impact statement,” which includes minority impact, attached to any bill, joint resolution, or

⁸Maya Groos, Maeve Wallace, Rachel Hardeman & Katherine P. Theall, *Measuring Inequity: A Systematic Review of Methods Used to Quantify Structural Racism*, 11 J. HEALTH DISPARITIES RESEARCH AND PRACTICE 190-206 (2018).

⁹<https://www.seattle.gov/civilrights/what-we-do/race-and-social-justice-initiative/racial-equity-toolkit>.

¹⁰[https://www.seattle.gov/Documents/Departments/RSJI/Racial%20Equity%20Toolkit_FINAL_August2012_with%20new%20cncl%20districts\(0\).pdf](https://www.seattle.gov/Documents/Departments/RSJI/Racial%20Equity%20Toolkit_FINAL_August2012_with%20new%20cncl%20districts(0).pdf).

¹¹<https://www.dcraciaequity.org/reia-database>.

¹²<https://app.smartsheet.com/b/publish?EQBCT=b90f65efc1d344b2be9ee13526e5236b>

¹³<https://www.sentencingproject.org/publications/racial-impact-statements/>.

amendment regarding criminal justice.¹⁴ Iowa's Legislative Services Agency prepares the statements using data on prison population, arrests, convictions, and sentences disaggregated by race. States such as New Jersey and most recently, Maryland, subsequently followed suit.

III. The Importance of Community Input

While the specific design of Offices of Equity may vary, it is crucial to integrate community input into the office's process in order to best serve vulnerable populations of interest.¹⁵ From May to October 2014, Seattle RSJI staff conducted 37 listening sessions with community members to assess community priorities.¹⁶ Particularly, the office provided targeted outreach to underrepresented communities, such as immigrant and refugee communities. The office's Racial Equity Toolkit requires that all budgetary proposals identify ways in which they will involve community members and stakeholders.

The city of Long Beach's Office of Equity toolkit, which includes an extensive list of questions for government officials to ask when undertaking a project, requires community outreach and engagement at every stage of the process. The toolkit asks officials to explicitly identify community stakeholders and their interests prior to undertaking a project, identify community participation during the project, and assess effectiveness of engagement efforts after.¹⁷

Racial impact statements at the state level often are produced in partnership with non-governmental entities specializing in the areas of race and equity. The Maryland General Assembly's racial impact statements, a requisite for all major criminal justice bills, are produced in collaboration with the state's Department of Legislative Services, Bowie State University—Maryland's oldest historically Black university—and the University of Baltimore's Schaefer Center for Public Policy.¹⁸

The Florida Senate maintains a partnership with the Florida State University Center for Criminology and Public Policy Research.¹⁹ The center provides assessments of the racial/ethnic impact of *select proposed criminal justice legislation* and empirically-based racial/ethnic impact statements for select bills that will be heard by the Senate's Criminal Justice Committee.

¹⁴<https://www.legis.iowa.gov/legislation/BillBook?ga=82&ba=HF2393>.

¹⁵Eduardo Bonilla-Silva, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA* (2009).

¹⁶ <https://www.seattle.gov/Documents/Departments/RSJI/rsji-2015-2017-plan.pdf>

¹⁷<https://www.longbeach.gov/globalassets/health/media-library/documents/healthy-living/office-of-equity/city-of-long-beach-office-of-equity-toolkit>.

¹⁸<https://www.marylandmatters.org/2021/02/01/jones-and-ferguson-to-require-racial-impact-statements-in-bill-analyses/>.

¹⁹<https://criminology.fsu.edu/center-for-criminology-and-public-policy-research/center-general-projects/assessing-statewide-raciaethnic-impact-proposed-criminal-justice-legislation-florida>.

IV. Relevant ABA Policy

This Resolution builds on existing ABA policy that supports the development of issue-driven jurisdictional entities in the areas of social justice and equity. It expands the scope of concern beyond race and color to include religion, sex, sexual orientation, gender identity, gender expression, national origin, age, disability and other groups protected by federal, state or local law in order to recognize that laws and policies can adversely affect those populations.

Resolution 13A10D²⁰ was passed in 2013 following the ABA's successful collaboration with state and local jurisdictions to establish Access to Justice (ATJ) Commissions²¹, in over 40 states across the country. The ABA Standing Committee on Legal Aid and Indigent Defendants (SCLAID) created the ABA Resource Center for Access to Justice Initiatives in 2006, in partnership with the National Center for State Courts (NCSC).²² The ABA built a web library of materials, authored articles in publications promising ATJ Commissions, provides support to commission leadership, and hosts an annual meeting of commissions. The ABA works with the National Legal Aid and Defender Association (NLADA) to sponsor the Equal Justice Conference, which co-hosts the ABA's National Meeting of State Access to Justice Commission Chairs.

Resolution 06M108A²³ addresses racial justice and supports the creation of an explicit commission to study the social, political, and economic consequences of slavery and its subsequent denial. Resolution 04A121B²⁴ recommends the establishment of Criminal Justice Racial Task Forces to reduce or eliminate racial disparities at each stage of the criminal justice process.

ABA policy further supports the implementation of racial impact assessments. Resolution 92A10F²⁵, regarding "Justice System Impact Statements," requires that such assessments be attached to all criminal-justice-related legislation or resolutions and executive branch orders or actions. This Resolution further advocates for the establishment of appropriate mechanisms to ensure the preparation of the justice system impact statements that examine and analyze the funding, workload, and resource impact of all proposed measures. Resolution 90M115A²⁶, in support of jail overcrowding impact statements, recommends the adoption of procedures requiring that a state legislature or Congress be provided with prison and jail impact statements assessing the ways in which

²⁰ABA 13A10D, https://www.americanbar.org/content/dam/aba/directories/policy/annual-2013/2013_hod_annual_meeting_10D.docx.

²¹https://www.americanbar.org/groups/legal_aid_indigent_defense/resource_center_for_access_to_justice/atj-commissions/.

²²https://www.americanbar.org/groups/legal_aid_indigent_defense/resource_center_for_access_to_justice/.

²³ABA 06M108A, https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2006/2006_my_108a.pdf.

²⁴ABA 04A121B, https://www.americanbar.org/content/dam/aba/directories/policy/annual-2004/2004_am_121b.pdf.

²⁵ABA 92A10F, https://drive.google.com/file/d/1_RSX7ISo-HIaN73ZdbI9yIhoDHjbkoYC/view?usp=sharing.

²⁶ABA 90M115A, https://drive.google.com/file/d/1_87s_X8ou6XYOwSRub-Cux0XSlaWp9ZZ/view.

proposed legislation may increase the number of incarcerated persons or length of their incarceration.

ABA policies also support data collection and racial impact assessment measures including studies of racial profiling in law enforcement (99A10A)²⁷ and studies of racial bias in the federal judicial system (91A10D).²⁸

As a general commitment to racial equity and its active policy implementation, the ABA supported the accession of the United States to the International Convention on the Elimination of All Forms of Racial Discrimination (Policy 78A105.3). The convention, in addition to requiring active promotion of racial equity policy, creates an international Committee on the Elimination of Racial Discrimination (Part II, Article 8, 1).

V. Conclusion

Offices of Equity offer a positive mechanism for recognizing and preventing, reducing, and eliminating the adverse effects of some governmental laws, policies, and programs on all Protected Classes. These concrete, data-driven entities enable government entities to make the impact of government actions transparent and empower community members to play a role in the decision-making processes affecting their lives.

Respectfully submitted,

Beth K. Whittenbury, Chair
Section of Civil Rights and Social Justice

August 2022

²⁷ABA 99A10A.

²⁸ABA 91A10D,
1991/1991 am 10d.pdf.

<https://www.americanbar.org/content/dam/aba/directories/policy/annual->

GENERAL INFORMATION FORM

Submitting Entity: Section of Civil Rights and Social Justice

Submitted By: Beth K. Whittenbury

1. Summary of the Resolution(s).

The American Bar Association urges the federal government and each state to implement legislation establishing offices with formal responsibility for identifying and addressing government laws, policies, and actions that discriminate against or adversely affect individuals based on race, color, religion, sex, sexual orientation, gender identity, gender expression, national origin, age, disability or other basis protected by federal, state or local law.

2. Indicate which of the ABA's Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

This resolution seeks to advance Goal 3 – Eliminate Bias and Enhance Diversity – by urging the establishment of government offices dedicated to recognizing and addressing bias resulting from federal, state, local, territorial, and tribal laws, policies, programs, and services.

3. Approval by Submitting Entity.

The Section of Civil Rights and Social Justice approved this resolution on April 13, 2022.

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

No.

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

This resolution builds on prior ABA resolutions. Resolution 13A10D, regarding the development of Access to Justice Commissions Access to Justice Commissions (ATJ), was passed following the ABA's successful collaboration with state and local jurisdictions to establish ATJ Commissions in over 40 states across the country. Resolution 06M108A, addresses racial justice and supports the creation of an explicit commission to study the social, political, and economic consequences of slavery and its subsequent denial. Resolution 04A121B recommends the establishment of Criminal Justice Racial Task Forces to reduce or eliminate racial disparities at each stage of the criminal justice process. See also Resolution 92A10F, regarding "Justice

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System Impact Statements.” Further ABA policies supports data collection and racial impact assessment measures including studies of racial profiling in law enforcement (99A10A) and studies of racial bias in the federal judicial system (91A10D). As a general commitment to racial equity and its active policy implementation, the ABA supported the accession of the United States to the International Convention on the Elimination of All Forms of Racial Discrimination (Policy 78A105.3).

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

N/A

7. Status of Legislation. (If applicable)

None

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

The Section of Civil Rights and Social Justice would notify coalition partners and municipalities of the results in order to implement Offices of Equity across the country.

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

The adoption of this proposed resolution would result in only minor indirect costs associated with Section or Committee staff time devoted to the policy subject matter as part of the staff members 'overall substantive responsibilities.

10. Disclosure of Interest. (If applicable)

N/A

11. Referrals.

Center for Human Rights
Commission on Disability Rights
Commission on Domestic and Sexual Violence
Commission on Hispanic Legal Rights and Responsibilities
Commission on Homelessness and Poverty
Commission on Law and Aging
Commission on Racial and Ethnic Diversity in the Profession
Commission on Sexual Orientation and Gender Identity
Council for Diversity in the Educational Pipeline
Commission on Women in the Profession
Commission on Youth at Risk
Criminal Justice

Environment, Energy & Resources
 Family Law
 Government and Public Sector Lawyers Division
 Health Law
 Labor & Employment Law
 State and Local Government Law
 Young Lawyers Division

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

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13. 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.

Mark I. Schickman
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EXECUTIVE SUMMARY

1. Summary of the Resolution.

This resolution seeks to create or expand upon existing Offices of Equity in order to evaluate the effects of government programs, services and policy on Protected Classes; develop plans to eliminate or reduce discrimination against Protected Classes; and perform equity impact assessments of proposed legislative and budgetary actions.

2. Summary of the issue that the resolution addresses.

In the wake of broad allegations of police violence, a rise in hate crimes, and suppression of civil rights, the need for increased government accountability is palpable.

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

Offices of Equity are one step towards positive change. These concrete, data-driven entities focus government action on minority impact while empowering community members to play a role in the decision-making process.

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

None reported.

AMERICAN BAR ASSOCIATION
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
COMMISSION ON HISPANIC LEGAL RIGHTS AND RESPONSIBILITIES
COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY
SECTION OF STATE AND LOCAL GOVERNMENT LAW

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association urges federal, state, local,
2 territorial and tribal governments to enact or amend cyberstalking legislation to
3 require investigation by law enforcement, stronger penalties for committing such
4 crimes, and a private right of action for victims of cyberstalking;
5

6 FURTHER RESOLVED, That the American Bar Association urges law
7 enforcement agencies to create and provide training to their officers to better equip
8 them in identifying and investigating cyberstalking, and educate them on the
9 varying types of cyberstalking, including cyberbullying, while respecting
10 constitutionally protected free speech; and
11

12 FURTHER RESOLVED, That the American Bar Association urges federal, state,
13 territorial, local, and tribal governments to allocate sufficient funding for the
14 essential technology and resources needed to identify and investigate
15 cyberstalking crimes and to provide law enforcement with necessary training.

REPORT

Introduction

With the ongoing rise and vast use of the internet, social media, and online communication, cyberstalking and cyberbullying have become issues for many individuals with an online presence. Although various state and federal laws address stalking, and although some of those laws are narrowly tailored to cyberstalking, many cyberstalking cases go unsolved and untouched. This Resolution tackles cyberstalking and cyberbullying crimes from several angles. First, this Resolution urges local governments and the federal government to create or expand laws prohibiting any form of cyberstalking, require investigations of such crimes, and allow for a private right of action. Second, this Resolution urges law enforcement agencies to create and require training for their officers so that they can recognize the varying types of cyberstalking and equip themselves to respond effectively. Finally, this Resolution urges law enforcement to purchase the essential technology and resources to identify and investigate cyberstalking crimes.

The Current Landscape: The Statistics on Cyberstalking

Stalking has been a legal issue for decades. Cyberstalking is a relatively new crime that recognizes the internet as a vehicle for stalking. It has escalated in the past 20 years. Although cyberstalking is a growing problem, data on its precise extent are limited. Statistics show that, nationally, around 87% of stalkers are males and cyberstalking victims are mostly females between the ages of 18 and 29.¹ A U.S. Department of Justice report addresses the varying relationships stalkers can have with their victims.² With the rise of the internet, anonymous stalkers can now find victims they have never met. Even more troublesome is the access other abusers have gained. Abusers can use cyberstalking to locate and continuously harass their victims, even when the victims have gone into hiding to flee other forms of abuse.³ According to a study done by the Pew Research Center in 2017, seven percent of Americans have been cyberstalked, with ten percent receiving physical threats and six percent being sexually harassed.⁴ Another study found that “30% of cases began via social media, 76% of cases escalated (meaning

¹ Moore, A. A. (2019, August 14). Are You a Potential Victim of Cyberstalking? *ThoughtCo*. Retrieved from <https://www.thoughtco.com/cyberstalking-and-women-facts-3534322>.

² (2009, January). *Stalking Victimization in the United States*. U.S. Department of Justice. Retrieved from <https://www.justice.gov/sites/default/files/ovw/legacy/2012/08/15/bjs-stalking-rpt.pdf>.

³ Shahani, A. (2014, September 15) Smartphones Are Used To Stalk, Control Domestic Abuse Victims. *NPR*, Retrieved from www.npr.org/sections/alltechconsidered/2014/09/15/346149979/smartphones-are-used-to-stalk-control-domestic-abuse-victims.

⁴ Duggan, M. (2020, September 18). Online Harassment 2017. *Pew Research Center*. Retrieved from <https://www.pewresearch.org/internet/2017/07/11/online-harassment-2017/>.

they moved to other services or social media accounts or became physical), and only 37% of cases were reported to the police.”⁵

Cyberstalking Laws and Prevention Efforts Across the United States

In every state, there is some form of law or policy that deals with stalking. A majority of those laws do not explicitly cover cyberstalking, although some of them do cover the less explicit term “online harassment.”⁶ To combat this relatively new area of crime, lawmakers, policy officials, and law enforcement agencies need to revise and specify cyberstalking law in new and existing legislation and rules, and allow for a private right of action.

Over the course of the last few years, federal anti-stalking laws have been passed, and multiple prevention efforts have been taken by various law enforcement organizations. Nonetheless, victims of cyberstalking have still been left to feel that they have no recourse, as law enforcement shows little to no engagement in their cases. This issue must be given adequate attention and effort by law enforcement. Law enforcement officials should be required to investigate all claims of such crimes and have the technology and manpower needed to identify the anonymous perpetrator while not intruding on the privacy rights of others.

In the Violence Against Women Act Reauthorization Act of 2022, Congress recognized the increase in cyberstalking crimes. Title XIV of the Act, entitled Cybercrime Enforcement, is specifically dedicated to supporting law enforcements efforts in the enforcement of such crimes by issuing grants for the “prevention, enforcement, and prosecution of cybercrimes”.⁷

Working to Halt Abuse Online (“WHO@”) is a comprehensive resource that lists all local current and pending cybercrime laws in the United States. Sadly, a majority of those laws do not explicitly mention or address cyberstalking; rather, they tend to concern offenses against minor children, the distribution and creation of child pornography, and interstate travel to physically stalk an individual.⁸ WHO@’s list does contain cyberstalking laws that cover and protect individuals of all ages from harassment online.

Gaps in Cyberstalking Laws

The primary federal statute that applies to these cases is 18 U.S.C. 875(c) and 18 U.S.C. 2261A(2)(B). That law makes it a “federal crime, punishable by up to five years in prison

⁵ Henshaw, S. (2019, June 14). Social Media Stalking Statistics: A Closer Look at Cyberstalking and How to Prevent it. *TigerMobiles.com*. Retrieved from <https://www.tigermobiles.com/blog/stop-social-media-stalking/>.

⁶ State and Federal Stalking Laws. (n.d.). *Cyber Harvard*. Retrieved from https://cyber.harvard.edu/vaw00/cyberstalking_laws.html.

⁷ Violence Against Women Act Reauthorization Act of 2022, <https://www.congress.gov/bill/117th-congress/senate-bill/3623?s=1&r=2>.

⁸ US Laws. (n.d.). *Working to Halt Online Abuse*. Retrieved from <https://www.haltabuse.org/resources/laws/index.shtml>.

and a fine of up to \$250,000, to transmit any communication in interstate or foreign commerce containing a threat to injure the person of another.”⁹ The law concerns only interstate communications, meaning that it does not account for the cases in which an individual is harassed online by someone residing in their own state. Moreover, for the law to apply, there must be an actual and traceable *threat* made by the perpetrator for them to be in violation of 18 U.S.C. 875(c). Annoyance or harassment is not enough. Neither does the law apply to a perpetrator who encourages mass harassment of an individual through online forums (“cancelling”).

A second federal law, 47 U.S.C. 223, states that, if a person “makes a telephone call or utilizes a telecommunications device ... without disclosing his identity and with intent to abuse, threaten, or harass any specific person,” they can be charged with a federal crime and punished with up to a two-year prison sentence.¹⁰ In the context of cyberstalking, the application of this statute is unclear. The law does not consider the various cryptic and unspecific details and situations of cyberstalking. Many victims are harassed across state lines, unaware of the identity of their stalker, or harassed by multiple people through various platforms and means online.

The varying gaps in federal stalking and cyberstalking law, and the language used in state and local cyberstalking policies, are not enough to address and adapt to this new and advanced technological form of harassment.

First Amendment Considerations

Issues with freedom of speech often arise when questionable or hostile speech is prohibited online. In particular, defendants in cyberbullying and cyberstalking cases regularly argue that they were simply exercising their First Amendment rights. On the contrary, the conduct of cyberstalking consists of threats, harassment, and intimidation. In *Watts v. United States*, the Supreme Court created the “true threat” doctrine, ruling that true threats of violence are not afforded First Amendment protection. True threats are statements that “frighten or intimidate one or more specified persons into believing that they will be seriously harmed by the speaker or by someone acting at the speaker’s behest.”¹¹ True threats do not merit protection as free speech. Three justifications lead to this doctrine: “preventing fear, preventing the disruption that follows from that fear, and diminishing the likelihood that the threatened violence will occur.”¹²

⁹ 18 U.S. Code § 875 - Interstate communications. (n.d.). *Legal Information Institute*. Retrieved from <https://www.law.cornell.edu/uscode/text/18/875>.

¹⁰ 47 U.S. Code § 223 - Obscene or harassing telephone calls in the District of Columbia or in interstate or foreign communications. (n.d.). *Legal Information Institute*. Retrieved from <https://www.law.cornell.edu/uscode/text/47/223>.

¹¹ O’Neill, Kevin F., and David L. Hudson. (2017, June) True Threats. *The First Amendment Encyclopedia*. Retrieved from <https://www.mtsu.edu/first-amendment/article/1025/true-threats#:~:text=True%20threats%20constitute%20a%20category,protected%20by%20the%20First%20A,mentent>.

¹² Stanner, A. P. (2018, September 15). Toward an Improved True Threat Doctrine for Student Speakers. *NYU Law Review*. Retrieved from <https://www.nyulawreview.org/issues/volume-81-number-1/toward-an-improved-true-threat-doctrine-for-student-speakers/>.

Under the First Amendment, harassment cannot be prosecuted unless the speech used includes a true threat or “fighting words,” or constitutes violent incitement.¹³ In cases of cyberstalking, many victims report their harassment to include “threats to kill, kidnap, or injure the person, to damage their reputation, or to take or damage property.”¹⁴ Thus, prosecution of the threats and intimidation that often come with cyberstalking may be undertaken notwithstanding *Watts*.

When writing and reforming cyberstalking laws legislative bodies must carefully formulate and consider free speech issues; nonetheless, the First Amendment does not protect threatening and intimidating speech,¹⁵ appropriation, disclosure, or distortion, nor the harassment of others when such harassment includes a true threat, fighting words, and/or incites violence.¹⁶ Reported feelings of fear and intimidation from an unknown entity are enough to justify a prosecution.

The Need for Training and Technological Advancement to Investigate Cyberstalking Crimes

Cyberstalking cases tend to be neglected because of lack of support, evidence, and law enforcement interest. The problems with prosecuting and addressing cyberstalking are made worse by the inadequate resources and inadequate efforts law enforcement officials use for enforcement of these cases. Since cyberstalking is a relatively new area of crime, most law enforcement officers have not been trained to recognize the injury or address the crime. Most law enforcement agencies do not have the equipment required to investigate cyberstalking crimes. In many cases one of two scenarios takes place: (1) Cyberstalking cases go unreported as victims are unsure whether the offense is prosecutable or whether law enforcement will take their case seriously, or (2) after reporting the crime to law enforcement, vulnerable victims are left to fend for themselves online unless a serious threat or offense has already been committed.¹⁷ The mandatory trainings urged by the Resolution should describe the torment victims go through so that all those who serve and protect the public give these cases the attention they deserve. Furthermore, police officers need to be provided with new funding or a reallocation of existing funding, the necessary equipment, and subsequent training to investigate and resolve these cases effectively.

The Need for a Private Right of Action

¹³ Supra note 11.

¹⁴ Dave, P. (n.d.). Cyberstalking Investigation and Prevention. *Computer Crime Research Center*. Retrieved from <http://www.crime-research.org/library/Cyberstalking.htm>.

¹⁵ Sokolow, B. A., Kast, D., & Dunn, T. J. (2011, October 1). The Intersection of Free Speech and Harassment Rules. *American Bar Association*. Retrieved from https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol38_2011/fall2011/the_intersection_of_free_speech_and_harassment_rules/.

¹⁶ Fisher, D. (2017, August 15). True threats are not protected by the First Amendment, so what are they? *The Free Speech Center*. Retrieved from <https://www.mtsu.edu/first-amendment/post/46/true-threats-are-not-protected-by-the-first-amendment-so-what-are-they>.

¹⁷ Supra note 14.

“Victims of cyberstalking can be affected emotionally, mentally, physically, and financially.”¹⁸ However, if law enforcement fails to intervene, victims have little civil legal recourse. Although criminal statutes can be used to deter stalkers, they do not allow for private right of action.¹⁹ In light of law enforcement’s lack of interest, training, or resources, victims of cyberstalking often remain exposed to ongoing harassment and possible violence indefinitely. Enabling those victims to advocate for their own protection by initiating a civil action offers the potential to stop the cyberstalking, deter future crimes, and compensate the victim for the cost of protective measures taken to avoid the perpetrator. “[C]ivil remedies may provide beneficial options” when law enforcement or criminal statutes fail to protect or compensate the victim.²⁰ Even if a victim can afford the cost of litigation, and is ready for the additional emotional and mental strains, many times, they are limited to the civil remedies for intentional infliction of emotional distress or defamation.

The inadequate technological capacity of law enforcement to investigate these crimes must be addressed. This Resolution urges the expansion of cyberstalking crimes to require investigation by law enforcement, stronger penalties for committing such crimes, and a private right of action and urges law enforcement agencies (1) to create an in-depth training to educate officers on the realities of cyberstalking, (2) to commit more resources to solving cyberstalking crimes, and (3) to enhance the sense of urgency when dealing with these crimes.

Respectfully submitted,

Beth K. Whittenbury, Chair
Section of Civil Rights and Social Justice

August, 2022

¹⁸ Kara Powell, Cyberstalking: Holding Perpetrators Accountable and Providing Relief for Victims, 25 RICH. J.L. & TECH., no. 3, 2019. <https://jolt.richmond.edu/cyberstalking-holding-perpetrators-accountable-and-providing-relief-for-victims/>.

¹⁹ *Id.*

²⁰ *Id.*

GENERAL INFORMATION FORM

Submitting Entity: Section of Civil Rights and Social Justice

Submitted By: Beth K. Whittenbury, Chair

1. Summary of the Resolution(s).

This Resolution urges federal, state, local, territorial and tribal governments to enact or expand cyberstalking legislation to require investigation by law enforcement, stronger penalties for committing such crimes, and a private right of action. Further it urges law enforcement agencies to create and require training for their officers so that they are better equipped and aware of the varying types of cyberstalking, including the purchase of essential technology and resources to identify and investigate cyberstalking.

2. Indicate which of the ABA's Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

This Resolution seeks to advance Goal I, serving our members, as any legislation involves members' substantive practices, and Goal 4, advance the rule of law, by addressing protections for victims of and potential legislation in the area of cyberstalking.

3. Approval by Submitting Entity.

Approved by the Section of Civil Rights and Social Justice as of April 28, 2022.

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

No.

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

The ABA has previously taken a clear position urging "Congress to reauthorize and fully fund the Violence Against Women Act and similar legislation that promote access to justice and safety for victims of...stalking within the United States." (10M115).

An amended version of that policy (20A113A) also "urges Congress to...enhance judicial, legal, and law enforcement tools that respond to...stalking in a trauma-informed way."

The ABA has recognized "freedom from domestic, dating and sexual violence and stalking and all other forms of gender-based violence as a fundamental human right,"

and has urged “governments to recognize, enact and adopt resolutions affirming the right of all people to live free from domestic, dating and sexual violence and stalking” (15A109C).

The ABA “urges governments to enact civil protection order statutes that extend protection to minor and adult victims of sexual assault, rape, and stalking, outside of the context of an intimate partner relationship, and specifically without a requirement for any particular relationship between the parties.” (15M109A).

An amended version of that resolution (15A109B) “urges governments to enact civil protection order statutes regarding domestic, intimate partner, sexual, dating, and stalking violence that extend protection to lesbian, gay, bisexual, and transgender individuals.”

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

N/A

7. Status of Legislation. (If applicable)

N/A

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

The Section will work with the Governmental Affairs Office to ensure that no cyberstalking cases are “put on the backburner” because of nonexistent or unspecific cyberstalking laws, or insufficient law enforcement training, funding, or resources.

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

The adoption of this proposed policy would result in only minor indirect costs associated with Section staff time devoted to the policy subject matter as part of the staff’s overall substantive responsibilities.

10. Disclosure of Interest. (If applicable)

N/A

11. Referrals.

Coalition on Racial and Ethnic Justice
Commission on Disability Rights
Commission on Racial and Ethnic Diversity in the Profession
Commission on Women in the Profession

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Council for Diversity in the Educational Pipeline
Criminal Justice Section
Diversity and Inclusion Center
Law Student Division
Science and Technology Law Section
Section of Labor and Employment Law
Section of Litigation
Section of State and Local Government Law
Section of Tort Trial and Insurance Practice
Senior Lawyers Division
Solo, Small Firm and General Practice Division
Young Lawyers Division
Government and Public Sector Lawyers Division
Commission on Sexual and Domestic Violence

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

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13. 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.

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Wendy K. Mariner
Boston, MA
Tel.: (617) 460-2284
Email: wmariner@bu.edu

EXECUTIVE SUMMARY1. Summary of the Resolution.

This Resolution urges federal, state, local, territorial and tribal governments to enact or expand cyberstalking legislation to require investigation by law enforcement, stronger penalties for committing such crimes, and a private right of action. Further it urges law enforcement agencies to create and require training for their officers so that they are better equipped and aware of the varying types of cyberstalking, including the purchase of essential technology and resources to identify and investigate cyberstalking.

2. Summary of the issue that the resolution addresses.

Unfortunately, the rate of cyberstalking has only increased with our society's vast use of the internet, social media, and online communication. Although there are various local and federal laws that address stalking, and some that are narrowly tailored to cyberstalking, many cases go unsolved and untouched. This resolution tackles cyberstalking crimes from multiple areas; the lack of specific cyberstalking policies and laws in the United States; the promotion of training for law enforcement so that their personnel's understanding of cyberstalking crimes is up to date; and the necessary funding that law enforcement needs to gain access to the technology that will help them address and solve these crimes.

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

The proposed policy position will urge federal, state, territorial, local, and tribal governments to ensure that no cyberstalking cases are "put on the backburner" because of nonexistent or unspecific cyberstalking policy or insufficient law enforcement training, funding, or resources.

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

None reported.

AMERICAN BAR ASSOCIATION**SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
COALITION ON RACIAL AND ETHNIC JUSTICE
COMMISSION ON HISPANIC LEGAL RIGHTS AND RESPONSIBILITIES
COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY
COUNCIL FOR DIVERSITY IN THE EDUCATIONAL PIPELINE
NATIONAL NATIVE AMERICAN BAR ASSOCIATION
NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION
CRIMINAL JUSTICE SECTION
COMMISSION ON YOUTH AT RISK
SECTION OF STATE AND LOCAL GOVERNMENT LAW****REPORT TO THE HOUSE OF DELEGATES****RESOLUTION**

1 RESOLVED, That the American Bar Association urges federal, state, local, and
2 territorial governments to engage in good faith and meaningful tribal consultation
3 to address government actions impacting tribal lands, citizens, interests, or
4 livelihoods;

5
6 FURTHER RESOLVED, That the American Bar Association urges Congress to
7 enact the “Requirements, Expectations, and Standard Procedures for Effective
8 Consultation with Tribes (RESPECT) Act” [H.R.3587, 117th Congress] or similar
9 legislation, to strengthen the federal government’s ability to uphold its trust and
10 treaty responsibilities by codifying requirements for meaningful tribal consultation,
11 to include:

- 12 • Tribal input prior to any proposed federal activity or finalizing any Federal
13 regulatory action that may have tribal impacts;
- 14 • Meaningful early notice of activity or regulatory action impacting to tribal
15 interests, especially regarding sacred sites;
- 16 • Permitting a range of consultations in form, substance, and length
17 depending on the needs and expressed desires of the affected tribal
18 government;
- 19 • Consolidating consultation notices and format internally and across
20 agencies;
- 21 • Considering and protecting the confidentiality of tribally sensitive
22 information; and

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- 23 • Institutionalizing a nation-to-nation relationship that seeks tribal input and
24 consent.

REPORT

Tribal consultation is the process by which tribal governments and communities interact with local, state or federal governments and agencies. American Indian policy in the United States has, to some degree, always been informed by an ideal of consensual relations between governments, even if this relationship has often been dishonored in practice. Hundreds of treaties commemorate agreements between tribes and the United States regarding governance, property, trade, and other matters. While Congress purported to end treaty making with tribes in 1871 through the passage of 25 U.S.C. Section 71, treaties remain the supreme law of the land today. Contemporary law and policy, focused on principles of tribal self-determination, have renewed the federal-tribal relationship and reinforced the federal government's trust responsibility to tribes.

The desire to strengthen federal-tribal relations through consultation has permeated federal policy for the last half century. Yet, the implementation of federal-tribal consultation is currently unfulfilled. There are instances in which federal agencies:

- Have no consultation policy whatsoever.
- Have inconsistent policies and/or practices from other agencies.
- Fail to follow their consultation policies, with no accountability measures.
- Treat consultation as merely checkbox procedural requirements regardless of actual tribal engagement.
 - Such as initiating consultation after all the relevant determinations have already been made, or
 - Conflating tribal interests with those of the general public.
- Perceive consultation as a one-sided event, in which the federal government solely develops the agenda, limits engagement to one meeting, or restricts the flow of information.
- Treat consultation with one tribe as satisfying consultation with all tribes for all issues.

Critically, because consultation has never been comprehensively codified, tribes have minimal statutory relief to compel federal agencies to engage in consultation or hold agencies accountable when they failed to engage meaningfully. The results have been disastrous for tribes, have resulted in reactionary and adversarial posturing, and have been immensely costly for tribes, the federal government, and the greater American polity.

Despite the lack of codified consultation requirements and expectations, consultation with tribal governments, when conducted meaningfully, is nevertheless the most effective and efficient means for acknowledging and braiding tribal concerns into the vast array of projects and interests that impact tribes, including, but not limited to, environmental and cultural resource protection. Consultation is a manifestation of the nation-to-nation federal-tribal relationship. It can facilitate large-scale resource management planning, incorporating tribal concerns early and thereby limiting costly and harmful intrusions later.

It can be an efficient and trusted mechanism for addressing unforeseen impacts. It is good federal and tribal governance.

Moreover, meaningful consultation has been identified internationally as a tool of good governance. The UN Declaration on the Rights of Indigenous Peoples calls for nation-States to consult and cooperate, in good faith with Tribal Governments in order to obtain their free, prior and informed consent (or FPIC), including before adopting and implementing legislative or administrative measures that may affect them.¹

Prior Federal Consultation Guidance

There are presently very few codified consultation requirements.² Two legislative examples of such institutionalized federal consultation protocols include the Section 106 process of the National Historic Preservation Act (NHPA)³ and the Native American Graves Protection and Repatriation Act (NAGPRA).⁴ Section 106 requires federal agencies to consider the effects on federal lands of different projects they assist, fund, or approve. If a federal or federally-assisted project has the potential to affect a historic property, Section 106 gives any interested parties, as well as the public and the Advisory Council on Historic Properties, the chance to weigh in.⁵ Similarly, NAGPRA requires that federal agencies and federally-funded museums inventory and provide written summaries of Native American human remains and other cultural items in their possession. The agencies and museums must attempt to reach agreements with tribes on the repatriation of these remains and sacred objects, as well as funerary or culturally significant ancestral property.⁶

In 2000, President Clinton issued Executive Order 13175 instructing government agencies to “respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.”⁷ To do so, Executive Order 13175 calls for agencies to implement processes “to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal

¹ G.A. Res. 61/295, annex, United Nations Declaration on the Rights of Indigenous Peoples, Art. 19 (Sept. 13, 2007).

² An example is the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370.

³ National Historic Preservation Act of 1966 (NHPA), Pub. L. 89-665, Sec. 106, codified as 54 U.S.C. § 306108.

⁴ Native American Graves Protection and Repatriation Act of 1990 (NAGPRA), 25 U.S.C. 3001-13; *see also* US Senate Report 101-473.

⁵ Further implementation of consultation protocols regarding Historic and Cultural Properties includes the National Register Bulletin 38, a set of Guidelines for Evaluating and Documenting Traditional Cultural Properties. These technical guidelines allow for Tribes to apply for inclusion in the National Register of Historic Places and has been particularly important for Indian tribes and Native Hawaiians seeking to protect culturally sacred or important places. [National Register Bulletin 38](#), U.S. Department of the Interior National Park Service Interagency Resources Division, NPS.gov (1992).

⁶ [Native American Graves Protection and Repatriation Act: Facilitating Respectful Return](#), NPS.gov

⁷ Executive Order No. 13175, [Consultation and Coordination with Indian Tribal Governments](#), 65 Fed. Reg. 67,249 (Nov. 6, 2000).

implications.”⁸ The Executive Order resulted in the creation of numerous internal policies committing to consultation and collaboration with tribal governments.⁹ Executive Order 13175 has proven to be an important expression of federal policy towards the nation-to-nation relationship with tribes, as well as a substantive push for federal agencies to build out their consultation infrastructure.

Unfortunately, these consultation policies have remained—in part due to their patchwork nature—poorly coordinated and largely an afterthought.¹⁰ Policies can vary, compelling tribes to master the idiosyncratic methods of different federal agencies for no substantive reason. Other federal agencies fail to have any substantive consultation policy, necessitating a reactive and frequently costly response to federal decisions that failed to engage tribes at the outset. This was most recently evidenced in the cancellation of plans to sell the Seattle branch of the National Archives due in part to the failure to consult with the impacted tribes.¹¹

Following President Clinton’s Executive Order there have been multiple commitments to continue implementing and bolstering tribal consultation policy. On November 5, 2009, President Obama signed a Presidential Memorandum, directing the head of each agency to develop a detailed plan of action to implement President Clinton’s Executive Order 13175. The Memorandum reiterated the push towards executive departments and agencies engaging in “regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications.”¹² Shortly thereafter, at the White House Tribal Nations Conference on December 15, 2010, President Obama also announced that the United States would “lend its support” to the United Nations Declaration on the Rights of Indigenous Peoples.¹³ Included in the Declaration is the process of Free, Prior, and Informed Consent (FPIC), principles which aim to establish effective and meaningful nation-to-nation consultation with tribal governments.

Most recently, on January 26, 2021, President Biden signed a memorandum titled “Tribal Consultation and Strengthening Nation-to-Nation Relationships,” declaring that “it is a priority of my Administration to make respect for Tribal sovereignty and self-governance, commitment to fulfilling Federal trust and treaty responsibilities to Tribal Nations, and regular, meaningful, and robust consultation with Tribal Nations cornerstones of Federal

⁸ *Id.*

⁹ Colette Routel & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. MICH. J. L. REFORM 417, 444 n.152 (2013).

¹⁰ *Id.* at 444-47 (detailing failure of the Department of the Interior to consult with Tribes regarding proposed reorganization divorcing the Office of Indian Education Programs from the Bureau of Indian Affairs).

¹¹ Liz Ruskin, “[In a win for Alaska tribes, Biden admin nixes plan to sell National Archives building in Seattle](#),” Alaska Public Media (Apr. 8, 2021).

¹² President Obama, *White House Memorandum For The Heads Of Executive Departments And Agencies on Tribal Consultation* (November 5, 2009).

¹³ National Congress of American Indians, “[President Obama Announces U.S. Support for United Nations Declaration on the Rights of Indigenous Peoples](#),” NCAI.org (Dec. 16, 2010).

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Indian policy.”¹⁴ The Presidential Memorandum, like President Obama’s before it, goes on to convey its commitment to fulfilling the consultation requirements of President Clinton’s Executive Order 13175. President Biden directs “each agency” to submit “a detailed plan of actions the agency will take to implement the policies and directives of Executive Order 13175” which are to “be developed after consultation by the agency with Tribal Nations and Tribal officials.”¹⁵

The memorandum serves as a valuable commitment to reaffirming the strength of tribal consultation protocol in the United States. However, it does not provide concrete examples of what strong consultation looks like. Critically, neither Executive Order 13175 nor the Presidential Memorandums provide a cause of action to compel federal agencies to comply with the tribal consultation protocol mandate, nor hold the substance of or compliance with those protocols accountable.

The RESPECT Act

Despite the Presidential memos and stated commitments over the years, tribal nations have continued to experience lapses in consultation and struggle with an ongoing inability to hold the United States government accountable for its trust and treaty responsibilities. On March 16, 2022, Rep. Raúl Grijalva (D-Arizona) introduced H.R.3587, the Requirements, Expectations, and Standard Procedures for Effective Consultation with Tribes Act, to address centuries of mistreatment by the federal government.

The bill, also known as the RESPECT Act, seeks to solidify the consultation requirement, making tribal consultation mandatory – not merely recommended – for U.S. government agencies. The bill would establish criteria for identifying tribal impacts, conducting outreach to tribal governments, and initiating tribal consultation sessions. Significantly, the RESPECT Act would also ensure that tribes can take the U.S. government to court for lapses in the process.

The RESPECT Act calls for a detailed floor of consultation expectations, in which all federal agencies should have a robust tribal consultation policy that:

- Tribal input prior to any proposed federal activity or finalizing any Federal regulatory action that may have tribal impacts;
- Meaningful early notice of activity or regulatory action impacting to tribal interests, especially regarding sacred sites;
- Permitting a range of consultations in form, substance, and length depending on the needs and expressed desires of the affected tribal government;
- Consolidating consultation notices and format internally and across agencies;
- Considering and protecting the confidentiality of tribally sensitive information; and
- Institutionalizing a nation-to-nation relationship that seeks tribal input and consent.

Free, Prior, and Informed Consent Should Be Our Framework

¹⁴ President Biden “[Tribal Consultation and Strengthening Nation-to-Nation Relationships](#)” (January 26, 2021).

¹⁵ Id.

Free, Prior and Informed Consent, or FPIC, is a framework for the federal government to engage with tribes in a way that maintains and respects tribal self-determination and sovereignty. FPIC is rooted in Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples.¹⁶ It is an information-gathering and decision-making framework that can help bolster the traditional understanding of consultation from perceiving tribes as obstacles to sovereign partners. Notably, Article 19 of the Declaration calls on States, including the United States, to

[C]onsult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.¹⁷

Because FPIC promotes the partnership aspect of consultation, it is an ideal framework for transforming consultation policy from a list of checkboxes to a genuine interaction between nations. FPIC goes further than the current U.S. domestic consultation regime and recognizes that tribal stakeholders have the right to influence and consent¹⁸ to any potential project or piece of legislation that implicates their interests.

In Line with Existing ABA Policy

In February 2021, the ABA adopted Resolution 21M107D, adopting the articles of the U.N. Declaration on the Rights of Indigenous Peoples as ABA policy, including supporting the implementation of free, prior, and informed consent as a procedure for engagement with Indigenous peoples. The Declaration is an international expression of human rights and Indigenous rights norms that have long been embraced by the ABA. The ABA has a long policy history of supporting tribes as separate sovereigns with the rights to self-determination and self-government.

ABA Policy Regarding Tribal Sovereignty

The ABA has significant policy regarding specifically Indigenous self-determination and the critical need to support tribes in their own self-government. Resolution 15M111A adopted the recommendations contained in the Indian Law and Order Commission's November 2013 Report, noting "tribes, as sovereign, should have the option to fully or partially opt out of [the] jurisdictional maze."¹⁹ Resolutions 20A116 and 12A301 urged Congress to strengthen tribal jurisdiction to address crimes of gender-based violence

¹⁶ G.A. Res. 61/295, annex, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

¹⁷ See The White House Office of Press Secretary, "[Remarks by the President at the White House Tribal Nations Conference](#)" (Dec. 16, 2010); United States State Department, "[Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples: Initiatives to Promote the Government-to-Government Relationship and Improve the Lives of Indigenous Peoples](#)," (Jan. 12, 2011).

¹⁸ See H.R. 3587, 117th Cong. Sec. 203-204 (2022).

¹⁹ ABA 15M111A, <https://www.americanbar.org/content/dam/aba/administrative/crsj/committee/feb-15-make-native-america-safer.authcheckdam.pdf>.

committed on tribal lands in the reauthorization of the Violence Against Women Act.²⁰ Resolution 08A117A urged for long-term funding for tribal justice systems, noting “the effective operation of tribal courts is essential to promote the sovereignty and self-governance of the Indian tribes.” As the Supreme Court has recognized: “Tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development.”²¹

Resolution 15A113 urged for the prompt implementation of certain recommendations of the U.S. Attorney General’s Advisory Committee on American Indian/Alaska Native Children Exposed to Violence report.²² That includes calling on Congress to restore the inherent authority of tribes to assert full criminal jurisdiction, for the federal executive branch to engage in comprehensive consultation with tribes, and for the development of culturally-specific tribal codes.

The ABA has long taken a stance supporting Native peoples, including upholding the federal responsibility to tribes. In 1980, the ABA adopted 80M110, urging strict adherence to Indian treaty obligations. The report to the Resolution notes:

The trust responsibility imposes on the United States an important standard of conduct. In *Seminole Nation v. United States*, 316 U.S. 286 (1942), the Supreme Court stated that the United States “has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealing with the Indians should therefore be judged by the most exacting fiduciary standards.” *Id.* at 297. ... Under the trust responsibility to Indian tribes, specifically recognized by Congress and the courts and secured by the treaties, statutes, and 150 years of judicial precedent, Indian tribes should be able to look to the future confident that the federal government will approach its obligation to Indian tribes in a manner consistent with its duty of protection.²³

In addition, the ABA has expressed support for Indigenous self-determination in other arenas, including child welfare. The ABA has explicitly supported the Indian Child Welfare Act, and its constitutionality.²⁴ Resolution 02A110 urges the resolution of Indian reserved eater right claims, noting “the opportunity to address historic injustices and fulfill the continuing federal trust obligation to support viable tribal communities....” Resolution 90M106A urges for an amendment to the American Indian Religious Freedom Act.²⁵

²⁰ ABA 12A301, <https://www.americanbar.org/content/dam/aba/administrative/crsj/committee/aug-12-violence-against-women.authcheckdam.pdf>.

²¹ ABA 08A117A, at 3, https://www.americanbar.org/content/dam/aba/directories/policy/2008_am_117a.authcheckdam.pdf

²² ABA 15A113, <https://www.americanbar.org/content/dam/aba/administrative/crsj/committee/aug-15-violence-against-children.authcheckdam.pdf>

²³ ABA 80M110, at 2-3.

²⁴ ABA 13A111A at 4, <https://www.americanbar.org/content/dam/aba/administrative/crsj/committee/feb-15-make-native-america-safer.authcheckdam.pdf>

²⁵ ABA 90M106A.

Respectfully submitted,

Beth K. Whittenbury, Chair
Section of Civil Rights and Social Justice

August 2022

GENERAL INFORMATION FORM

Submitting Entity: Section of Civil Rights and Social Justice

Submitted By: Beth K. Whittenbury, Chair

1. Summary of the Resolution(s).

This Resolution urges federal, state, local and territorial governments to prioritize tribal consultation and urges the passage of the RESPECT Act [H.R.3587] or similar legislation in order to strengthen the United States government-to-government relationship with tribes and better effectuate its trust responsibility through codifying tribal consultation processes.

2. Indicate which of the ABA's Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

The Resolution seeks to advance Goal 3 to eliminate bias and enhance diversity. In acknowledging that the government-to-government relationship between tribes and the federal government should require meaningful and consistent tribal consultation, the ABA can play a role in addressing misunderstandings about tribal sovereignty and the United States' trust and treaty responsibilities.

This Resolution additionally advances Goal 4, to advance the rule of law, by urging the passage of codified processes for federal consultation with tribes. These processes are currently absent and when in place, can assist with effectuating the federal government's trust responsibilities, and ensure the applicability of the rule of law in the future.

3. Approval by Submitting Entity.

Approved by the Section of Civil Rights and Social Justice as of April 28, 2022.

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

No.

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

21M107D adopts the articles of the UN Declaration on the Rights of Indigenous Peoples as ABA policy, including supporting the implementation of free, prior, and informed consent as a procedure for engagement with Indigenous Peoples. This

Resolution would further enhance the ABA's embrace of human rights and Indigenous rights norms.

15M111A adopts the recommendations contained in the Indian Law and Order Commission's November 2013 Report, noting "tribes, as sovereign, should have the option to fully or partially opt out of [the] jurisdictional maze."

20A116 and 12A301 urge Congress to strengthen tribal jurisdiction to address crimes of gender-based violence committed on tribal lands in the reauthorization of the Violence Against Women Act.

08A117A urges for long-term funding for tribal justice systems, noting "'the effective operation of tribal courts is essential to promote the sovereignty and self-governance of the Indian tribes.' As the Supreme Court has recognized: 'Tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development.'"

15A113 urges for the prompt implementation of certain recommendations of the U.S. Attorney General's Advisory Committee on American Indian/Alaska Native Children Exposed to Violence report. That includes calling on Congress to restore the inherent authority of tribes to assert full criminal jurisdiction, for the federal executive branch to engage in comprehensive consultation with tribes, and for the development of culturally-specific tribal codes.

80M110, urging strict adherence to Indian treaty obligations.

13A111A supports the Indian Child Welfare Act, and its constitutionality.

02A110 urges the resolution of Indian reserved eater right claims, noting "the opportunity to address historic injustices and fulfill the continuing federal trust obligation to support viable tribal communities...."

90M106A urges for an amendment to the American Indian Religious Freedom Act.

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

N/A

7. Status of Legislation. (If applicable)

May 20, 2021 – Hearings Held by the House Natural Resources Subcommittee for Indigenous Peoples of the United States Prior to Introduction and Referral.

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May 28, 2021 – Introduced in the U.S. House of Representatives. Referred to the Committee on the Judiciary, in addition to the Committee on Natural Resources, for a period to be subsequently determined by the Speaker, in each case for the consideration of such provisions as fall within the jurisdiction of the committee concerned.

June 28, 2021 – Referred to the Subcommittee for Indigenous Peoples of the United States by the House Committee on Natural Resources.

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

The cosponsors will work with relevant internal and external stakeholders and the Governmental Affairs Office to ensure the implementation of the policy.

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

The adoption of the proposed resolution would result in indirect costs related to ABA and Section staff time devoted to advocacy for the subject matter of the resolution, as part of overall staff responsibilities.

10. Disclosure of Interest. (If applicable)

N/A

11. Referrals.

Commission on Disability Rights
Commission on Racial and Ethnic Diversity in the Profession
Commission on Women in the Profession
Criminal Justice Section
Diversity and Inclusion Center
International Law Section
Judicial Division
Section of State and Local Government Law
Administrative Law Section
Government and Public Sector Lawyers Division
Public Contract Law
Young Lawyers Division

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

Paula Shapiro
Section of Civil Rights and Social Justice

Tel.: (860) 508-5550

Email: paula.shapiro@americanbar.org

13. 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.

Mark I. Schickman

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EXECUTIVE SUMMARY1. Summary of the Resolution.

This Resolution urges the prioritization of tribal consultations by federal, state, local, and territorial governments and the passage of the RESPECT Act [H.R.3587, 117th Congress] or similar legislation by Congress in order to strengthen the United States government-to-government relationship with tribes and effectuate its trust responsibilities by codifying meaningful tribal consultation processes.

2. Summary of the issue that the resolution addresses.

The Resolution addresses the lack of consistent formalized processes and requirements surrounding tribal consultation. The lack of uniform codified tribal consultation processes results in an inconsistency in how and if consultation is conducted by the federal government within and under each new administration.

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

This Resolution calls for legislation to establish minimum requirements for meaningful tribal consultation by the federal government when federal activities, policies, and regulations affect tribal members and interests and Alaska Native shareholders. These requirements support and strengthen the federal government's trust responsibility and government-to-government relationship with tribes.

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

None have been identified.

AMERICAN BAR ASSOCIATION
YOUNG LAWYERS DIVISION
REPORT TO THE HOUSE OF DELEGATES
RESOLUTION

- 1 RESOLVED, That the American Bar Association urges Congress to amend the
- 2 Supplemental Nutritional Assistance Program ("SNAP"), 7 U.S.C. Ch. 51, to afford States
- 3 the ability to permit SNAP to purchase shelf-stable food and other emergency necessities,
- 4 within a certain time period, in preparation for a disaster. ("Preparedness SNAP");
- 5
- 6 FURTHER RESOLVED, That the American Bar Association urges the Secretary of the
- 7 U.S. Department of Agriculture to require Preparedness SNAP as part of each state's
- 8 SNAP plan; and
- 9
- 10 FURTHER RESOLVED, That the American Bar Association encourages all state, local,
- 11 territorial and tribal governments to participate in Preparedness SNAP.

REPORT

The two federal programs that address disaster food insecurity —the Supplemental Nutrition Assistance Program (“SNAP”) and Disaster SNAP (“D-SNAP”)—are contingent upon a precedent disaster or event. Rather than provide an opportunity for the individual to prepare for a disaster, these programs force individuals to wait and suffer the harm of uncertainty. This resolution aims to target food security in disasters by affording options *before* the disaster.

SNAP is a program of the Food and Nutrition Service of the United States Department of Agriculture. SNAP aims to end hunger and promote self-sufficiency by offering a monthly allotment to supplement the food budget of families in need.¹ SNAP programs are federally funded and state-regulated. SNAP eligibility for individuals and families is based on income status, household size, and available resources.²

One of the federal programs that assists in food security after a disaster is Disaster-SNAP. D-SNAP is only available to SNAP participants *after* the President has declared a disaster *and* the state governor has requested this specific assistance.³ SNAP also has a program designed to assist in food security after a disaster or emergency. SNAP regulations allow for food damaged in a household misfortune to be replaced, under a time-limited circumstance.⁴ The loss must be beyond the household’s control, and D-SNAP must not be available. However, these options, while well-intentioned, occur far too late in the disaster cycle to effectively ensure food security and resiliency in disasters.

Retroactive disaster assistance can have the effect of prolonging potential unnecessary reliance on governmental and community efforts for low-income individuals and families. Further, it denies meaningful opportunities to build resiliency. By affording a proactive opportunity for preparedness, Americans with low-income can mitigate reliance on assistance for food security. Therefore, the USDA should amend SNAP regulations to include a preparedness program, Preparedness SNAP (“P-SNAP”), which would allow recipients to purchase shelf-stable foods and other emergency necessities *before* a disaster occurs.

1. Financial insecurity limits preparedness

¹ Food & Nutrition Serv., U.S. Dep’t of Agric., *Supplemental Nutrition Assistance Program (SNAP)*, <https://www.fns.usda.gov/snap/supplemental-nutrition-assistance-program> (last visited June 24, 2021).

² Food & Nutrition Serv., U.S. Dep’t of Agric., *SNAP Eligibility*, <https://www.fns.usda.gov/snap/recipient/eligibility>.

³ U.S. Dep’t of Agric., *Disaster Supplemental Nutrition Assistance Program (D-SNAP)* (last visited June 16, 2021), <https://www.disasterassistance.gov/get-assistance/forms-of-assistance/5769>

⁴ U.S. Dep’t of Agric., *Disaster Supplemental Nutrition Assistance Program (D-SNAP)* (last visited June 16, 2021), <https://www.disasterassistance.gov/get-assistance/forms-of-assistance/5769>

Poverty rates increase in disaster-affected areas at a higher rate than in unaffected areas.⁵ According to one study, average poverty rates increased by 18.1% from 1970 to 2000.⁶ Meanwhile, the disaster-affected neighborhoods experienced a 21.4% poverty rate increase.⁷ The disparity in poverty rates between neighborhoods affected and unaffected by a disaster is greatest in low-income areas, reinforcing the concept of compounding inequities.⁸ It takes an additional 18.6 years for disaster-affected neighborhoods to return to the same level of poverty as unaffected areas, thereby exacerbating wealth inequality.⁹

Food insecurity is one societal inequity that is a component of financial insecurity. It is also perpetuating poverty. Disasters exacerbate food insecurity; thus, disasters perpetuate poverty.¹⁰ Preparedness efforts and activities can mitigate this increase in poverty. The cycle is repetitive, unless something is done to stop the cycle. Preparedness efforts build resiliency. Providing assistance, training, and education focused on preparedness, before a disaster or emergency, can help reduce the needs during recovery. The creation of preparedness activities for Americans experiencing food insecurity affords one opportunity for relief.

Despite general recognition of the importance of preparedness efforts, 26% of people believe preparing for a disaster is too expensive. Even among people who self-identified as being prepared for an emergency, there were still barriers and motivators.¹¹ For example, 14.4% of people reported that they would be motivated to prepare if they received a discount on basic supplies.¹² Furthermore, 16.7% of individuals reported that they experienced preparedness barriers because they could not afford to buy supplies.¹³ Finally, 8.3% of individuals reported they did not know where to begin or what to do to prepare.¹⁴

The Federal Emergency Management Agency (FEMA) identified individuals with economic insecurity and those who lack savings and insurance as populations vulnerable to the impact of disasters. Individuals without expendable income are less likely to spend the time and money necessary to prepare for a disaster or emergency. FEMA's 2020 National Preparedness Report states that only 50% of adults have, at most, \$700 saved

⁵ Dalbyul Lee, *The Impact of Natural Disasters on Neighborhood Poverty Rate: A Neighborhood Change Perspective*, JOURNAL OF PLANNING, EDUCATION AND RESEARCH, 447, 453 (Apr. 11, 2018) <https://journals.sagepub.com/doi/10.1177073945X18769144>.

⁶ *Id.* at 453.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 453-54.

¹⁰ PREVENTIONWEB, *Poverty and Inequality*, <https://www.preventionweb.net/disaster-risk/risk-drivers/poverty/> (last visited June 24, 2021).

¹¹ Judy Kruger, Brenda Chen, Suzanne Heitfield, Lauren Witbar, Crystal Bruce, & Dana L. Pitts, *Attitudes, Motivators, and Barriers to Emergency Preparedness Using the 2016 Styles Survey*, HEALTH PROMOTION PRAC. VOL. 21, No. 3, 448, 452 (2020), <https://journals.sagepub.com/doi/pdf/10.1177/1524839918794940>.

¹² *Id.* at 452 Table 2.

¹³ *Id.*

¹⁴ *Id.* at 10.

for emergencies. Furthermore, nearly 40% of Americans would not have the resources needed to pay for an unexpected \$400 cost. Those who are facing food insecurity are most concerned with securing their next meal and are unable to prepare for disasters and emergencies.

Specific to food security, a 2014 Hunger in America Study revealed that the food-insecure populations have to prioritize necessities; 69% reported choosing between food and utilities, 67% between food and transportation, 66% between food and medical care, 57% between food and housing, and 31% between food and education.¹⁵ A sociologist interviewing families with food insecurities found, “[p]arents avoid paying other bills, they will skip meals themselves.”¹⁶ It is unreasonable to expect SNAP recipients to use their limited allowance to purchase shelf-stable foods to prepare for emergencies. Recipients should not have to choose between being prepared and being fed.

A study conducted in 2020, *Disease and Disaster: Navigating Food Insecurity in a Community Affected By Crises During COVID-19*, found that “low income residents with limited access to food are less likely to have the resources needed to secure food during—and post—disaster.” This study was based on the experience of individuals in Oconee County, South Carolina. Oconee County is a predominantly rural area where many residents experience food insecurity. The county was hit concurrently by two major disasters, (1) a devastating tornado in April of 2020, and (2) the Covid-19 pandemic. Many individuals received SNAP benefits before either disaster, and all participants reported receiving community support, such as assistance from food banks. Survivors were unable to pay for all living expenses. This forced them to choose between basic necessities such as food or electricity. The study revealed a disparity between the responses of people within the same community, Mill Village. Those who already faced food insecurity were struggling to meet their most basic needs, while the others in the community were equipped to be more resilient. While the latter group voiced concerns about the quality of their children’s education post-disaster, the former group was still facing fears about their children’s access to food.¹⁷

These reports and studies reveal the importance of having access to resources *before* a disaster is declared. Additionally, the 2020 study revealed that the loss of infrastructure resulting from the disaster impaired food quality and limited food access. Many healthy foods were unavailable because of food shortages and increased prices. Many participants were forced to resort to “junk” foods. Therefore, government assistance that seeks to provide low-income households with “a more nutritious diet” cannot suddenly make those healthy products available in a disaster. Neither D-SNAP nor SNAP

¹⁵ Feeding America, *Compromises & Coping Strategies*, <https://www.feedingamerica.org/hunger-in-america/impact-of-hunger> (last visited June 24, 2021).

¹⁶ Victoria Bouloubasis, *The State of Hunger Driving COVID-19 in the U.S.*, SELF (June 11, 2021), <https://www.self.com/story/hunger-during-covid-19>.

¹⁷ Andrew S. Pyle, Michelle Eichinger, Barry A. Garst, Catherine Mobley, Sarah F. Griffin, Leslie H. Hossfeld, & Mike McGirr, *Disease and Disaster: Navigating food insecurity in a cmtly affected by crises during COVID-19*, J. OF AGRIC., FOOD SYSTEMS, & CMTY DEV., 4 (2020), ISSN: 2152-0801, <https://www.foodsystemsjournal.org/index.php/fsj/article/view/970/943>.

replacement provides the same preparedness or peace of mind as having a supply of shelf-stable food pre-disaster.

2. The American Bar Association's position towards SNAP

The American Bar Association ("ABA") has recognized the importance of public assistance programs while also supporting improvements to the efficiency and effectiveness of their administration and procedures. This Resolution is consistent with those tenets in an attempt to improve the system.

This proposed Resolution is consistent with ABA policy as adopted in 14M107, which sought to "promote the human right to adequate food and nutrition for all through increased funding, development and implementation of strategies to prevent infringement of that right."¹⁸

In 2018, the ABA openly opposed a proposition to reduce SNAP funding and availability. The ABA Governmental Affairs Office sent letters to Capitol Hill emphasizing the importance of SNAP and the impact that a reduction of benefits would have on the most vulnerable communities in America. The ABA was steadfast in defending the "right to adequate nutrition."

In a 2019 article, the ABA stated, "SNAP lifts families out of poverty by freeing up money that would otherwise go toward food, allowing it to instead go toward other necessities like clothing, housing, and medical expenses."¹⁹ This is especially relevant when SNAP recipients become disaster survivors facing the new, unexpected costs of repairs, relocation, evacuation, and replacement. Even with FEMA reimbursement, these costs are often paid out of pocket. This article also recognized that food assistance programs are ineffective in meeting all intended needs or reaching all intended groups. "People should not have to rely on the charity of food banks or kind neighbors to survive."²⁰ Remedying impaired access to resources and empowering individual independence are the goals of government assistance. Disaster preparedness is a necessary aspect of achieving those goals.

This Resolution seeks to make SNAP more complete and to build resilience for Americans experiencing food insecurity. Amending SNAP would allow disaster survivors more autonomy after an event, unlike the people of Oconee County. P-SNAP would empower them to be prepared and resilient. *Disease and Disaster* reiterated this ideology when some participants refused to use community services such as food banks, not for

¹⁸ Alexandra Holden, *Solve Hunger with Anti-Poverty Policies, Not Anti-Hunger Policies*, AM. BAR ASS'N (Nov. 30, 2019),

https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/economic-justice/solve-hunger-with-anti-poverty-policies--not-anti-hunger-police/.

¹⁹ *Id.*

²⁰ *Id.*

lack of necessity, but for self-efficacy and independence.²¹ Preparedness programs can be a more efficient use of resources through fostering autonomy and resilience.

3. A practical approach to a pervasive issue

Disasters have become more frequent in recent years.²² In the last eight years, there were 248 major federal natural disaster declarations in the U.S., exclusive of state and local emergency declarations.²³ In 2020 the U.S. saw 22 separate billion-dollar weather and climate disasters.²⁴ This number set a new annual record that exceeded the previous record of 16 set in 2017 and 2011.²⁵ The observed trend is that extreme weather events with dramatic impacts are likely to continue.²⁶

Families living with low socioeconomic status (“SES”) are more likely to live in areas at a higher risk of disaster.²⁷ On the other hand, people who benefit from higher SES are more likely to have their assets both protected in banks and widely distributed in various locations and interests.²⁸ Individuals of low SES tend to maintain savings concentrated in tangible objects that could be damaged in seconds by a natural disaster.²⁹

One study, based on the experience of individuals living in the Rockaway Peninsula of New York City during Superstorm Sandy, found that not only were high SES households less worried about access to food, but they were also 4.5 times more likely to leave the Rockaways to obtain food than households with low SES.³⁰ This could be because families who have low-income are more reliant on public transportation. Public transportation is often unavailable during disasters, resulting in greater difficulty accessing grocery stores.³¹ Such families are more reliant on public systems in other ways, such as SNAP, as well.

Much like natural disasters, poverty is an ever-present reality in America. There were 39,884,000 SNAP recipients in 2020, an increase of approximately 4 million individuals

²¹ See *supra* note 16, at 11.

²² Hannah Ritchie & Max Roser, *Natural Disasters*, OUR WORLD IN DATA (Nov. 2019), <https://ourworldindata.org/natural-disasters>.

²³ Legal Serv. Corp., *LSC Disaster Task Force*, <https://www.lsc.gov/initiatives/lsc-task-forces/lsc-disaster-task-force> (last visited Jun. 24, 2021).

²⁴ Adam B. Smith, *2020 U.S. billion-dollar weather and climate disasters in historical context*, NOAA (Jan. 8, 2021), <https://www.climate.gov/news-features/blogs/beyond-data/2020-us-billion-dollar-weather-and-climate-disasters-historical>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ See *supra* note 3, at 7. Substance Abuse & Mental Health Serv. Admin., *Disaster Technical Assistance Center Supplemental Research Bulletin, Greater Impact: How Disasters Affect People of Low Socioeconomic Status*, SAMHSA, 9 (Jul. 2017),

²⁸ *Id.* at 9

²⁹ *Id.* at 9

³⁰ *Id.* at 10

³¹ *Id.* at 10

from 2019³². The increase in SNAP recipients between 2019 and 2020 correlated with a drastic rise in food insecurity during the Covid-19 pandemic. Feeding America reports that food insecurity was at its lowest in over 20 years (10.9%) before the pandemic.³³ They estimate that 1 in 7 individuals (14.3%) may have experienced food insecurity in 2020.³⁴ This is likely due to the pandemic's economic shocks, which increased unemployment and poverty rates, impacting food security and the need for government assistance.³⁵ Additionally, the Center for Strategic & International Studies estimates that 50 million Americans were food insecure in 2020, reflecting an increase of 10 million from 2019.³⁶

In December of 2020, the COVID-19 relief package increased SNAP eligibility by \$28 per person per month for the first six months of 2021.³⁷ The American Rescue Plan Act then further extended this additional allotment through September.³⁸ These provisions were made available in all states and territories participating in SNAP.³⁹ In light of the increase of numbers of Americans reliant on government assistance and the inevitability of concurrent disasters, something must be done to increase preparedness and resilience for those living on the margins of society. "Poverty reduction can be considered as disaster risk management, and disaster risk management can be considered as poverty reduction."⁴⁰

This Resolution proposes to extend SNAP provisions by urging the amendment of the program's governing legislation, 7 U.S.C. § 2011-2036, to allow recipients to purchase shelf-stable food and water as a preparedness measure. Such a proposed amendment would afford a Preparedness SNAP program that would provide individuals and families with the resources needed and choice to prepare for emergencies. P-SNAP would foster resilience and deploy resources efficiently to mitigate potential hardship due to financial insecurity and the lack of access to preparedness.

P-SNAP would be a requirement of each state participating in SNAP. P-SNAP should function according to the prospective SNAP calculating system where the issuance month (when participants receive their allotment) is the same as the budgeting month (the

³² Food & Nutrition Service, *SNAP Data Tables*, U.S. DEP'T OF AGRIC. (June 11, 2021), <https://www.fns.usda.gov/pd/supplemental-nutrition-assistance-program-snap>.

³³ Feeding America, *The Impact of the Coronavirus on Food Insecurity in 2020 & 2021*, 2 (March 2021), https://www.feedingamerica.org/sites/default/files/2021-03/National%20Projections%20Brief_3.9.2021_0.pdf

³⁴ *Id.* at 3.

³⁵ *Id.*

³⁶ Center for Strategic & International Studies, *Data Unpacked – America's Food Security Crisis* (Mar. 3, 2021), <https://www.youtube.com/watch?v=lvuha2cbWXE&t=29s>.

³⁷ Center on Budget & Policy Priorities, *States are Using Much-Needed Temporary Flexibility in SNAP to Respond to COVID-19 Challenges*, (June 3, 2021), <https://www.cbpp.org/research/food-assistance/states-are-using-much-needed-temporary-flexibility-in-snap-to-respond-to>.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Stephane Hallegatte, Adrien Vogt-Schilb, Julie Rozenberg, Mook Bangalore, & Chloe Beaudet, *From Poverty to Disaster and Back: a Review of the Literature*, ECONOMICS OF DISASTERS AND CLIMATE CHANGE, 223 (Jan. 2020), <https://link.springer.com/article/10.1007/s41885-020-00060-5>.

monthly income for which the allotment amount is based).⁴¹ Every eligible SNAP recipient should also be eligible for P-SNAP, without needing to provide further documentation. Their plan should allow recipients the opportunity to purchase preparedness items outlined in the recommendations below according to their respective time frames.

There are practical guidelines available to govern the P-SNAP allotment. For example, emergency supply kits should include enough food and water to last each household member three to five days.⁴² Individuals should allocate one gallon of water per person for each day.⁴³ FEMA recommends that shelf-stable foods such as dried fruits, crackers, potatoes, and boxed powdered milk be used within six months.⁴⁴ Canned condensed-meat and vegetable soups, canned fruits and vegetables, peanut butter, cereals, canned nuts, and vitamins should be used within one year. Wheat, rice, and dried pasta can be stored indefinitely. Other foods could last a year or indefinitely. Based on these shelf-stable timelines, SNAP recipients should be allowed to purchase enough emergency food and water for their household within an appropriate time frame. For example, every six months, a family of four could purchase enough shelf-stable food for three days and 12-20 gallons of water. Six months later, they should receive another allotment to replace those items that have expired.

State, local, tribal and territorial officials could raise awareness to low-income individuals about P-SNAP at community events and through trusted partners. Partnering with community-based organizations such as local nonprofits, consignment shops, and advocacy groups could effectively educate individuals about access to P-SNAP.⁴⁵ The message and information must be effective; thus, it must be accessible for those with language, sensory and cognitive needs.⁴⁶ State and local events that promote tax-free events for emergency supplies and events occurring in national preparedness month (September) would be great opportunities to promote P-SNAP.⁴⁷ It is especially important that social workers, other advocates, and those providing disaster preparedness activities who would be connecting participants with SNAP resources are aware and educated about the availability of P-SNAP.

Until poverty is no longer an issue, we must seek to build systems that allow for equitable access and individual resilience amidst the uncertainty. A P-SNAP program would decrease reliance and build resiliency by helping communities navigate the complex and often financially daunting task of emergency preparedness. Preparedness SNAP is a both

⁴¹ Food & Nutrition Serv., *SNAP Quality Control Review Handbook*, U.S. DEP'T OF AGRIC., 23 (Oct. 2018), https://fns-prod.azureedge.net/sites/default/files/snap/FNS_310_Handbook.pdf.

⁴² Ready.gov, *Build a Kit*, <https://www.ready.gov/kit> (last visited June 17, 2021).

⁴³ *Id.*

⁴⁴ Fed. Emergency Mgmt. Agency, *Food & Water in an Emergency*, U.S. DEP'T OF HOMELAND SEC. 4 (2004), <https://www.fema.gov/pdf/library/f&web.pdf>.

⁴⁵ Lauren Laglagaron, *Ten Tips for Conducting Effective Community Outreach*, U.S. DEP'T OF JUSTICE <https://www.justice.gov/crt/fcs/newsletter/Winter-2015/10Tips> (last visited June 24, 2021).

⁴⁶ *Id.*

⁴⁷ READY.GOV, *National Preparedness Month*, <https://www.ready.gov/september> (last visited June 24, 2021).

necessary and practical approach for mitigating the needs of disaster survivors of low-income.

Respectfully submitted,

Choi Portis, Chair
Young Lawyers Division

August 2022

GENERAL INFORMATION FORM

Submitting Entity: Young Lawyers Division

Submitted By: Choi Portis

1. Summary of the Resolution(s).

This Resolution urges Congress to amend regulations under the United States Department of Agriculture (USDA), Food and Nutrition Service (FNS), Supplemental Nutrition Assistance Program (SNAP), to create an Emergency Preparedness SNAP (P-SNAP). The program would be a proactive approach to disasters and afford eligible SNAP beneficiaries the opportunity to prepare for disasters and emergencies, by purchasing shelf-stable food and necessities in advance of a disaster. This preparedness program can mitigate food insecurity during and after the disaster and build resiliency by avoiding unnecessary reliance on reactive disaster assistance.

2. Indicate which of the ABA's Four Goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

This Resolution seeks to advance Goal 4 – advancing the rule of law by holding governments accountable under the law, as well as working for just laws. By urging the USDA to expand the SNAP program to allow for a Preparedness SNAP, we are acknowledging the inequities and advancing the rule of law to mitigate the harm for underserved and underrepresented communities. Additionally, this Resolution seeks to advance Goal 3 – eliminating bias in the justice system by advocating for policies that will ensure equal access to justice, irrespective of poverty and wealth and other systematic inequities.

3. Approval by Submitting Entity.

Approved by the Young Lawyers Division Assembly on February 22, 2022.

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

The House has previously adopted 14M107 which urges governments to promote the human right to adequate food and nutrition for all through increased funding, development, and implementation of strategies to prevent infringement of that right. That resolution further urges the United States government to make the realization of a human right to adequate food a principal objective of U.S. domestic policy.

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

14M107

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

N/A

7. Status of Legislation.

N/A.

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

The ABA Governmental Affairs Office will work with Division representatives to advocate for the report's recommendations before Congress and the USDA.

9. Cost to the Association.

None.

10. Disclosure of Interest.

None.

11. Referrals.

Commission on Race & Ethnic Diversity in the Profession
Commission on Sexual Orientation & Gender Identity
Commission on Women in the Profession
Judicial Division
Law Student Division
Section of Civil Rights and Social Justice
Section of Family Law
Section of Litigation
Section of State & Local Government Law
Government and Public Sectors Lawyers Division
Tort, Trial and Insurance Practice Section
Solo Small Firm and General Practice Division
Administrative Law Section
Criminal Justice Section
Commission on Homelessness and Poverty
Coordinating Group on Practice Forward
Standing Committee on Disaster Response and Preparedness

12. Name and Contact Information (Prior to Meeting)

Sheila M. Willis
ABA YLD Representative to the ABA House of Delegates
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swillis@fisherphillips.com

Abre' Connor
ABA YLD Speaker
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yldspeaker21@gmail.com

13. Name and Contact Information (Who will present the Resolution with Report to the House)

Sheila M. Willis
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EXECUTIVE SUMMARY1. Summary of the Resolution.

This Resolution asks the ABA to urge Congress to amend regulations under the United States Department of Agriculture (USDA), Food and Nutrition Service (FNS), Supplemental Nutrition Assistance Program (SNAP), to create an Emergency Preparedness SNAP opportunity for low-income households. The program would be a proactive approach to disasters and afford eligible SNAP beneficiaries the opportunity to prepare for disasters and emergencies by purchasing shelf-stable food and necessities in advance of a disaster. This preparedness program can mitigate food insecurity during and after the disaster and build resiliency by avoiding unnecessary reliance on reactive disaster assistance.

2. Summary of the issue that the resolution addresses.

Americans with low income do not have the same choices or options in how to prepare for a disaster, because financial security dictates preparedness efforts. Disaster survivors who cannot prepare sufficiently for disasters and emergencies are reliant on assistance provided by others to meet their needs after a tragedy. This reliance creates a greater opportunity for harm, embarrassment and mental anguish and exacerbates the inequalities and injustices our marginalized communities already experience.

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

In general, preparedness efforts can build resiliency, mitigate risks, afford choices and help promote autonomy. Specifically, for food insecurity in a disaster, P-SNAP can mitigate harm by reducing the need for disaster survivors to physically get out in a disaster or in the immediate aftermath to search for food; provides the assurance of having shelf-stable food reduces the uncertainty and stress of an already tragic event; avoids the stigma of reliance on others after a disaster; and provides a choice for how the individual or family can prepare for a disaster.

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

There are no minority views or opposition known at this time.

AMERICAN BAR ASSOCIATION
YOUNG LAWYERS DIVISION
REPORT TO THE HOUSE OF DELEGATES
RESOLUTION

1 RESOLVED, That the American Bar Association recognizes that racism, in its structural,
2 cultural, interpersonal, and other forms, is a threat to public health;

3 RESOLVED, That the American Bar Association urges federal, state, local, territorial, and
4 tribal governments to enact legislation remedying longstanding effects of structural racism
5 on public health; and

6 FURTHER RESOLVED, That the American Bar Association supports the enactment of
7 the Anti-Racism in Public Health Act of 2021 (S. 162, 117th Congress) or similar
8 legislation that would create a National Center for Anti-Racism, and a law enforcement
9 violence prevention program at the Center for Disease Control and Prevention.

REPORT

Introduction

The American Bar Association (“Association”) has a long history of advocating for the rights of those discriminated against based on race, national origin, disability, age, sexual orientation, gender identity/expression, and other protected characteristics. Recently, the Association adopted a resolution urging local, state, and federal lawmakers to prohibit race discrimination on the basis of the texture, style, or appearance of hair.¹

The Association’s fundamental position against discrimination is based on its commitment to the idea of equal opportunity – that no person should be denied basic civil rights due to membership in a protected class. Pursuant to this commitment and related policies, the Association has participated in lobbying for effective federal anti-discrimination legislation.² This Resolution urges anti-discrimination legislation that would amend the Public Health Service Act “to provide for public health research and investment into understanding and eliminating structural racism and police violence.”³ By adopting this Resolution, the Association will continue its longstanding commitment to advocating on behalf of people discriminated against, including lawyers of color and their clients who suffer the burden of structural racism (as that term is defined on the following page).⁴

Further, in addition to a longstanding history of advocacy surrounding racism⁵ and public health the Association seeks to equally serve its members, the profession, and the public by defending liberty and delivering justice as the national representative of the legal profession.⁶ This Resolution aims to meet the objectives specifically outlined in Goals III and IV of the Association. Structural racism has plagued communities of color and people from diverse backgrounds for centuries, thus creating a public health crisis.

Through meaningful policy and full participation of members, the Association can help eradicate structural racism to eliminate bias in the legal profession and the justice system. Additionally, this Resolution seeks to assure meaningful access to justice for all persons

¹ 20A100B.

² *Id.*; See also 17A119.

³ Anti-Racism in Public Health Act of 2021, Congress.gov, <https://www.congress.gov/bill/117th-congress/senate-bill/162/text> (last visited May 19, 2022).

⁴ This Resolution includes quotes where the phrase “systemic racism” is used interchangeably with “structural racism.” Structural racism is defined in the Anti-Racism and Public Health Act and is therefore the term that will be defined and formally used in this Resolution.

⁵ See 22M610, <https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2022/610-midyear-2022.pdf> (urging the Department of Homeland Security, the Department of Justice, and the Department of Health and Human Services to identify and eradicate actual and perceived racial bias, discrimination, and xenophobia in the enforcement of the Immigration and Nationality Act, 8 U.S.C. § 1101, et. seq.) and 21M10F, <https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2021/10f-midyear-2021.pdf> (urging federal, state, local, territorial, and tribal governments and police commissions to establish officer training concerning automatic exit orders during discretionary traffic enforcement stops).

⁶ <https://www.americanbar.org/about-the-aba/aba-mission-goals/>.

under the law. It seeks to advance policies to create just laws to promote fairness in defending rights provided by the Constitution and its Amendments. If lawmakers and policymakers pursue policies to remedy racial disparities, including unfair policing procedures, they will eliminate biases and enhance diversity, as well as advance the rule of law. This Resolution relates to Association core values because it a) enhances lawyers' access to justice to advocate on behalf of those discriminated on the basis of race; b) recognizes the Association's commitment to justice and inclusion; and c) recognizes the Association's commitment to building a profession reflective of diverse voices that protect the communities with which they identify.

Structural racism generally refers to how laws, norms, institutions, and values operate in conjunction to create a social order in which people of color are systematically disadvantaged.⁷ At its core, structural racism is a system that ensures that racial hierarchies persist over time and across a broad spectrum of living, a system the transformation of which requires not just changing "hearts and minds," but a real transformation of "institutional power."⁸

In the context of public health, structural racism has strong explanatory power as an organizing and conceptual tool for making sense of consistent disparities in the social determinants of health ("SDOH").⁹ The SDOH commonly refers to "the conditions which people are born, grow, live, work and age." Systemic racism ensures that, for people of color, the conditions in which they are born, live, work, play, and age are consistently marked by racial disadvantage.¹⁰ Some results of such systematic racism include a low Black maternal mortality rate that has persisted for decades and the water crisis Flint, Michigan. SDOH are key drivers of health inequities within communities of color, placing these populations at greater risk for poor health outcomes.¹¹

Throughout the United States, people of color experience higher rates of illness and death across a wide range of health conditions, including diabetes, hypertension, obesity, asthma, and heart disease, as compared to their White counterparts.¹² Additionally, the life expectancy of non-Hispanic/Black¹³ Americans is four years lower than that of White Americans.¹⁴ To build a healthier America for all, we must confront the systems and

⁷ The Network for Public Health Law: [How Can Public Health Advocates Grapple with the Dual Challenges of Systemic Racism and Discriminatory Policing?](https://www.networkforphl.org/wp-content/uploads/2020/07/Issue-Brief-Systemic-Racism-and-Policing.pdf), July 2020, available at <https://www.networkforphl.org/wp-content/uploads/2020/07/Issue-Brief-Systemic-Racism-and-Policing.pdf>

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ The Center for Disease Control and Prevention, [Racism is a Serious Threat to the Public's Health](https://www.cdc.gov/healthequity/racism-disparities/index.html), November 2021, available at <https://www.cdc.gov/healthequity/racism-disparities/index.html>.

¹² *Id.*

¹³ The collective research in this Report uses the terms "African-American" and "Black" interchangeably. For consistency, this Report uses the term "Black" in reference to the racial, ethnic, and culture group. "African-American" is used herein only as part of an official name or a direct quote.

¹⁴ *Supra* Note 12.

policies that have resulted in the generational injustice giving rise to racial and ethnic health inequities.¹⁵

The Anti-Racism in Public Health Act of 2021 acknowledges structural racism as an “overarching system of racial bias across institutions and society,” which serves as a major barrier to achieving health equity.¹⁶ According to the Act, structural racism determines the conditions in which people are born, grow, work, live, and age, and determines people’s access to quality housing, education, food, transportation, and political power, and other social determinants of health.¹⁷ Structural racism causes people of color to suffer from chronic health conditions such as heart disease, diabetes, and asthma at higher rates than White people, according to the Act.¹⁸ People of color also suffer from infectious disease such as HIV/AIDS and COVID-19 at higher rates. The effects of structural racism do not end with illness.¹⁹ The Act also highlights that police kill Black men at a higher rate than they kill White men, and Black and Latinx women are more likely to die from violence than White women.²⁰ Because racial and ethnic inequity in public health is a result of structural racism, dismantling structural racism is integral to addressing public health.²¹

I. Structural Racism Drives Certain Health Inequities that Promote a Public Health Crisis

Healthcare is a vital necessity to maintaining one’s physical and mental health. However, many individuals of color encounter challenges obtaining and maintaining health care insurance. In addition, because people of color are more likely to encounter death or serious injury at the hands of police, their health and well-being is severely impacted by encounters with police. Systemic racism contributes to these challenges.

A. Physical Health

Several aspects of structural racism, including inequitable access to healthcare, contribute to the public health crises. People of color are less likely to have income and education levels necessary to attain private or public health insurance. This in turn, impacts their access to quality medical treatment. Indeed, pay and education play a role in the ability to afford private or public health insurance. While individuals are covered, the cost and use of insurance is high. The cost of healthcare is more than just the bill or premium paid to the insurance company; it also includes “out of pocket” costs. These

¹⁵ *Supra* Note 12.

¹⁶ Anti-Racism in Public Health Act of 2021, Congress.gov, <https://www.congress.gov/bill/117th-congress/senate-bill/162/text> (last visited May 19, 2022).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

costs can be deductibles, copayments and coinsurance which add to an already excessive cost of insurance, placing a heavy burden on Black households.

The attainment of high school diplomas in the Black community has come closer to the national average in recent years.²² Still, a significant college enrollment gap between the Black population and national average persists. Even where college enrollment is attained, the crippling effects of student loan debt and pay inequity make it difficult to afford health care insurance. Black college graduates owe an average of \$52,000 and 50% of these student borrowers' net worth is less than they owe in student loan debt.²³

While Black women participate in the workforce at a much higher rate than most other women, they face a wider than average pay gap.²⁴ As of 2019, the average Black woman earned 63% of what non-Hispanic White men were paid. Further, the average median income for a Black household is about 45,000, with Blacks having the highest poverty rate (19.5 percent).²⁵

Another aspect of structural racism that impacts public health inequities are the historic relationship between persons of color and the medical profession. Within Black communities in particular, there exists a general mistrust of medical practitioners..²⁶ The factors leading to mistrust of medical practitioners include the use of supposed "scientific evidence" of racial inferiority to justify racial discrimination, ethical violations targeting Black communities, disparate allocation of medical resources, negative patient-provider interactions, and inequitable access to health care.²⁷

The Black community has endured many examples of unethical medical practices. From excruciatingly painful experimental surgeries performed on enslaved Black/African American women without the use of anesthesia, to little or no support for establishing and sustaining medical facilities and training opportunities to increase the workforce of Black practitioners treating Black patients for diseases that often resulted from imposed poor social conditions (e.g., the 1918 influenza epidemic), the Black community has been plagued with medical misdeeds that aggregate to form a mistrust of the medical profession.²⁸ Additional instances include the use of patient Henrietta Lacks' cells to advance scientific knowledge without her or her family's consent or financial compensation; forced sterilization of Black women without their consent, particularly

²² U.S. Census Bureau. (2020, June 10). *Black high school attainment nearly on par with national average*. <https://www.census.gov/library/stories/2020/06/black-high-school-attainment-nearly-on-par-with-national-average.html>.

²³ Hanson, M. (2020, November 14). *Student loan debt by race [2020]: Analysis of statistics*. EducationData. <https://educationdata.org/student-loan-debt-by-race>.

²⁴ *Black women & the pay gap*. (2021, September 14). AAUW : Empowering Women Since 1881. <https://www.aauw.org/resources/article/black-women-and-the-pay-gap/>.

²⁵ US Census Bureau. (2021, September 14). *Income and poverty in the United States: 2020*. <https://www.census.gov/library/publications/2021/demo/p60-273.html>.

²⁶ American Public Health Association, *Structural Racism is a Public Health Crisis: Impact on the Black Community*, October 2020, available at <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2021/01/13/structural-racism-is-a-public-health-crisis>.

²⁷ *Id.*

²⁸ *Id.*

those enrolled in government welfare programs; and denial of known effective syphilis treatment for Black male participants for the purpose of studying the progression of the disease, resulting in severe pathology and deaths (the Tuskegee Syphilis Study). Ironically, awareness of the Tuskegee study fostered further distrust of the medical, public health, and social services sectors. This has led to low participation in public health programs, clinical trials, and organ donation related to Black communities.²⁹

To remedy the systemic and long-standing abuse of the medical system on communities of color, it is imperative that health care providers become educated and culturally competent.

B. Mental Health

Racism contributes to psychological and physiological stress, which may explain in part the deleterious effects of racism on physical and mental health outcomes across life spans.³⁰ To date, research has focused primarily on perceived racial discrimination and has shown negative effects on mental health and physiological markers of stress.³¹

Historically underrepresented communities consistently experience worse mental health than other communities for preventable reasons. People from historically excluded communities such as Asian American and Pacific Islanders, Black, Latinx, Indigenous, and other people of color often find themselves particularly hard hit by mental health issues.³²

Historically underrepresented communities face many barriers to receiving needed mental health care. For example, individuals from these communities are overrepresented in jobs that do not provide health insurance.³³ Without health insurance, few can afford any type of mental health care service.³⁴ People from historically oppressed backgrounds have encountered discrimination or disparate treatment when receiving care.³⁵ For instance, Black individuals are offered medication and therapy for their mental health issues at lower rates than the general population, according to the American Psychiatric Association.³⁶

A lack of cultural competency among mental health care providers can diminish the quality of care historically excluded individuals receive as well. According to Mental Health

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Tulane University, *Understanding Mental Health as a Public Health Issue*, January 2021, available at <https://publichealth.tulane.edu/blog/mental-health-public-health/>.

³³ UC Berkeley Labor Center *Job-based coverage is less common among workers who are Black or Latino, low-wage, immigrants, and young adults*, November 2021, available at <https://laborcenter.berkeley.edu/job-based-coverage-is-less-common-among-workers-who-are-black-or-latino-low-wage-immigrants-and-young-adults/>.

³⁴ *Id.*

³⁵ St. Catherine University, *Racial Discrimination in Healthcare: How Structural Racism Affects Healthcare*, June 2021, available at <https://www.stkate.edu/academics/healthcare-degrees/racism-in-healthcare>.

³⁶ *Supra* Note 34.

America, the fact that less than two percent of American Psychological Association members are Black makes it especially difficult for Black individuals to receive culturally competent care. This underrepresentation of mental health care providers expands beyond the Black community. Many historically excluded people have fewer mental health professionals in their communities. This can pose challenges to accessing care as well. Further, language barriers and implicit bias can interfere with access to mental health services, resulting in individuals' giving up on treatment or not recovering completely. Organizations that influence treatment approaches need more reflective representation within their ranks to expand historically excluded communities' access to mental health care.³⁷ Therapeutic relationships depend on understanding and comfort. A lack of diverse representation in the mental health field can limit both and makes it harder for mental health professionals to understand their patients' identities and address them openly.³⁸ Thus, structural racism threatens mental health just as it threatens physical health.

In order to close the gap in care for both physical and mental health, governments must develop programs that address the factors that contribute to poor mental health or focus on intervention methods known to foster good mental health. Identifying risk factors for mental illness, such as trauma and chronic health conditions, plays an important role in prevention programs. Identifying risk factors also allows for early intervention.³⁹ However, we must make these resources available to all, in equitable measures that make care both affordable and obtainable in communities of color.

II. Policing Contributes to Racism as a Public Health Crisis

Policing has been a historic and highly visible form of structural racism in this country.⁴⁰ In April 2021, Dr. Rochelle Walensky, Director of the Center for Disease Control and Prevention (CDC), declared racism as a serious public health threat.⁴¹ The physical effects of police brutality born of racism are apparent. The mental effects of policing are not limited to trauma, terror, fear of everyday activities, isolation, or feeling of inherent guilt. Moreover, policing can have a detrimental impact on Black communities with mental health conditions. Those mental health conditions often becoming fatal.

The Anti-Racism in Public Health Act would create a Law Enforcement Violence Prevention Program that would address both the psychological and physical violence

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Since George Floyd's murder in May 2020, 1,646 people have been killed by police, according to Mapping Police Violence, a nonprofit that tracks people killed by police. Black people are three times more likely to be killed by police than White people, while Black people are 1.3 times less likely to be armed. *Racism and Health*, Centers for Disease Control and Prevention (2021), <https://www.cdc.gov/healthequity/racism-disparities/index.html> (last visited Jan 7, 2022).

⁴¹ Media Statement from CDC Director Rochelle P. Walensky, MD, MPH, on *Racism and Health*, The Center for Disease Control and Prevention (2021), <https://www.cdc.gov/media/releases/2021/s0408-racism-health.html> (last visited Jan 6, 2022).

perpetrated by police. According to the bill, such violence results in “deaths, injuries, trauma, and stress, and disproportionately affects marginalized populations.” It is imperative that this bill is enacted to support the health and full citizenship of people of color in this country.

Conclusion

Racism is a public health crisis that carries many problems that, if not eradicated, will continue to affect historically marginalized individuals in the United States. This Resolution urges lawmakers and policymakers to pursue policies that combat racial disparities. In acknowledgment of the grave danger that racism poses to the community. This Resolution urges policymakers to propose, pass, and enforce policies that acknowledge current issues as it relates to racism as a public health crisis and work to prevent further harm.

Respectfully submitted,

Choi Portis, Chair
Young Lawyers Division

August 2022

GENERAL INFORMATION

Submitting Entity: Young Lawyers Division

Submitted By: Choi Portis

1. Summary of the Resolution:

This Resolution urges federal, state, local, tribal, and territorial governments to recognize structural racism as a public health crisis and enact policy to remedy its longstanding effects. This Resolution further urges the aforementioned government entities to enact the Anti-Racism in Public Health Act of 2021 or similar legislation creating both a National Center for Anti-Racism, and a Law Enforcement Violence Prevention Program at the Center for Disease Control and Prevention.

2. Indicate which of the ABA's Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

This Resolution aims to meet the objectives specifically outlined in Goals III and IV of the Association. Structural racism has plagued communities of color and people from diverse backgrounds for centuries, thus creating a public health crisis. Through meaningful policy and full participation of members, the Association can help eradicate structural racism to eliminate bias in the legal profession and the justice system. Additionally, this Resolution will assure meaningful access to justice for all persons under the law. It will advance policies to create just laws to promote fairness in defending rights provided by the Constitution and its Amendments. If lawmakers and policymakers pursue policies to remedy racial disparities and unfair policing procedures, they will eliminate biases and enhance diversity, as well as advance the rule of law.

3. Approval by Submitting Entities:

Approved by the Young Lawyers Division Assembly on February 12, 2022

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

No.

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

None.

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

Not applicable.

7. Status of Legislation:

The Anti Racism in Public Health Act was introduced in February 2021 and referred to the subcommittee on Health in the House of Representatives on February 2, 2021.

8. 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 and other entities in the ABA, as well external entities to determine the most effective way to advocate for this Resolution.

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

No known costs.

10. Disclosure of Interest.

None.

11. Referrals:

Commission on Race & Ethnic Diversity in the Profession
 Commission on Sexual Orientation & Gender Identity
 Commission on Women in the Profession
 Judicial Division
 Law Student Division
 Section of Civil Rights and Social Justice
 Section of Family Law
 Litigation Section
 Center for Professional Responsibility
 Government and Public Sectors Lawyers Division
 Tort Trial and Insurance Practice Section
 Solo, Small Firm and General Practice Division
 Section of Administrative Law and Regulatory Practice
 Criminal Justice Section
 Health Law Section
 Commission on Homelessness and Poverty

Commission on Youth at Risk
Coalition on Racial and Ethnic Justice

12. Contact Persons (Prior to the meeting):

Rene Morency
ABA YLD Representative to the ABA House of Delegates
314-963-4678
Jurisdoc2016@planetsuccessdomains.net

Abre' Conner
ABA YLD Speaker
863-838-8819
Yldspeaker21@gmail.com

13. Contact Person (Who will present the report to the Executive Council and/or Assembly):

Rene Morency
ABA YLD Representative to the ABA House of Delegates
314-963-4678
Jurisdoc2016@planetsuccessdomains.net

EXECUTIVE SUMMARY1. Summary of the Resolution

This Resolution urges federal, state, local, tribal, and territorial governments to recognize structural racism as a public health crisis and enact policy to remedy its longstanding effects. This Resolution furthermore urges the aforementioned government entities to enact the Anti-Racism in Public Health Act of 2020 or similar legislation creating both a National Center for Anti-Racism, and a Law Enforcement Violence Prevention Program at the Center for Disease Control and Prevention.

2. Summary of the issue that the Resolution addresses.

This Resolution addresses the significant impact that racism in the United States has on public health, specifically the health of those individuals who identify as people of color. Structural racism has detrimental effects on the physical and mental health of persons of color.

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

The proposed policy would urge governmental entities to recognize the impact that structural racism has on public health and to develop policies to combat this significant and pressing issue.

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

None.

AMERICAN BAR ASSOCIATION
SECTION OF INTELLECTUAL PROPERTY
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, that the American Bar Association supports, in principle, the adoption of a
2 uniform test for deciding when the Lanham Act should apply extraterritorially that applies
3 the following factors:

- 4
5 (1) whether the defendant's conduct has a substantial effect on U.S. commerce;
6 (2) whether the defendant is a United States citizen or domiciliary; and
7 (3) whether such an application would conflict with trademark rights established under the
8 relevant law of a foreign jurisdiction.

REPORT

Introduction

The Lanham Act, 15 U.S.C. §§ 1051 et seq., is the primary federal statute governing trademark rights in the United States, and the Supreme Court has recognized that, under certain circumstances, the extraterritorial application of the Act can be vital to the protection of United States trademark rights. See *Steele v. Bulova Watch Co.*, 344 U.S. 280, 288 (1952) (holding that the United States had the authority to enforce the Lanham Act as to acts of infringement committed by a U.S. corporation, in Mexico, where exercising jurisdiction did not interfere with Mexico's sovereignty). Particularly as technology expands the potential geographical scope of sales and the potential for "long-distance" infringement increases, that extraterritoriality allows trademark owners to protect their rights against infringing conduct abroad.

Nevertheless, a distinct split among the federal circuit courts of appeals exists regarding how to determine when the Act's reach should extend outside the United States. The Tenth Circuit recently deepened that split by setting forth its own framework on the issue. In *Hetronic Int'l, Inc. v. Hetronic Germany GmbH*, 10 F.4th 1016 (10th Cir. 2021), *petition for cert. docketed*, No. 21-1043 (U.S. Jan. 26, 2022), that court adopted a modified version of the First Circuit's *McBee* test, see *McBee v. Delica Co.*, 417 F.3d 107 (1st Cir. 2005), and held that the Lanham Act applies extraterritorially if: (1) the defendant is a U.S. citizen, or (2) the foreign defendant's conduct has a substantial effect on U.S. commerce and the extraterritorial application of the Lanham Act would not create a conflict with trademark rights established under the relevant foreign law. Based on a petition for certiorari filed early this year, the *Hetronic* decision may prompt the Supreme Court to examine this issue for the first time in seventy years and articulate a uniform test to resolve the current circuit split. Indeed, on May 2, 2022, the Court called for the views of the Solicitor General on whether it should grant that petition, which increases the importance of the Association addressing this issue now.¹

The most widely applied standard, the Second Circuit's *Vanity Fair* test, assesses (1) whether "the defendant's conduct had a substantial effect on United States commerce"; (2) whether "the defendant was a United States citizen"; and (3) whether there was a

¹ Two commentators have noted the following of the correlation between calls for the views of the Solicitor General ("CVSG") and successful petitions for writs of certiorari:

[Taking into account in forma pauperis petitions, which have a low success rate], the overall grant rate increases from 0.9% to 34% following a CVSG from the Court; in other words, the Court is 37 times more likely to grant a petition following a CVSG. For petitions on the paid docket, the grant rate increases even more, to 42%; a paid petition is 47 times more likely to be granted following a CVSG.

“conflict with trade-mark rights established under the foreign law.” *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633, 642 (2d Cir. 1956). The Resolution supports adoption of the *Vanity Fair* test as the appropriate test for extraterritorial applications of the Lanham Act because that test incorporates the requirement that the conduct at issue have a “substantial impact” on commerce. *Vanity Fair*, 234 F.2d at 639. A “substantial impact” on commerce properly should be a critical component of the proper test because it is well established that (1) extraterritorial applications of the Lanham Act are rooted in the Act’s definition of “commerce” as “all commerce which may be lawfully regulated” and (2) it is well established that Congress may use its commerce power to regulate activity that has a “*substantial effect*” on interstate commerce. 15 U.S.C. § 1127; *see also United States v. Lopez*, 514 U.S. 549, 558 (1995). The *Vanity Fair* test is also appropriate because it does not, as a threshold question, ask whether the defendant is a U.S. citizen. While citizenship is properly part of the inquiry, it is not dispositive. Finally, the *Vanity Fair* test properly accounts for international comity; the test looks to whether there is a conflict with established trademark rights under the relevant foreign law and considers whether there is an existing dispute, rather than assessing the nature of the laws themselves. *Vanity Fair*, 234 F.2d at 639. These “factors should not be applied ‘mechanically’ and should be refined to ‘preserve the Lanham Act’s goals of protecting American consumers against confusion, and protecting holders of American trademarks against misappropriation of their marks.’” *Aerogroup Int’l, Inc. v. Marlboro Footworks, Ltd.*, 152 F.3d 948, 948 (Fed. Cir. 1998) (quoting *Sterling Drug, Inc. v. Bayer AG*, 14 F.3d 733, 746 (2d Cir. 1994)).

Background

A. *Steele v. Bulova*, 344 U.S. 280 (1952)

The multiple splits in the federal circuit courts of appeal regarding the proper test for determining when the Lanham Act should be applied on an extraterritorial basis have arisen from differing interpretations of the Supreme Court’s opinion in *Steele v. Bulova*, 344 U.S. 280 (1952). In *Steele*, the defendant Sidney Steele was a U.S. citizen who lived in Texas and ran a foreign watch business in Mexico. *Id.* at 284-85. Steele imported watch parts from Switzerland and the United States, and sold watches in Mexico bearing counterfeit imitations of the plaintiff’s BULOVA WATCH CO. trademark. *Id.* at 285. Bulova Watch Co., “one of the largest watch manufacturers in the world, soon began receiving complaints from customers who needed repairs of defective ‘Bulova’ watches that often turned out to be the defendant’s product.” *Hetronic Int’l*, 10 F.4th at 1034. Bulova responded by challenging Steele’s right to use its name in Mexican court and, later, in federal court under the Lanham Act. *Steele*, 344 U.S. at 281-82.

Although recognizing a presumption against extraterritoriality, *id.* at 339, the Supreme Court determined that the Lanham Act applied to Steele’s conduct because “the United States is not debarred . . . from governing the conduct of [its] own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed.” *Id.* at 285-86. Moreover, “Congress has the power to prevent unfair trade practices in foreign commerce by citizens of the United States, although some of the acts are done outside the territorial limits of the United States.” *Id.* at 286. The fact that Steele’s

“operations and their effects were not confined within the territorial limits of a foreign nations”; that “spurious Bulovas filtered through the Mexican border into” the United States; and that inferior watches could damage Bulova’s reputation were critical factors underlying the Court’s decision. *Id.*

B. *Hetronic Int’l, Inc. v. Hetronic Germany GmbH and the Split in the Circuits*

The Supreme Court’s failure to articulate a specific doctrinal test for evaluating the extra-territorial reach of the Lanham Act has led the Second, Eleventh, and Federal Circuits to adopt the so-called *Vanity Fair* standard, which considers (1) whether the defendant’s conduct had a substantial effect on U.S. commerce; (2) whether the defendant was a United States citizen; and (3) whether there was a conflict with trademark rights established under the relevant foreign law. See *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633, 642 (2d Cir. 1956); see also *Int’l Cafe, S.A.L. v. Hard Rock Cafe Int’l, (U.S.A.), Inc.*, 252 F.3d 1274, 1278 (11th Cir. 2001); *Aerogroup Int’l, Inc. v. Marlboro Footworks, Ltd.*, 152 F.3d 948, 1998 WL 169251, at *2 (Fed. Cir. 1998) (per curiam) (unpublished). The Fourth and Fifth Circuits also have gravitated toward *Vanity Fair* as well, although the former has modified the first factor to require a “significant” (as opposed to a “substantial”) effect, see *Nintendo of Am., Inc. v. Aeropower Co.*, 34 F.3d 246, 250 (4th Cir. 1994), and the latter requires only a demonstration that a defendant’s conduct have “some” effect on United States commerce. See *Am. Rice, Inc. v. Ark. Rice Growers Coop. Ass’n*, 701 F.2d 408, 414 n.8 (5th Cir. 1983).

The Ninth Circuit has adopted its own tripartite test, which allows liability for extraterritorial activities if: (1) those activities have “some” effect on “American foreign commerce”; (2) that effect is sufficiently cognizable to injure the plaintiff; and (3) “the interests of and links to American foreign commerce [are] sufficiently strong in relation to those of other nations to justify an assertion of extraterritorial authority.” *Trader Joe’s Co. v. Hallatt*, 835 F.3d 960, 969 (9th Cir. 2016) (alteration in original). Finally, the First Circuit applies the anti-trust-based *McBee* test, pursuant to which: (1) the Lanham Act will usually extend extra-territorially when the defendant is an American citizen because “a separate constitutional basis for jurisdiction exists for control of activities, even foreign activities, of an American citizen”; but (2) when the defendant is not a United States citizen, the Lanham Act applies “only if the complained-of activities have a substantial effect on [U.S.] commerce, viewed in light of the purposes of the Lanham Act.” *McBee v. Delica Co.*, 417 F.3d 107, 111 (1st Cir. 2005).

Choosing between these competing approaches, the Tenth Circuit recently picked that of the First Circuit, but with what it described as “one caveat.” *Hetronic Int’l*, 10 F.4th at 1036. That caveat was in reality the court’s engrafting of a third prerequisite for extraterritoriality, which was that “if a plaintiff successfully shows that a foreign defendant’s conduct has had a substantial effect on U.S. commerce, courts should also consider whether extraterritorial application of the Lanham Act would create a conflict with trademark rights established under the relevant foreign law.” *Id.* at 1037. “Though the *McBee* court eschewed

such an analysis,” the court explained, “every other circuit court considers potential conflicts with foreign law in assessing the Lanham Act’s extraterritorial reach.” *Id.* at 1030. It then summarized its holding in the following manner:

To recap, in deciding whether the Lanham Act applies extraterritorially, courts should consider three factors. First, courts should determine whether the defendant is a U.S. citizen. Second, when the defendant is not a U.S. citizen, courts should assess whether the defendant’s conduct had a substantial effect on U.S. commerce. Third, only if the plaintiff has satisfied the substantial-effects test, courts should consider whether extraterritorial application of the Lanham Act would create a conflict with trademark rights established under foreign law.

Id. at 1038.

The court then applied its new test to hold that the Act indeed reached the conduct of the defendants before it. Those defendants, none of which was a United States citizen or domiciliary, had manufactured radio remote controls for heavy-duty construction equipment bearing the plaintiff’s trademarks for nearly a decade. The parties’ amicable relationship abruptly ended, however, when the defendants decided on the basis of “an old research-and-development agreement between the parties” that they, rather than the plaintiff, owned the marks in question. The defendants then continued to manufacture and sell goods bearing the marks outside the United States, even when found liable for infringement by a jury and having been permanently enjoined on a worldwide basis from doing so. Some of those goods wound up in United States markets, and the defendants apparently sold at least some of them directly to United States consumers. Those facts were enough for the court to hold in the plaintiffs’ favor on the issue of whether the defendants’ conduct had had the required substantial effect on United States commerce, especially considering the plaintiff’s evidence that United States consumers encountering the defendants’ goods were actually confused about the goods’ origin:

Viewing the evidence as a whole, [Plaintiff] has presented more than enough evidence to show that Defendants’ foreign infringing conduct had a substantial effect on U.S. commerce. Besides the millions of euros worth of infringing products that made their way into the United States after initially being sold abroad, Defendants also diverted tens of millions of dollars of foreign sales from [Plaintiff] that otherwise would have ultimately flowed into the United States. Moreover, though much of [the plaintiff’s] evidence focused on consumer confusion abroad, it also documented numerous incidents of confusion among U.S. consumers. We thus conclude that [Plaintiff] has presented evidence of impacts within the United States of a sufficient character and magnitude as would give the United States a reasonably strong interest in the litigation. Accordingly, the Lanham Act applies extraterritorially here to reach all of Defendants’ foreign infringing conduct.

Id. at 1045-46.

The Second Circuit's *Vanity Fair* Test is the Appropriate Standard

The pending petition for a writ of certiorari in *Hetronic* provides the Supreme Court with an opportunity to resolve the current split among the lower federal courts. This Resolution urges the Court to effect such a resolution through its ratification of the Second Circuit's *Vanity Fair* test.

A. *Vanity Fair* Properly Requires a Defendant's Conduct to Have a Substantial Effect on United States Commerce.

1. Extraterritorial application of the Lanham Act should be guided by Congress's power to regulate commerce.

A general presumption exists against the extraterritorial application of U.S. statutes. This presumption against extraterritorial application is a canon of statutory construction whereby courts assume that Congress legislates within the limits of its territory. RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, Tentative Draft No. 3, § 203 cmt. (b) (Am. Law Inst. 2017); *see also Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007) (“United States law governs domestically but does not rule the world.”). Nevertheless, the presumption is rebuttable if the statutory language at issue illustrates a congressional intent for that statute to have extraterritorial application; if so, courts ask “whether Congress has affirmatively and unmistakably instructed that the statute will [apply to foreign conduct].” *RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. 325, 339-40 (2016) (holding that RICO applied extraterritorially).

The Lanham Act's definition of “commerce” is its extraterritorial hook. This is evident from the Supreme Court's treatment of the issue in *Steele*. The *Steele* Court's legal analysis and ultimate holding that the plaintiff had rebutted the presumption against extraterritoriality is critical to understanding why “substantial” effects on commerce is a component of the appropriate test. In *Steele*, the Court specifically held that the Lanham Act could reach Steele's conduct in Mexico because (1) the Act defined commerce as “all commerce which may lawfully be regulated by Congress,”² and (2) the United States has the ability to regulate trade practices by US nationals abroad. *Id.* at 283, 287-88. Based on this definition of “commerce,” the Court reasoned that Congress must have intended for the Act to have extraterritorial reach. *Id.*

The Second Circuit's opinion in *Vanity Fair* echoes this reasoning. The Second Circuit explained that Section 32(1)(a) of the Lanham Act, 15 U.S.C. § 1114(1)(a), “protects the owner of a registered mark from use ‘in commerce’ by another that is likely to cause

² The Lanham Act's expressed intent is “to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by use of reproductions, copies, counterfeits, or colorable imitations of registered marks; to provide rights and remedies stipulated by treaties and conventions respecting trade-marks, trade names, and unfair competition entered into between the United States and foreign nations.” 15 U.S.C. § 1127.

confusion or mistake or to deceive purchasers as to the source of origin' of the other's good or services," *Vanity Fair*, 234 F.2d at 641. Further, the Lanham Act defines commerce as "all commerce which may lawfully be regulated by Congress." § 45, 15 U.S.C. § 1127. Accordingly, the extraterritorial application of the Lanham Act should be guided by Congress's power to regulate commerce and the extent to which the commerce power extends to conduct committed on foreign soil. See *RJR Nabisco, Inc.*, 579 U.S. at 339 ("[W]hen a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms" (internal citation omitted)).

2. Conduct must "substantially affect" U.S. commerce because this approach aligns with congressional power to regulate foreign conduct based on the commerce clause.

It follows that the next logical question to ask is "when does Congress have the power to regulate foreign conduct?" It is well established that Congress has the power to regulate commerce "with foreign Nations, and among the several states." Const. art. 1, § 8, cl. 3. The Supreme Court has recognized "three broad categories of activity that Congress may regulate under its commerce power." *United States v. Lopez*, 514 U.S. 549, 558 (1995). "First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come on from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce." *Id.* at 448 (citations omitted); see also *United States*, 529 U.S. 598, 609 (2000) (recognizing that "Congress's commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce."); *Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536-37 (2012) (citation omitted) ("Our precedents read that to mean that Congress may regulate 'the channels of interstate commerce,' 'persons or things in interstate commerce,' and those activities that substantially affect interstate commerce.' The power over activities that substantially affect interstate commerce can be expansive."); *Taylor v. U.S.*, 579 U.S. 301, 306 (2016) (similarly recognizing Congress's power to regulate "those activities having a substantial relation to interstate commerce"). The federal circuit courts of appeal have followed suit in recognizing the expansive extent of Congress's commerce authority. See *United States v. Koech*, 992 F.3d 686, 691 (8th Cir. 2021); *United States v. Bremmer*, 841 F. App'x 33, 33 (9th Cir. 2021); *United States v. Wehrle*, 985 F.3d 549, 557 (7th Cir. 2021); *United States v. Davila-Mendoza*, 972 F.3d 1264, 1271-72 (11th Cir. 2020); *United States v. Roof*, 10 F.4th 314, 382-83 (4th Cir. 2021).

While these cases refer to parties located within the United States, the same principle applies to the regulation of non-resident defendants' conduct. When the defendant is not a resident, the "plaintiff typically must show a greater degree of contact with the United States." Stephen J. Newman, *Proof of Personal Jurisdiction in the Internet Age*, 59 AM. JUR. PROOF OF FACTS 3d 1, 1 (2021). Further, "where a federal cause of action is asserted (in federal court) against a non-U.S. defendant, the defendant's contacts with the United

States as a whole are considered and can support a finding that jurisdiction exists.” *Id.* Consistent with these principles, *Vanity Fair’s* requirement that foreign infringing conduct have a *substantial* effect on commerce is proper because it aligns with Congress’ commerce authority.

3. How to Measure “Substantial Impact”

When considering how to measure “substantial impact,” courts should look to the defendant’s contacts with the United States as a whole. Stephen J. Newman, *Proof of Personal Jurisdiction in the Internet Age*, 59 AM. JUR. PROOF OF FACTS 3d, 1 (2021). For example, in *McBee*, the First Circuit emphasized that the “Lanham Act grants subject matter jurisdiction over extraterritorial conduct by foreign defendants *only where the conduct has a substantial effect on United States commerce*. This “substantial effects” test requires “there be evidence of impacts within the United States, and these impacts must be of a sufficient character and magnitude to give the United States a reasonably strong interest in the litigation.” *McBee*, 417 F.3d at 120. The test must also “be applied in light of the core purposes of the Lanham Act, which are both to protect the ability of American consumers to avoid confusion and to help assure a trademark’s owner that it will reap the financial and reputational rewards associated with having a desirable name or product. The goal of the jurisdictional test is to ensure that the United States has a sufficient interest in the litigation, as measured by the interests protected by the Lanham Act, to assert jurisdiction.” *Id.* at 122.

In the context of trademark cases, courts have recognized the existence of substantial effects on commerce based on such showings as:

- forty years of residence and business activity in the U.S., coupled with a relationship with a U.S. corporation, see *Versace v. Versace*, 213 F. App’x 34 (2d Cir. 2007);
- a defendant’s running of a business in the U.S. that specifically “solicit[s] former musicians to play in an ‘imposter band’ in the U.S., maintaining infringing internet domains in the U.S., and drafting and sending emails from the U.S. to solicit infringing bookings,” *Parsons v. Regna*, 847 F. App’x 766, 771 (11th Cir. 2021);
- a defendant’s operation of a website providing an option for customers in “the Americas” coupled with evidence that the “use of a ‘confusingly similar’ mark has caused actual confusion and has led to reputational, relationship and economic injury to the Plaintiff’s business in the United States,” *Dmarcian, Inc. v. Dmarcian Europe BV*, No. 1:21-CV-00067-MR, 2021 WL 2144915 at *19 (W.D.N.C. May 26, 2021);
- a Canadian defendant’s solicitation of business in the United States, leading to the plaintiff’s loss of its most significant customer, see *Aerogroup Int’l, Inc. v. Marlboro Footworks, Ltd.*, 152 F.3d 948, 948 (Fed. Cir. 1998) (applying Second Circuit law); and
- a defendant’s shipping through the United States of materials used to create goods bearing an allegedly infringing mark. See *Babbitt Elecs., Inc. v. Dynascan Corp.*, 38 F.3d 1161, 1179 (11th Cir. 1994).

A determination that the Lanham Act should or should not be applied on an extraterritorial basis is truly context dependent, and many courts have reached the opposite result, declining to find a substantial effect on U.S. commerce. See, e.g., *Atlantic Richfield Co. v. Arco Globus Int'l Co.*, 150 F.3d 189, 192-93 (2d Cir. 1998) (merely making decisions about foreign activities on U.S. soil is not enough when none of the actual activities take place on U.S. soil, even when the defendant is a U.S. citizen operating abroad); *Buti v. Perosa, S.R.L.*, 139 F.3d 98, 103 (2d Cir. 1998) (Owning and operating a business abroad does not automatically establish “use in commerce” of the business name without proof the defendant offered any services in U.S. commerce); *Combe Inc. v. Dr. August Wolff GmbH & Co. KG Arzneimittel*, 309 F. Supp. 3d 414, 424 (E.D. Va. 2018) (finding an injunction with respect to Defendant’s website would be inappropriate because the “defendant has no offices in the United States and no United States employees.”); *McBee*, 417 F.3d at 112 (finding no substantial effect on U.S. commerce where only a small amount of sales (approximately \$2500) were conducted through Japanese defendant’s website).

B. *Vanity Fair* Properly Weighs the Citizenship of Defendants

In assessing whether the Lanham Act applies extraterritorially, citizenship of the parties is a factor to consider. However, it should not be treated as a dispositive, threshold question because, as discussed above, legislation “will not extend beyond the boundaries of the United States unless a contrary legislative intent appears.” *Steele*, 344 U.S. at 285. This is true no matter the citizenship of the parties involved.

As a threshold matter, the United States has the *power* to create and enforce laws on U.S. citizens, even those operating abroad, because “the law of Nations does not prevent a State from exercising jurisdiction over its subjects travelling or residing abroad, since they remain under its personal supremacy,” this power is not without limits and citizenship does not automatically indicate jurisdiction. L. OPPENHEIM, INTERNATIONAL LAW, VOLUME 1, 281 (4th ed. 1928); 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 255-56 (1906); CHARLES CHENEY HYDE, INTERNATIONAL LAW, VOLUME 1, 424 (2017); EDWIN M. BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD: OR THE LAW OF INTERNATIONAL CLAIMS 21-22 (1915); see also *Steele*, 344 U.S. at 285 (“[T]he United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed.”). This means that “Congress[,] in prescribing standards of conduct for American citizens[,] may project the impact of its laws beyond the territorial boundaries of the United States.” *Steele*, 344 U.S. at 285 (emphasis added).

Nevertheless, whether a federal statute like the Lanham Act is enforceable against United States citizens (or even non-citizens) is context dependent; per se rules do not apply. The *Steele* Court recognized a presumption against the extraterritorial application of U.S. laws because “legislation of Congress will not extend beyond the boundaries of the United States unless a contrary legislative intent appears.” *Steele*, 344 U.S. at 285 (citing *Blackmer v. United States*, 284 U.S. 421, 436-37 (1932)); *Foley Bros., Inc. v. Filardo*, 336 U.S.

281, 285 (1932)). The Court also defined the proper question as “whether Congress *intended* to make the [Lanham Act] applicable *to the facts of this case*” because the “resolution of the jurisdiction issue in this case . . . depends on the construction of exercised congressional power, *not* the limitations upon that power itself.” *Id.* at 85, 282 (emphasis added). This context-dependent analysis is well-established as to the extraterritorial application of any statute to a U.S. citizen abroad. See, e.g., *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2136 (2018) (in the context of a patent infringement case, noting the rebuttable presumption that “federal statutes apply only within the territorial jurisdiction of the United States”); *Foley Bros. v. Filardo*, 336 U.S. 281, 283-84 (1932) (citing the “[t]he canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States” and considering whether Congress *intended* the Eight Hour Law to apply extraterritorially, not whether Congress had the *power* to do so.); *Blackmer v. United States*, 284 U.S. 421, 437 (1932) (finding that Congress intended the taxing power to have extraterritorial application and explaining that “[w]hile the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States, the question of its application, *so far as citizens of the United States are concerned*, is one of construction, not of legislative power” (emphasis added)). Accordingly, the adoption of per se rules, rather than context-dependent analysis, would be contrary to controlling precedent.

1. The Lanham Act does not automatically apply to U.S. citizens operating abroad.

Because U.S. laws do not always apply to U.S. citizens operating abroad, and instead, are applied extraterritorially based on perceived Congressional intent, citizenship of the parties alone cannot be used to establish that extraterritorial application of the Lanham Act is appropriate. Instead, citizenship of the parties is simply one element to balance with the other prongs of the *Vanity Fair* Test. This approach toes the line between respecting the presumption against extraterritorial application of U.S. laws and “preserv[ing] the Lanham Act’s goals of protecting American consumers against confusion, and protecting holders of American trademarks against misappropriation of their marks,” *Aerogroup Int’l, Inc. v. Marlboro Footworks, Ltd.*, 152 F.3d 948, 948 (Fed. Cir. 1998) (quoting *Sterling Drug, Inc. v. Bayer AG*, 14 F.3d 733, 746 (2d Cir. 1994)). The examples below demonstrate how courts consider citizenship as one factor among many, illustrating that extraterritorial reach can be found when dealing with both citizens and non-citizens. As the examples will make clear, more important to the analysis is whether the infringing activity has a substantial effect on commerce (addressed in more detail in Section IV *supra*).

In *Atlantic Richfield Co. v. Arco Globus Int’l Co., Inc.*, 150 F.3d 189 (2d Cir. 1998) the court did not apply the Lanham Act extraterritorially despite the fact that there was no conflict with foreign law and defendant Arco Globus Intern, Co. (“AGI”) was a U.S. citizen. *Id.* at 190. The only question on appeal was whether AGI’s activity had a substantial effect on U.S. commerce. *Id.* at 192-93. The Second Circuit concluded that an extraterritorial application of the Lanham Act should not apply in that case because “at best, Arco ha[d]

shown that AGI ha[d] a geographic presence in the United States and, by inference from that fact, that some decision-making regarding AGI's foreign activities ha[d] taken place on American soil." *Id.* at 193. The court went on to explain that it did not think "that such a presence suffice[d] to trigger an extraterritorial application of the Lanham Act. The ultimate purpose of the Lanham Act pertinent to th[e] appeal is to encourage domestic sellers to develop trademarks to assist domestic buyers in their purchasing decisions." *Id.* at 193.

Nevertheless, the Lanham Act "will *usually* extend extraterritorially when the defendant is an American citizen" because "[n]o one questions Congress's ability to regulate the conduct of its own citizens, even extraterritorial conduct." *Hetronic Int'l*, 10 F.4th at 1036 (emphasis added). In *Parsons v. Regna*, 847 F. App'x 766 (11th Cir. 2021), where all parties were citizens, the court applied the Lanham Act extraterritorially after concluding that Regna's infringing activities abroad had substantial effects in the United States based on the fact that Defendant was "running their business in the U.S., soliciting former musicians to play in an 'imposter band' in the U.S., maintaining infringing internet domains in the U.S., and drafting and sending emails from the U.S. to solicit infringing bookings." *Id.* at 771. Similarly, in *Commodores Ent. Corp. v. McClary*, 879 F.3d 1114 (11th Cir. 2018) the court relied on the "substantial effects" test to find McClary's "use of the marks abroad would create confusion both abroad and in the United States . . . and his use of the marks affects CEC, and American corporation, both at home and abroad." *Id.* at 1139.

2. The Lanham Act may apply to non-citizens operating in the United States or abroad, but this is dependent on whether a non-citizen's conduct had a substantial effect on U.S. commerce.

Just as citizenship does not automatically lead to extraterritoriality, a lack of citizenship is not dispositive. Again, the critical inquiry is whether or not defendant's conduct had a substantial effect on U.S. commerce.

In *Versace v. Versace*, 213 F. App'x 34 (2d Cir. 2007), in which the defendant was a non-citizen, the court found that "Alfredo's forty years of residence and business activity in the United States, and his relationship with a United States corporation . . . [were] sufficient to support the international reach of the permanent injunction when taken together with the district court's unchallenged conclusions regarding the lack of conflict with foreign law and the existence of a substantial effect on commerce." *Id.* at 36. *See also Aerogroup Int'l, Inc. v. Marlboro Footworks, Ltd.*, 152 F.3d 948, 948 (Fed. Cir. 1998) (where Marlboro solicited Canadian customers at shoe shows in the United States, its sales caused, in part, Aerogroup to lose its largest Canadian customer, that lost orders would have been larger but for Aerogroup's "prompt action in filing this lawsuit," but that much of the injury to Aerogroup's reputation was mitigated by its own knock-off sales."); *Reebok Int'l, Ltd. v. Marnatech Enters.*, 970 F.2d 552, 554 (9th Cir. 1992) (finding sales of shoes bearing counterfeit imitations of REEBOK-branded shoes in Mexican border towns detracted from purchases of legitimate Reebok shoes in both Mexico and the United States); *Nintendo of Am., Inc. v. Aeropower Co.*, 34 F.3d 246, 252 (4th Cir. 1994) (applying the Lanham Act

extraterritorially because “[the defendant’s] infringing conduct in Canada and Mexico had a significant impact on commerce in the United States”).

In contrast, there also have been instances in which courts have declined to apply the Lanham Act extraterritorially against non-U.S. citizens. As an example, in *Vanity Fair*, the court did not think that “Congress intended that the infringement remedies provided in 32(1)(a) and elsewhere should be applied to acts committed by a foreign national in his home country under a presumably valid trademark registration in that country.” 234 F.2d at 642. In *Buti v. Perosa, S.R.L.*, 139 F.3d 98 (2d Cir. 1998), the defendant Impresa Perosa, S.R.L. (“Impresa”) appealed the district court’s grant of summary judgment to plaintiffs “on their claim for a declaratory judgment that Impresa ha[d] no rights under federal trademark law in the name “Fashion Café” for restaurant services and clothing in the United States.” *Id.* at 99. The Second Circuit held that Impresa’s principal, Santambrogio’s, “activities in the United States were insufficient to establish ‘use in commerce’ of the Fashion Café name absent proof that Impresa offered any restaurant services in United States commerce.” *Id.* at 103; see also *Tire Eng’g & Distrib., LLC*, 682 F.3d at 311 (rejecting claim of a “significant impact” on commerce because defendants lacked a “pervasive system of domestic operations” and relied entirely on “exclusively foreign sales of infringing tires”).

Accordingly, while citizenship is an element to consider when applying the Lanham Act extraterritorially, is not by itself dispositive. Rather, the question turns on whether or not defendant’s actions had a substantial impact on U.S. commerce.

C. *Vanity Fair* Properly Weighs Potential Conflicts with Established Rights in Other Jurisdictions

When evaluating whether there is a conflict with a foreign jurisdiction’s law, courts should consider comity, finding a conflict not only where there is a pending proceeding, but also where there is a possibility of conflict that is weighed based on the degree of risk. Comity is a judicial expression of one state’s respect for another state’s internal sovereignty because it prevents courts from interfering in the other state’s internal affairs. *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895) (“[N]either a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens.”). Since *Steele*, the Supreme Court has shown more reluctance to apply U.S. statutes extraterritorially. See, e.g., *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 244 (1991) (deciding that Title VII of the Civil Rights Act does not bind US companies’ employment practices abroad and finding that the term “commerce” in Title VII did not amount to a clear statement by Congress that the statute was to be applied extraterritorially); *Kiobel Royal Dutch Petroleum Co.*, 569 U.S. 108, 108 (2013) (limiting the reach of the Alien Tort Statute); *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 265 (2010) (finding that possible interpretations of the Exchange Act “d[id] not override the presumption against extraterritoriality”). Out of deference to international comity and this apparent shift

in Supreme Court precedent, any test regarding the extraterritorial application of the Lanham Act should assess whether that application would interfere with another jurisdiction's laws.

A conflict likely exists if there is a relevant, ongoing dispute in another jurisdiction. For example, in *Trader Joe's*, the Ninth Circuit explained that courts "typically find a conflict with foreign law or policy when there is an ongoing trademark dispute or other proceeding abroad." 835 F.3d at 973; *see also Am. Rice, Inc. v. Producers Rice Mill, Inc.*, 518 F.3d 321, 328 (5th Cir. 2008) ("Absent a determination by a Saudi court that [the defendant] has a legal right to use its marks, and that those marks do not infringe [the plaintiff's] mark, we are unable to conclude that it would be an affront to Saudi sovereignty or law if we affirm the district court.").

Further, to the extent there is a *possibility* of conflict with another jurisdiction's laws, out of deference to international comity, courts should consider that possibility as a factor weighing against extraterritorial application, evaluating the degree of risk of conflict as part of this analysis. *See Reebok Int'l*, 970 F.2d at 555 n.2 (holding that it is a sufficiently cognizable interest under the *Timberlane* Test for the *possibility* of a conflict between the law or policy of the United States and the law or policy of another jurisdiction to exist. Of course, the degree of the risk of conflict is highly relevant to the *weight* of that factor in the *Timberlane* balance: the greater the possibility of conflict, the less the exercise of extraterritorial jurisdiction is justified, and vice-a-versa." Although this assessment of the possibility of a conflict has traditionally only been part of the Ninth Circuit's *Timberlane* Test, the Supreme Court's increasing respect for international comity and reluctance to apply laws extraterritorially counsels in favor of adopting this additional analysis in the manner consistent with *Vanity Fair*.

Conclusion

For the reasons stated above, any test for when the Lanham Act applies extraterritorially should: (1) assess whether the allegedly infringing conduct has had a substantial impact U.S. commerce; (2) treat citizenship as a factor weighing in favor, but not dispositive of extraterritorial application; and (3) assess potential conflict with the law of other jurisdictions. The *Vanity Fair* test is the only one that addresses each of these conclusions, and it therefore should be accepted as the uniform standard across the circuits.

Respectfully submitted,

Kim Jessum, Chair
Section of Intellectual Property Law

August 2022

GENERAL INFORMATION FORM

Submitting Entity: Section of Intellectual Property Law

Submitted By: Kim Jessum, Section Chair

1. Summary of the Resolution(s).

The Resolution addresses an apparently irreconcilable split among the federal circuit courts of appeal regarding the proper test for determining when and whether courts should apply the federal Lanham Act on an extraterritorial basis. The Resolution urges the uniform adoption of the three-part test for extraterritoriality set forth in *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633 (2d Cir. 1956), which considers: (1) whether “the defendant’s conduct had a substantial effect on United States commerce”; (2) whether “the defendant was a United States citizen”; and (3) whether there was a “conflict with trade-mark rights established under the foreign law.” *Id.* at 642. The issue underlying the resolution is the subject of a pending cert. petition in *Hetronic Int’l, Inc. v. Hetronic Germany GmbH*, 10 F.4th 1016 (10th Cir. 2021), *petition for cert. docketed*, No. 21-1043 (U.S. Jan. 26, 2022), and the Association’s adoption of the resolution will permit the filing of an amicus brief if the Supreme Court grants the petition.

2. Indicate which of the ABA’s Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

This Resolution advances the ABA’s goal of advancing the Rule of Law by urging the adoption of a uniform test for the extraterritorial application of the Lanham Act, which will reduce forum shopping and inconsistent results in cases arising from comparable facts.

3. Approval by Submitting Entity.

The Section of Intellectual Property Law Council approved the Resolution on April 6, 2022.

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

No.

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

There are no relevant existing Association policies.

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

This is not a late report.

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

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

The policy will provide authority for the preparation and filing of an Association *amicus* brief in the Supreme Court or other appropriate judicial forum in a case presenting the issues that are addressed in the policy and for the pursuit of a legislative fix should the Supreme Court adopt a rule inconsistent with the Resolution.

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

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

10. Disclosure of Interest. (If applicable)

There are no known conflicts of interest with regard to this recommendation.

11. Referrals.

The Resolution and Report have been referred to the Delegates of the following ABA Sections:

- Business Law Section
- Section of International Law
- Section of Science & Technology Law
- Young Lawyers Division
- Section of Litigation
- Solo, Small Firm and General Practice Division
- Section of Administrative Law and Regulatory Practice

12. Name and Contact Information (prior to the meeting)

Lisa A. Dunner
Section of Intellectual Property Law Delegate to the House of Delegates
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and

Kim Jessum
Chair of Section of Intellectual Property Law
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13. Name and Contact Information. (Who will present the Resolution with Report to the House)

Lisa A. Dunner
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EXECUTIVE SUMMARY1. Summary of the Resolution.

This Resolution calls for the adoption of policy in favor of the adoption of a uniform test for the extraterritorial application of the federal Lanham Act, 15 U.S.C. § 1051 et seq. The Resolution supports adoption of the test applied by a plurality of federal circuit courts of appeal to address the issue, namely, that first articulated in *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633, 642 (2d Cir. 1956).

2. Summary of the issue that the resolution addresses.

This Resolution addresses an important issue of federal law, with respect to which the federal circuit courts of appeal are split, and which is the subject of a pending petition for a writ of certiorari in *Hetronic Int'l, Inc. v. Hetronic Germany GmbH*, 10 F.4th 1016 (10th Cir. 2021), *petition for cert. docketed*, No. 21-1043 (U.S. Jan. 26, 2022).

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

The uniform test for extraterritorial applications of the federal Lanham Act urged by this Resolution will eliminate the forum shopping encouraged by the current split in the federal circuit courts of appeal and advance the rule of law by producing similar outcomes in disputes arising from similar facts. This Resolution will provide authority for the preparation and filing of an Association *amicus* brief in the Supreme Court or other appropriate judicial forum in an appropriate case and for the pursuit of a legislative fix should the Supreme Court adopt a rule inconsistent with this Resolution.

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

None known at this time.

AMERICAN BAR ASSOCIATION
SECTION OF INTELLECTUAL PROPERTY
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, that the American Bar Association supports, in principle, that a final
2 judgment on the merits by a court of competent jurisdiction that a product or service does
3 not infringe a patent owner's patent precludes that patent owner from subsequently
4 asserting against other persons that the same product or service infringes the same
5 patent.

REPORT

A. Introduction

A patent infringement claim is an assertion by a patent holder that an alleged infringer's product or process practices the patent holder's patented invention without authorization. Under certain circumstances, an alleged infringer may argue that the patent holder is precluded from bringing another infringement action. This Resolution addresses a type of preclusion originating in the Supreme Court's opinion in *Kessler v. Eldred*, 206 U.S. 285 (1907), and clarified by numerous opinions by the United States Court of Appeals for the Federal Circuit, including most recently *ABS Global, Inc. v. Cytonome/ST, LLC*, 984 F.3d 1017 (Fed. Cir. 2021).

Kessler preclusion is unique to patent law and is distinguishable from the two other primary preclusion defenses that apply generally to civil litigation claims. The first is claim preclusion, also known as *res judicata*, "prevents parties from raising issues that *could have been raised* and decided in a prior action-even if it was not actually litigated." *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp.*, 140 S. Ct. 1589, 1594 (2020). Claim preclusion traditionally requires: (1) mutuality of the parties unless an exception applies; and (2) that the two actions involve the same claim that arises from the same transaction or involve a common nucleus of operative facts. *Lucky Brand*, 140 S. Ct. at 1594-95; *Nevada v. United States*, 463 U.S. 110, 143 (1983). Claim preclusion typically does not bar claims based on events following the prior action. *Lucky Brand*, 140 S. Ct. at 1596.

The second type of widely applied preclusion is issue preclusion, also known as collateral estoppel, "precludes a party from relitigating an issue *actually decided* in a prior case and necessary to the judgment." *Lucky Brand*, 140 S. Ct. at 1594. If a court has not resolved the substantive issues presented, a consent judgment ordinarily will constitute a final judgment and usually support claim, but not issue, preclusion. *Arizona v. California*, 530 U.S. 392, 414 (2000). In contrast to claim preclusion, issue preclusion no longer requires mutuality of parties. *Blonder-Tongue Lab'ys v. Univ. of Ill. Found.*, 402 U.S. 313 (1971). Therefore, a judgment resolving an issue against a party in one case may be used against that party in other cases even if the opposing parties in those cases are different. Unlike claim preclusion, which operates as a complete bar to re-litigation of an entire claim, issue preclusion will allow a (new and different) claim to proceed, but "the prior judgment conclusively resolves an issue actually litigated and determined in the first action." *DKN Holdings LLC v. Faerber*, 352 P.3d 378, 386-87 (Cal. 2015), *reh'g denied* (Aug. 12, 2015). Claim preclusion bars litigation of all issues that were or could have been litigated in the original action, while issue preclusion resolves only those issues that were actually litigated.

Issue and claim preclusion are two strategic defenses upon which an accused infringer can rely if that party was previously cleared of patent infringement. Nevertheless, there are situations in which claim preclusion will not apply because of non-mutuality, and issue preclusion will not apply if the issues being barred were not actually litigated in the first case and a party would be forced to litigate a patent that was already found to not infringe against another party regarding materially same products.

In *Kessler v. Eldred*, 206 U.S. 285 (1907), the Court established a defense for customers of a party who previously litigated patent infringement for a product and was found not to infringe if the patent's owner subsequently sues the customers for patent infringement for the same product. Eldred first sued Kessler for infringing Eldred's patent for an electrical cigar lighter. The issue as between Eldred and Kessler was fully decided, and Kessler was found not to infringe Eldred's patent. Issue preclusion would bar Eldred from re-litigating this issue against Kessler. However, Eldred then sued one of Kessler's customers in New York, and Kessler intervened on its customer's behalf. After considering the issues, the Supreme Court held that, because the infringement issue was already decided in Kessler's favor, equity required that original holding to apply in this subsequent case where Kessler intervened. The Supreme Court expressly refused to speculate what the outcome of the case would have been if Kessler had not intervened.

Under the facts of *Kessler*, both issue and claim preclusion leave a "gap" that would allow a patent owner to bring another lawsuit against a product previously found not to have infringed a patent, where any of the elements of issue preclusion are not met. Instead, the *Kessler* doctrine bars a patent infringement lawsuit against the customer of a seller who had previously prevailed against a patentee in an earlier patent infringement suit. This allows an adjudged non-infringer "to avoid repeated harassment for continuing its business-as-usual post-final judgment in a patent action where circumstances would justify that result." *Brain Life, LLC v. Elekta Inc.*, 746 F.3d 1045, 1056 (Fed. Cir. 2014).

More recently, the Federal Circuit has followed the *Kessler* doctrine in *Brain Life, LLC*, as well as *SpeedTrack, Inc. v. Office Depot, Inc.*, 791 F.3d 1317, 1323-1329 (Fed. Cir. 2015), *SimpleAir, Inc. v. Google LLC*, 884 F.3d 1160, 1169-1170 (Fed. Cir. 2018), *Mentor Graphics Corp. v. EVE-USA, Inc.*, 851 F.3d 1275, 1301 (Fed. Cir. 2017), *Xiaohua Huang v. Huawei Techs. Co.*, 787 F. App'x 723, 724 (Fed. Cir. 2019), *In re PersonalWeb Techs. LLC*, 961 F.3d 1365, 1377-79 (Fed. Cir. 2020), *cert. denied*, No. 20-1394, 2022 WL 1528375 (U.S. May 16, 2022), and most recently in *ABS Glob., Inc. v. Cytonome/ST, LLC*, 984 F.3d 1017, 1022 (Fed. Cir. 2021).

B. The *PersonalWeb* Litigation

Although the dispute may now have been resolved, the litigation strategy undertaken by the plaintiff in *In re PersonalWeb Techs. LLC*, 961 F.3d 1365 (Fed. Cir. 2020), *cert. denied*, No. 20-1394, 2022 WL 1528375 (U.S. May 16, 2022), demonstrates the wisdom of the ABA having policy in support of the *Kessler* doctrine.

1. The Eastern District of Texas Case Against Amazon

In December 2011, Plaintiff PersonalWeb (“Plaintiff”) sued Amazon for patent infringement of its Simple Storage Service (“S3”). After claim construction,¹ Plaintiff stipulated to dismiss Defendant Amazon with prejudice, and the court entered final judgment against Plaintiff. It is typical in patent litigation that, if claim construction does not go in a plaintiff’s favor, the plaintiff may decide to dismiss the defendant rather than litigate.

2. Plaintiff’s Subsequent Suits Against Amazon’s Customers Consolidated in the Northern District of California

In January 2018, Plaintiff filed new lawsuits in several districts against website operators, and many of them were Amazon customers. Plaintiff alleged that by using S3, Amazon’s customers had infringed the same patents as the Eastern District case. Amazon intervened in the actions and undertook the defense of all cases pending before the Federal Circuit. Amazon also filed a declaratory judgment action against Plaintiff, seeking an order barring Plaintiff’s infringement actions against Amazon and its customers based on the prior Eastern District of Texas case. The cases were consolidated in a multi-district litigation (“MDL”) proceeding before the Northern District of California, which proceeded with the declaratory judgment first. As is common in MDLs, a representative or test case was chosen to proceed along with the declaratory judgment action because Plaintiff stipulated it could not proceed if it lost the first representative case.

The court granted Amazon’s motion for summary judgment in part, finding that claim preclusion barred Plaintiff’s claims regarding acts of infringement prior to the final judgment in the Texas action. Further (and the subject of this potential resolution), the court held that the *Kessler* doctrine barred Plaintiff’s claims of infringement “after the final judgment in the Texas action.” 961 F.3d at 1373. The district court applied its ruling to all of the consolidated cases. Plaintiff appealed.

3. The Federal Circuit’s Decision and Practical Implications

Relevant to the Resolution, Plaintiff contended that the with-prejudice dismissal of the action against Amazon in the Texas case did not constitute an adjudication of non-infringement and was therefore insufficient to trigger the *Kessler* doctrine. The Federal Circuit rejected this argument, affirming the district court.

The Federal Circuit declined to adopt a requirement that issues of infringement or validity be actually litigated because that would leave the patentee free to engage in “the type of harassment that the Supreme Court sought to prevent in *Kessler*.” *PersonalWeb*, 961

¹ Claim construction of words in the patent (“claims”) is a question of law reserved for the court and not a question of fact left to the fact-finder. See *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996). District courts therefore hold *Markman* hearings in which the judge examines evidence from all parties on the meaning of key words in the patent that will help the fact-finder determine whether or not the patent at issue has been infringed.

F.3d at 1379 (quoting *SpeedTrack, Inc. v. Office Depot, Inc.*, 791 F.3d 1317, 1328 (Fed. Cir. 2015)). It elaborated on this point with the following observation:

[W]e [have] said that the *Kessler* Doctrine serves to fill the ‘temporal gap’ left by claim preclusion, even if that gap is not filled by issue preclusion. . . . [W]e have treated the *Kessler* doctrine as a close relative to claim preclusion, without its temporal limitation, rather than as an early version of non-mutual collateral estoppel, as [Plaintiff] characterizes it.

PersonalWeb, 961 F.3d at 1377 (citations omitted).

The Federal Circuit further disagreed that applying *Kessler* to voluntary dismissals with prejudice would “contravene the public interest in the settlement of patent litigation.” *Id.* at 1379. Going forward, patentees should be careful to qualify dismissals with prejudice to preserve its rights to sue the same or other parties in the future. The Federal Circuit noted that the parties “simply have to fashion their agreement in a way that makes clear any limitations to which they wish to agree as to the downstream effect of the dismissal.” “[Plaintiff] abandoned its claims against Amazon without reservation, explicit or implicit. The judgment in that case therefore stands as an adjudication that Amazon was not liable for the acts of infringement alleged by [Plaintiff].” *Id.* at 1378. As the court further explained:

[W]e have characterized the *Kessler* doctrine as granting a “limited trade right” that attaches to the product itself. The scope of that right is not limited to cases involving a finding of non-infringement that was necessary to the resolution of an earlier lawsuit, but extends to protect any products as to which the manufacturer established a right not to be sued for infringement.

Id. at 1378-79.

C. Recommended ABA Policy and Action

This Resolution calls for the Association to adopt policy supporting in principle the general substantive equitable rule established by the Supreme Court in *Kessler v. Eldred*, 206 U.S. 285 (1907), that an earlier judgment of non-infringement precludes a later claim in district court even where the earlier judgment would not be the basis for claim preclusion or issue preclusion. The request for the view of the Solicitor General on the recent petition for a writ of certiorari in *PersonalWeb* increases the importance of the Association addressing this issue even though the Court ultimately denied the petition.²

² Two commentators have noted the following of the correlation between calls for the views of the Solicitor General and successful petitions for writs of certiorari:

[Taking into account in forma pauperis petitions, which have a low success rate], the overall grant rate increases from 0.9% to 34% following a CVSG from the Court; in other words, the Court is 37 times more likely to grant a petition following a CVSG. For petitions on the paid docket, the grant rate increases even more, to 42%; a paid petition is 47 times more likely to be granted following a CVSG.

Although the Supreme Court expanded issue preclusion in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971) (“[T]he principle of mutuality of estoppel . . . is today out of place . . .”), the Federal Circuit has substantially relied on and even expanded the *Kessler* doctrine in the past decade instead of relying on *Blonder-Tongue*. Since claim preclusion does not extend to post-judgment acts of infringement, whether or not same or different product, see *Brain Life* 746 F.3d at 1056 (applying Ninth Circuit definition of claim preclusion), the *Kessler* doctrine creates equity by providing a defense to an allegation of infringement against materially same products post-judgment (even where issue preclusion does not apply). Accordingly, the *Kessler* doctrine fills an equitable need that results when claim and issue preclusion do not apply.

In *SpeedTrack, Inc.*, the Federal Circuit held that the *Kessler* doctrine “attaches to the product itself,” 791 F.3d at 1324, and “bars a patent infringement action against a customer of a seller who has previously prevailed against the patentee because of invalidity or noninfringement of the patent.” *Id.* at 1323. The Federal Circuit’s reason to extend the *Kessler* doctrine in *PersonalWeb* was such that claim preclusion could not extend to post-judgment actions even where there was no judgment of non-infringement or invalidity. This seems to be a similar rationale for why the Court created the *Kessler* doctrine in the first place.

While previous Federal Circuit cases applying the *Kessler* doctrine did not specifically require actual litigation of the issues of non-infringement or invalidity, those cases “have characterized the *Kessler* doctrine as granting a ‘limited trade right’ that attaches to the product itself.” *PersonalWeb*, 961 F.3d at 1378. While it would be inequitable to apply the doctrine in a separate matter involving dissimilar products or services, a voluntary dismissal on behalf of the patent owner over a product/service should prevent the patent owner from any successive infringement suits against purchasers of that product/service because preclusive effect attaches to the outcome of the prior suit. Otherwise, as stated by the Federal Circuit, a manufacturer would be protected in making a product, but customers of that manufacturer would not be protected for selling or using the same product, and hence defeat the purpose of the *Kessler* doctrine. Without the doctrine, “the patentee [is] free to engage in the same type of harassment that the Supreme Court sought to prevent in *Kessler*.” *Id.* at 1379.

Accordingly, the Association should support in principle the general rule that *Kessler* preclusion bars a patent owner from asserting patent rights against a customer for products and services provided by a supplier when that patent owner previously asserted those same patent rights against alike products or services of the supplier in a court of

David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237, 245 (2009). Consequently, the CVSG in *PersonalWeb* may signal the Court’s interest in addressing the *Kessler* doctrine in a future case.

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competent jurisdiction and there was a finding of non-infringement or other dismissal of the infringement claims with prejudice.

Respectfully submitted,

Kim Jessum, Chair
Section of Intellectual Property Law

August 2022

GENERAL INFORMATION FORM

Submitting Entities: Section of Intellectual Property Law

Submitted By: Kim Jessum, Section Chair

1. Summary of the Resolution(s).

This Resolution calls for the Association to adopt policy supporting the principle that a final judgment by a court of competent jurisdiction that a product or service does not infringe a patent owner's patent precludes that patent owner from subsequently asserting against other persons that the same product or service infringes the same patent. The Section of Intellectual Property Law recommends that the House of Delegates adopt this Resolution to support an Association *amicus curiae* brief in future judicial proceedings presenting this issue. This Resolution would also allow the Association to advocate and support legislation on the issue should the Supreme Court adopt a contrary rule in such a proceeding.

2. Indicate which of the ABA's Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

This Resolution advances the ABA's goal of advancing the rule of law by precluding patent owners from asserting consecutive infringement actions under circumstances in which case law from the Supreme Court and the United States Court of Appeals for the Federal Circuit has held those actions barred.

3. Approval by Submitting Entity.

The Section of Intellectual Property Law Council approved the Resolution on November 15, 2021.

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

No.

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

There are no relevant existing Association policies.

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

This is not a late report.

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

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

The policy will provide authority for the preparation and filing of an Association *amicus* brief in the Supreme Court or other appropriate judicial forum in a case presenting the issues that are addressed in the policy.

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

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

10. Disclosure of Interest. (If applicable)

There are no known conflicts of interest with regard to this recommendation.

11. Referrals.

The Resolution and Report have been referred to the Delegates of the following ABA Sections:

- Business Law Section
- Section of International Law
- Section of Science & Technology Law
- Young Lawyers Division
- Section of Litigation
- Solo, Small Firm and General Practice Division
- Section of Administrative Law and Regulatory Practice

12. Name and Contact Information (prior to the meeting)

William L. LaFuze
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Chair of Section of Intellectual Property Law
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13. Name and Contact Information. (Who will present the Resolution with Report to the House)

William L. LaFuze

Section of Intellectual Property Law Delegate to the House of Delegates

McKool Smith

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(713) 485-7307

EXECUTIVE SUMMARY1. Summary of the Resolution.

This Resolution calls for the Association to adopt policy supporting the principle that a final judgment by a court of competent jurisdiction that a product or service does not infringe a patent owner's patent precludes that patent owner from subsequently asserting against other persons that the same product or service infringes the same patent. The Resolution is consistent with the outcome of *In re PersonalWeb Techs. LLC*, 961 F.3d 1365 (Fed. Cir. 2020), *cert. denied*, No. 20-1394, 2022 WL 1528375 (U.S. May 16, 2022).

2. Summary of the issue that the resolution addresses.

Case law from the Supreme Court and the United States Court of Appeals for the Federal Circuit have long recognized a defense for customers of a party who previously litigated patent infringement for a product and was found not to infringe, if the patent's owner subsequently sues the original defendant's customers for patent infringement for the same product. This Resolution supports the principles underlying the defense.

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

The proposed policy position supports the continued recognition of *Kessler* preclusion to discourage patent owners from repeatedly filing infringement actions based on the essentially the same facts underlying prior actions brought by those owners that have been dismissed in final judgments.

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

None known at this time.

AMERICAN BAR ASSOCIATION
SECTION OF INTELLECTUAL PROPERTY LAW
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, that the American Bar Association supports legislation to improve diversity,
2 equity, and inclusion in the intellectual property ecosystem, including inventorship, legal
3 employment opportunities, and the representation of clients;
4

5 FURTHER RESOLVED, that the American Bar Association supports the Inventor
6 Diversity for Economic Advancement Act of 2021 (S.632 and H.R. 1732, 117th Congress)
7 or similar legislation giving the Director of the United States Patent and Trademark Office
8 authority to collect from patent applicants voluntarily disclosed information on gender,
9 gender identity, sexual orientation, disability, race, ethnicity, military or veteran status,
10 and any other demographic information that the Director determines is appropriate for the
11 purpose of determining participation rates in the intellectual property profession; and
12

13 FURTHER RESOLVED, that the Association opposes any legislation or procedures
14 making said demographic information a factor favoring or disfavoring patentability.

REPORT

I. Introduction

An aspiring inventor can apply to protect her idea with the U.S. Patent and Trademark Office (“USPTO”), but critics have long argued that there is a “patent gap” faced by women and other minorities. Indeed, the percentage of inventors applying for patent protection who are women, or from communities of color, lags behind their traditional counterparts. Unfortunately, no formal process exists at the USPTO for collection of inventorship participation among any given demographic community in the U.S. patent application system.

A. SUCCESS Act Study

In recent years, Congress has explored a number of diversity issues within the intellectual property system. These efforts considered a range of public policy issues, *e.g.*, affecting the national economy, the United States’ global technology leadership, expanding opportunities for entrepreneurship and innovation, and other national industry concerns.

In the 115th Congress (2017-18), several members of Congress expressed their concerns about the patent gap and championed the mission of understanding this issue and any deficiencies in the patent ecosystem at the USPTO. Congressional representatives in both the U.S. House and the U.S. Senate introduced the “*Study of Underrepresented Classes Chasing Engineering and Science Success Act of 2018*” or “the SUCCESS Act.”¹ The “SUCCESS Act” was passed by Congress and signed into law on October 31, 2018 (Public Law No. 115-273).

The SUCCESS Act requires the USPTO and the Small Business Administration to conduct a study of issues related to the “patent gap”, including:

- Identifying publicly available data on the number of patents annually applied for and obtained by women, minorities, and veterans.
- Identifying publicly available data on the benefits of increasing the number of patents applied for and obtained by women, minorities, and veterans and the small businesses owned by them.
- Providing legislative recommendations for how to promote the participation of women, minorities, and veterans in entrepreneurship activities and increase the number of women, minorities, and veterans who apply for and obtain patents.

The USPTO maintains a webpage with background information about the legislation and the resulting 2018 report.² This legislation was intended to gain understanding and address deficiencies by:

¹ <https://www.congress.gov/bill/115th-congress/house-bill/6758>).

² <https://www.uspto.gov/ip-policy/legislative-resources/successact>

- Directing the USPTO to study and report to Congress on the number of patents applied for and obtained: (1) by women, minorities, and veterans; and (2) by small businesses owned by women, minorities, and veterans.
- Requesting the USPTO to provide legislative recommendations to increase the number of women, minorities, and veterans who participate in entrepreneurship activities and apply for patents.

In response, the USPTO issued at least two reports on the SUCCESS Act, which were transmitted to Congress on February 11, 2019, and October 31, 2019, respectively.³

The major findings in the USPTO's SUCCESS Act report include:

- A review of literature and data sources found that there is a limited amount of publicly available information regarding the participation rates of women, minorities, and veterans in the patent system.
- The bulk of the existing literature focuses on women, with a very small number of studies focused on minorities, and only some qualitative historical information on U.S. veteran inventor-patentees.
- One of the most comprehensive studies focused on women inventor-patentees is *Progress and Potential: A Profile of Women Inventors on U.S. Patents*, a report published by the USPTO in February 2019. It found that 12% of all inventor-patentees in 2016 were women, up from 5% in the mid-1980s.
- Overall, there is a need for additional information to determine the participation rates of women, minorities, and veterans in the patent system.
- The report concludes with a list of six new USPTO initiatives and five legislative recommendations for increasing the participation of women, minorities, and veterans as inventor-patentees and entrepreneurs.⁴

The report acknowledges the so-called “pipeline” issues around participation rates by groups, such as women and minorities. It states: “Historically, science and engineering (S&E) fields produce the most patentable inventions. Naturally, when fewer women pursue careers in S&E fields, they will make up a smaller share of inventor-patentees.”⁵ However, the USPTO report paints a complex set of data trends. For example, while the participation rate among women inventors is trending up over the years, the rate varies by technology sector. The report states further that:

Although the female share of inventor-patentees has increased over time in each sector (moving from left to right), there is considerable variation in growth patterns. Women's inventor-patentee participation has improved the most in chemistry and

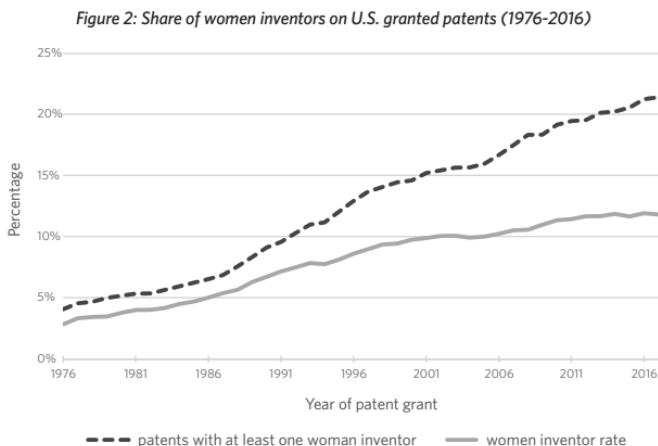
³ <https://www.uspto.gov/ip-policy/legislative-resources/successact?MURL=successact>

⁴ *Id.*

⁵ *Id.* at 9.

design patents. While women accounted for only 6% of inventors named on chemistry patents issued 1977–1986, they comprised roughly 18% in the last decade (2007–2016). Within chemistry, certain subcategories exhibit even higher women inventor rates. In 2016, for example, women accounted for more than one-fifth of inventors granted patents in biotechnology (25% women inventor rate), pharmaceuticals (23%), and organic fine chemistry (21%).⁶

The report provides several useful charts, including this one explaining these patent gap gender trends.



(Source: USPTO 2019)

In developing the SUCCESS Act report, the USPTO took a number of steps to solicit public input, including: (1) holding three public hearings to obtain comments regarding the participation of women, minorities, and veterans in the patent system and entrepreneurial activities; and, (2) soliciting written comments from the public regarding the participation of women, minorities, and veterans in the patent system and entrepreneurial activities. Accordingly, the USPTO received dozens of comments from the IP community, including bar associations, private corporations, academia, and the public.

It is notable that many of the submissions discuss past efforts to understand patent applicant demographic trends through various studies and methodologies, such as matching inventor names with other public information sources. A number of studies directed at developing a better understanding of the “patent gap” and trends in the IP ecosystem have been published over the years. However, critics argue that these studies paint an incomplete picture since much of the demographic data are based on indirect methodologies and do not analyze information provided directly by patent applicants. Some of these studies include:

⁶ *Id.*

- The National Women's Business Council ("NWBC"), coupled with Delixus, Inc., undertook an extensive review of patents granted by the USPTO from 1975-2010. Using data from the U.S. Census Bureau and the U.S. Social Security Administration, the study cross-referenced first names of inventors on granted patents against the 10,000 most common American names amongst women. They found that only 18.8% of all patents filed domestically "had at least one woman inventor" named on the patent. These data were further broken down to show what percentage of patents list 1) a woman as the primary inventor, and 2) a woman as a non-primary inventor.
- Researchers associated with The National Center for Women & Information Technology and 1790 Analytics, LLC studied the percentage of U.S. invented information technology patents that listed at least one female inventor on the patent. The researchers used similar cross-referencing analytics as the previous study, to identify the gender of applicants based on their names.

B. Patent Bar Representation

A related question pertaining to the overall diversity of the patent ecosystem concerns the demographics of the patent bar. This issue has been debated over the past several years as well. The practice of patent law includes a unique exception to the general system of professional credentials on a state-by-state basis and the USPTO regulates the admission of patent professionals through a separate national bar. Some have criticized this practice. These issues are outside the scope of the SUCCESS Act, the IDEA Act (discussed below), or other pending legislation.

In a January 2021 letter to the U.S. Senate, the USPTO reported its research about demographics concerning the gender ratio within the "patent bar." Its research concluded that over the period reviewed, the bar was 70.78% male and 29.22% women.⁷ By way of context, the ABA National Lawyer Population Survey found that the national gender gap in the profession was 63% (male) to 37% (women).

Table 1 - Applicants Who Applied for the Registration Examination and Have Been Registered Since October 19, 2019

APPLIED & BECAME REGISTERED SINCE 10/19/2019	Mr.	Ms.	TOTAL	APPLIED & BECAME REGISTERED SINCE 10/19/2019 (%)	Mr.	Ms.	TOTAL
REGISTERED	281	116	397	REGISTERED	70.78%	29.22%	100.00%
Category A	229	88	317	Category A	57.68%	22.17%	79.85%
Category B	50	28	78	Category B	12.59%	7.05%	19.65%
Category C	2	-	2	Category C	0.50%	0.00%	0.50%
TOTAL	281	116	397	TOTAL	70.78%	29.22%	100.00%

Applicants represented in Table 1 both (i) applied for the registration examination and (ii) became registered on or after October 19, 2019.

⁷ <http://www.ipwatchdog.com/wp-content/uploads/2021/01/USPTO-response-to-Sens.-Hirono-Tillis-Coons-letter-01192021-1-2.pdf>

It is expected that the public interest and debate around the “patent gap” concerning demographics around the patent bar and its eligibility requirements will continue in the near future.

II. IDEA ACT: Text and Legislative History

The current patent application process at the USPTO does not provide for collection of demographic information about gender, race, or other such information about patent applicants. In an effort to address this issue, the “Inventor Diversity for Economic Advancement” (“IDEA”) Act was introduced to provide for more transparency in the patent application process by allowing for the voluntary disclosure and collection of demographic information of patent applicants.

The IDEA Act seeks to have the USPTO gather information regarding inventor demographics through voluntary submissions. The IDEA Act would amend the Patent Act (35 USC § 1 *et al.*) by adding in part:

The Director shall provide for the collection of demographic information, including gender, race, military or veteran status, and any other demographic category that the Director determines appropriate, related to each inventor listed with an application for patent, that may be submitted voluntarily by that inventor.

Any such information submitted would be kept confidential, exempt from disclosure under FOIA, and separate from the corresponding patent application. The USPTO would then provide to Congress an annual report on the data collected.

In developing these new procedures directed at increasing inventor demographic transparency, several concerns arose among lawmakers, including the potential side effect of “implicit bias” arising and potential international retaliation. The proponents of said legislation have responded by emphasizing the importance that any of the collected demographic information neither be shared with the patent examiner nor become a factor in determining the patentability of an invention disclosed within a pending patent application. This aspect of the IDEA Act is important to ensure that the information collected would not directly or indirectly augment or otherwise modify the statutory requirements to obtain a patent as set forth in the Patent Act, which do not include the voluntary disclosure of demographic information by inventors (or by their assignees). Additionally, the factors underlying the requirements for a patent’s eligibility (*e.g.*, novelty, non-obviousness) are dictated by a long tradition and international treaty obligations.⁸ Accordingly, any change in the factors within U.S. examination policy could trigger a response from international users of the U.S. patent system.

In response, the Congressional sponsors have been consistent in her support of the bill, its text, and legislative intent to avoid any implicit bias at home or retaliation. The text of

⁸ TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

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the IDEA Act expressly states that the collected demographic information would not be available for use by patent examiners. The bill text of S. 632 and H.R. 1723 plainly states in pertinent part:

Sec. 2. The Director shall—

“(1) keep any information submitted under subsection (a) confidential and separate from the application for patent; and

“(2) establish appropriate procedures to ensure—

“(A) the confidentiality of any information submitted under subsection (a); and

“(B) that demographic information is not made available to examiners or considered in the examination of any application for patent.”⁹

Further, the chief sponsors of the bill in both the U.S. House and the U.S. Senate, Rep. Velázquez and Sen. Hirono respectively, have emphasized this policy in statements in the legislative materials explaining the bill, for example:

Prevent Implicit Bias in Patent Examination Process. Ensures the USPTO keeps all demographic information separate from the patent application to prevent implicit bias from entering the patent examination process.¹⁰

Likewise, Sen. Hirono has been fully consistent in expressing her concern that with the IDEA Act that “[t]he information would have had no impact on who received a patent”¹¹ in response to a variety of concerns from stakeholders and potential political opposition. In the U.S. House of Representatives, the chief proponents of the bill also expressed similar concerns regarding implicit bias and other potential criticisms from opponents.¹²

In the past year, both the U.S. House and Senate have advanced legislation aimed at improving diversity, equity, and inclusion in the intellectual property ecosystem. Each chamber has passed a version of “the IDEA Act.” This Resolution will allow the Association to advocate on this legislation and comment on these issues more broadly.

A. Status of the IDEA Act Legislation

In May 2021, the U.S. Senate passed a large economic competitiveness legislative package entitled the “U.S. Innovation and Competition Act of 2021” or “USICA.”

On February 4, 2022, the U.S. House passed similar legislation entitled, the “America Competes Act.” (<https://www.congress.gov/bill/117th-congress/house-bill/4521>)

⁹ <https://www.congress.gov/117/bills/s632/BILLS-117s632is.pdf>

<https://www.congress.gov/117/bills/hr1723/BILLS-117hr1723ih.pdf>

¹⁰ https://www.hirono.senate.gov/download/20210224-idea-act_one-pager

¹¹ <https://www.judiciary.senate.gov/imo/media/doc/10.17.2019%20Hirono%20Statement.pdf>

¹² https://smallbusiness.house.gov/uploadedfiles/idea_act_one_pager.pdf

Next, the House and Senate are expected to convene a conference committee to reconcile differences between the two versions of the bill. The following summarizes some of the legislative provisions.

B. U.S. House Legislative Version

A summary of the IDEA Act provisions from the U.S. House's recently passed America Competes Act:

Sec. 80102. Collection of demographic information for patent inventors.

- Subsection (a) would add a new section 124 to title 35:
- *New § 124(a)* provides that the Director shall allow for the collection, on a voluntary basis, of information on gender, race, military or veteran status, and any other demographic category that the Director determines is appropriate from patent applicants.
- *New § 124(b)* requires the Director to keep the demographic information confidential and separate from the rest of the patent application as it is considered by the patent examiner.
- *New § 124(c)* exempts this demographic information from disclosure under the Freedom of Information Act and the Paperwork Reduction Act.
- *New § 124(d)* requires annual reporting from the Director on patent applicants and inventors on issued patents broken down by demographics, technology class of the invention, and country and state (if in the United States) of residence and that the Director make an anonymized version of the underlying data available to the public.
- *New § 124(e)* requires the Director to provide a biennial report to Congress on the data collection process and recommendations for improvements.
- Subsection (b) makes technical and conforming edits.

C. Original U.S. House Legislative version: H.R. 1732

In the U.S. House of Representatives, Congresswoman Nydia Velázquez (D-NY) sponsored and introduced “the IDEA Act,” H.R. 1732.¹³ The bill was introduced in the U.S. House on March 9, 2021. In summary, (1) this bill requires the USPTO to request the voluntary disclosure of demographic information, which shall include gender, race, and military or veteran status, from the inventor on each patent application submitted to the USPTO; (2) prohibits the USPTO from requiring the requested information as a condition of patentability; and, (3) requires the USPTO to (a) publish an annual public report about the collected data, including the collected data broken down by the types of technology covered by the patent applications; and (b) make the underlying data publicly available.

¹³ <https://www.congress.gov/117/bills/hr1723/BILLS-117hr1723ih.pdf>

D. Senate Legislative Version: S. 632

In the U.S. Senate, Senator Mazie Hirono (D-HI) introduced its version of the IDEA Act, S. 632,¹⁴ The IDEA Act was introduced in the U.S. Senate on March 9, 2021. Its text mirrors its U.S. House companion bill. In summary, (1) the bill requires the USPTO to request demographic information from the inventor on each patent application submitted to the USPTO; (2) prohibits the USPTO from requiring disclosure of the requested information, which shall include gender, race, and military or veteran status; and, (3) requires the USPTO to (a) publish an annual public report about the collected data, including the collected data broken down by the types of technology covered by the patent applications; and (b) make the underlying data publicly available.

III. Conclusion

This Resolution requests the American Bar Association's support of legislation permitting the USPTO to collect demographic data to determine participation rates among women, minorities and veterans, including inventorship, legal employment opportunities, and the representation of clients. The Association's support of the initiatives and procedures that the IDEA Act will authorize, will help increase transparency in the patent ecosystem and pave the way for other potential remedies to expand opportunities for all communities seeking to innovate and capitalize on their next great idea.

Respectfully submitted,

Kim R. Jessum, Chair
Section of Intellectual Property Law
August 2022

¹⁴ <https://www.congress.gov/117/bills/s632/BILLS-117s632is.pdf>

GENERAL INFORMATION FORM

Submitting Entities: Section of Intellectual Property Law

Submitted By: Kim Jessum, Section Chair

1. Summary of the Resolution(s).

This Resolution calls for the Association to adopt policy supporting the U.S. Patent and Trademark Office's collection of voluntarily provided demographic information from patent applicants. The Resolution would also allow the Association to advocate on any proposed agency rulemaking in connection with the legislation implementing that policy.

2. Indicate which of the ABA's Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

This Resolution advances two of the ABA's key goals: Goal 1— Serve our Members— this Resolution allows greater transparency around the collection and dissemination of demographic information of patent applicants. Goal 3—Eliminating Bias and Enhancing Diversity—this Resolution will help advance this goal by promoting transparency among the patent applicant pool and thus help policymakers understand how to eliminate barriers for any communities of color potentially disadvantaged by the current system.

3. Approval by Submitting Entity.

The Section of Intellectual Property Law Council approved the Resolution on April 6, 2022.

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

No.

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

There are no relevant existing Association policies.

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

This is not a late report.

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7. Status of Legislation. (If applicable)

The IDEA Act legislation is currently pending in both the U.S. House and the Senate as part of larger legislative packages. The legislation was originally introduced as standalone bills in both chambers: the Inventor Diversity for Economic Advancement Act of 2021 H.R. 1723, S. 632 (117th Congress). The IDEA Act legislative text is also included as part of the presently pending America Competes Act, H.R. 4521(117th Congress) and the United States Innovation and Competition Act of 2021, S. 1260 (117th Congress).

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

The policy will provide authority for the Association to advocate for the enactment of legislation to further the goals of this Resolution, as well as to allow for the preparation and filing of any Association comments on any agency rulemaking implementing those goals.

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

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

10. Disclosure of Interest. (If applicable)

There are no known conflicts of interest with regard to this recommendation.

11. Referrals.

The Resolution and Report will be referred to the Delegates of the following ABA Sections:

- Business Law Section
- Section of International Law
- Section of Science & Technology Law
- Young Lawyers Division
- Section of Litigation
- Solo, Small Firm and General Practice Division
- Section of Administrative Law and Regulatory Practice

12. Name and Contact Information (prior to the meeting)

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13. Name and Contact Information. (Who will present the Resolution with Report to the House)

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EXECUTIVE SUMMARY

1. Summary of the Resolution.

This Resolution seeks the Association's support of legislation aimed at improving diversity, equity and inclusion in the intellectual property profession. Presently pending legislation, the "Inventor Diversity for Economic Advancement Act of 2021" or the "IDEA Act" H.R. 1723, S. 632 (117th Congress). The IDEA Act language is also included as part of the presently pending "America Competes Act," H.R. 4521 (117th Congress), as well as the "United States Innovation and Competition Act of 2021" or "USICA" S. 1260 (117th Congress).

2. Summary of the issue that the resolution addresses.

Critics have argued that the rates of patent applications by certain communities, e.g., women, communities of color, lag far behind their traditional white male counterparts. Currently, there is a lack of objective statistical information on this subject. This proposed policy would permit the USPTO to collect demographic information about its patent applicants.

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

This Resolution supports legislation to permit the USPTO the necessary authority to establish procedures that would allow the voluntary collection and dissemination of demographic information in connection with patent application filings.

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

None known at this time

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

RESOLUTION

1 RESOLVED, That the American Bar Association approves the following paralegal
2 education program: Texas Southmost College, Paralegal Studies Program, Brownsville, TX;

3
4 FURTHER RESOLVED, That the American Bar Association reapproves the following
5 paralegal education programs: Santa Ana College, Paralegal Studies Program, Santa Ana,
6 CA; University of California, Irvine, Paralegal Certificate Program, Irvine, CA; Nova
7 Southeastern University, Paralegal Studies Program, Fort Lauderdale, FL; University of
8 Southern Mississippi, Legal Studies Program, Hattiesburg, MS; Capital University,
9 Paralegal Program, Columbus, OH; Central Penn College, Paralegal Program,
10 Summerdale, PA; Walters State Community College, Paralegal Studies Program,
11 Morristown, TN; Spokane Community College, Paralegal Program, Spokane, WA;
12 Northeast Wisconsin Technical College, Paralegal Program, Green Bay, WI; Casper
13 College, Paralegal Program, Casper, WY;

14
15 FURTHER RESOLVED, That the American Bar Association withdraws the approval of the
16 following paralegal education programs: South University, Paralegal and Legal Studies
17 Program, Savannah, GA; University of North Georgia, Paralegal Program, Gainesville,
18 GA; Kankakee Community College, Paralegal/Legal Assistant Program, Kankakee, IL;
19 Henry Ford Community College, Paralegal Studies Program, Dearborn, MI; Middlesex
20 County College, Paralegal Studies Program, Edison, NJ; Mount St. Joseph University,
21 Legal Studies Program, Cincinnati, OH; Manor College, Paralegal Program, Jenkintown,
22 PA; South University, Legal and Paralegal Studies Program, Columbia, SC; and
23 Mountwest College, Paralegal Studies Program, Huntington, WV;

24
25 FURTHER RESOLVED, That the American Bar Association extends the terms of approval
26 until the February 2023 Midyear Meeting of the House of Delegates for the following
27 paralegal education programs: Auburn University, Montgomery, Legal Studies Program,
28 Montgomery, AL; University of Alaska, Fairbanks, Paralegal Studies Program, Fairbanks,
29 AK; NorthWest Arkansas Community College, Paralegal Studies Program, Bentonville,
30 AR; El Camino Community College, Paralegal Studies Program, Torrance, CA; Miramar
31 College, Paralegal Program, San Diego, CA; Mt. San Antonio College, Paralegal
32 Program, Walnut, CA; National University, Paralegal Studies Program, Los Angeles, CA;
33 Pasadena City College, Paralegal Studies Program, Pasadena, CA; University of

34 California, Los Angeles, Paralegal Training Program, Los Angeles, CA; Quinnipiac
 35 University, Legal Studies Program, Hamden, CT; Widener University, Legal Studies
 36 Program, Wilmington, DE; Seminole State College, Legal Assistant/Paralegal Program;
 37 Sanford, FL; Western Kentucky University, Paralegal Studies Program, Bowling Green,
 38 KY; Roosevelt University, Paralegal Studies Program, Chicago, IL; William Rainey Harper
 39 College, Paralegal Studies Program, Palatine, IL; Tulane University, General Legal
 40 Studies Program, New Orleans, LA; Stevenson University, Legal Studies Program,
 41 Owings Mills, MD; Suffolk University, Paralegal Program, Boston, MA; Eastern Michigan
 42 University, Paralegal Program, Ypsilanti, MI; Oakland Community College, Paralegal
 43 Program, Bloomfield Hills, MI; Oakland University, Paralegal Program, Rochester, MI;
 44 Missouri Western State University, Legal Studies Program, St. Joseph, MO; Missoula
 45 College, Paralegal Studies Program, Missoula, MT; Metropolitan Community College,
 46 Paralegal Program, Omaha, NE; Raritan Valley Community College, Paralegal Studies
 47 Program, Somerville, NJ; Genesee Community College, Paralegal Studies Program,
 48 Batavia, NY; LIU Brooklyn, Paralegal Studies Program, Brooklyn, NY; New York City
 49 College of Technology, Law and Paralegal Studies Program, Brooklyn, NY; Suffolk
 50 County Community College, Paralegal Studies Program, Selden, NY; Pitt Community
 51 College, Paralegal Technology Program, Greenville, NC; Sinclair Community College,
 52 Legal Studies Program, Dayton, OH; University of Cincinnati, Clermont, Law and
 53 Paralegal Studies Program, Batavia, OH; University of Toledo, Paralegal Studies
 54 Program, Toledo, OH; Rose State College, Paralegal Studies Program, Midwest City, OK;
 55 University of Oklahoma Law Center, Legal Assistant Education Program, Norman, OK;
 56 Central Carolina Technical College, Paralegal Program, Sumter, SC; Midlands Technical
 57 College, Paralegal Studies Program, Columbia, SC; Technical College of the Low
 58 Country, Paralegal Program, Beaufort, SC; South College, Paralegal Studies Program,
 59 Knoxville, TN; Tarrant County College, Paralegal Studies Program, Hurst, TX; Wharton
 60 County Junior College, Paralegal Studies Program, Wharton, TX; J. Sargeant Reynolds
 61 Community College, Paralegal Studies Program, Richmond, VA; Edmonds Community
 62 College, Paralegal Program, Lynnwood, WA; Chippewa Valley Technical College, Legal
 63 Studies/Paralegal Program, Eau Claire, WI; Western Technical College, Legal
 64 Studies/Paralegal Program, La Crosse, WI; Laramie County Community College,
 65 Paralegal Studies Program, Cheyenne, WY.

REPORT

In August 1973, the House of Delegates of the American Bar Association adopted the Guidelines for the Approval of Legal Assistant Education Programs as recommended by the Special Committee on Legal Assistants, now known as the Standing Committee on Paralegals (<https://www.americanbar.org/content/dam/aba/administrative/paralegals/aba-guidelines-for-the-approval-of-paralegal-education-programs-2021-web.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 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 and may inspect various program data, such as detailed curriculum materials, admission and placement records, student evaluations of faculty members, and courses.

Following the 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 following school was recently evaluated for initial approval. Having demonstrated compliance with the Guidelines for the Approval of Paralegal Education Programs, the Standing Committee on Paralegals recommends that approval be granted to the following paralegal education program:

Texas Southmost College, Paralegal Studies Program, Brownsville, TX

Texas Southmost College is a community college accredited by the Southern Association of Colleges and Schools. The College offers an Associate of Applied Science Degree in Paralegal Studies.

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:

Santa Ana College, Paralegal Studies Program, Santa Ana, CA

Santa Ana College is a community college accredited by the Western Association of Schools and Colleges. The College offers an Associate of Arts Paralegal Degree and a Paralegal Certificate.

University of California, Irvine, Paralegal Certificate Program, Irvine, CA

University of California, Irvine is a four-year university accredited by the Western Association of Schools and Colleges. The University offers a Paralegal Certificate.

Nova Southeastern University, Paralegal Studies, Fort Lauderdale, FL

Nova Southeastern University is a four-year university accredited by the Southern Association of Colleges and Schools. The University offers a Bachelor of Science Degree in Paralegal Studies, a Post-Baccalaureate Paralegal Studies Certificate, and a Minor in Paralegal Studies.

University of Southern Mississippi, Legal Studies Program, Hattiesburg, MS

University of Southern Mississippi is a four-year university accredited by the Southern Association of Colleges and Schools. The University offers a Bachelor of Arts Degree in Legal Studies.

Capital University, Paralegal Program, Columbus, OH

Capital University Law School is a four-year university and law school accredited by the Higher Learning Commission. The University offers a Paralegal Post-Baccalaureate Paralegal Certificate (Evening), a Paralegal Post-Baccalaureate Certificate (Summer Immersion), and a Legal Nurse Consultant Post-Baccalaureate Certificate.

Central Penn College, Paralegal Program, Summerdale, PA

Central Penn College is a college accredited by Middle States Association of Colleges and Schools. The College offers a Bachelor of Science Degree in Legal Studies, a Paralegal Associate of Science Degree, and a 2 + 3 Bachelor of Science Degree in Legal Studies in conjunction with Widener University Commonwealth Law School.

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

Walters State Community College is a community college accredited by the Southern

Association of Colleges and Schools. The College offers an Associate of Applied Science Business Degree in Paralegal Studies and a Paralegal Studies Certificate.

Spokane Community College, Paralegal Program, Spokane, WA

Spokane Community 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, a Paralegal Studies Certificate and a Legal Nurse Certificate.

Northeast Wisconsin Technical College, Paralegal Program, Green Bay, WI

Northeast Wisconsin Technical College is a community college accredited by the Higher Learning Commission. The College offers a Paralegal Associate of Applied Science Degree and a Paralegal Post-Baccalaureate Technical Diploma.

Casper College, Paralegal Program, Casper, WY

Casper College is a community college accredited by the Higher Learning Commission. The College offers an Associate of Arts Degree in Paralegal Studies and a Post-Baccalaureate Paralegal Certificate.

Withdrawal of Approval

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

South University – Savannah, Paralegal and Legal Studies Program, Savannah, GA

South University – Savannah is a four-year university accredited by the Southern Association of Colleges and Schools. The University offers a Bachelor of Science degree in Legal Studies and an Associate of Science Degree in Paralegal Studies.

University of North Georgia, Paralegal Program, Gainesville, GA

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

Kankakee Community College, Paralegal/Legal Assistant Program, Kankakee, IL

Kankakee Community College is a community college accredited by the Higher Learning Commission. The College offers an Associate of Applied Science Degree in Paralegal/Legal Assistant Studies and a Paralegal/Legal Assistant Studies Post-Baccalaureate Certificate.

Henry Ford College, Paralegal Studies Program, Dearborn, MI

Henry Ford College is a community college accredited by the Higher Learning Commission. The College offers an Associate of Business Degree in Paralegal Studies, a Paralegal Studies Certificate and a Legal Studies Certificate.

Middlesex County College, Paralegal Studies Program, Edison, NJ

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Middlesex County 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.

Mount St. Joseph University, Legal Studies Program, Cincinnati, OH

Mount St. Joseph University is a four-year university accredited by the Higher Learning Commission. The University offers a Bachelor of Arts Degree in Legal Studies, an Associate of Arts Degree in Legal Studies, and a Paralegal Studies Certificate.

Manor College, Paralegal Program, Jenkintown, PA

Manor College is a college accredited by Middle States Association of Colleges and Schools. The College offers an Associate of Science Paralegal Degree and a Post-Baccalaureate Paralegal Certificate.

South University - Columbia, Legal and Paralegal Studies Program, Columbia, SC

South University – Columbia is a four-year university accredited by the Southern Association of Colleges and Schools. The University offers a Bachelor of Science Degree in Legal Studies and an Associate of Science Degree in Paralegal Studies.

Mountwest Community and Technical College, Paralegal Studies Program, Huntington, WV

Mountwest Community and Technical College is a community college accredited by the Higher Learning Commission. The College offers an Associate of Applied Science Degree 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 2023 Midyear Meeting of the American Bar Association House of Delegates.

Auburn University, Montgomery, Legal Studies Program, Montgomery, AL;
University of Alaska, Fairbanks, Paralegal Studies Program, Fairbanks, AK;
NorthWest Arkansas Community College, Paralegal Studies Program,
Bentonville, AR;
El Camino Community College, Paralegal Studies Program, Torrance, CA;
Miramar College, Paralegal Program, San Diego, CA;
Mt. San Antonio College, Paralegal Program, Walnut, CA;
National University, Paralegal Studies Program, Los Angeles, CA;
Pasadena City College, Paralegal Studies Program, Pasadena, CA;
University of California, Los Angeles, Paralegal Training Program, Los
Angeles, CA;
Quinnipiac University, Legal Studies Program, Hamden, CT;
Widener University, Legal Studies Program, Wilmington, DE;
Seminole State College, Legal Assistant/Paralegal Program, Sanford, FL;

Western Kentucky University, Paralegal Studies Program, Bowling Green, KY;
 Roosevelt University, Paralegal Studies Program, Chicago, IL;
 William Rainey Harper College, Paralegal Studies Program, Palatine, IL;
 Tulane University, General Legal Studies Program, New Orleans, LA;
 Stevenson University, Legal Studies Program, Owings Mills, MD;
 Suffolk University, Paralegal Program, Boston, MA;
 Eastern Michigan University, Paralegal Program, Ypsilanti, MI;
 Oakland Community College, Paralegal Program, Bloomfield Hills, MI;
 Oakland University, Paralegal Program, Rochester, MI;
 Missouri Western State University, Legal Studies Program, St. Joseph, MO;
 Missoula College, Paralegal Studies Program, Missoula, MT;
 Metropolitan Community College, Paralegal Program, Omaha, NE;
 Raritan Valley Community College, Paralegal Studies Program, Somerville, NJ;
 Genesee Community College, Paralegal Studies Program, Batavia, NY;
 LIU Brooklyn, Paralegal Studies Program, Brooklyn, NY;
 New York City College of Technology, Law and Paralegal Studies Program, Brooklyn, NY;
 Suffolk County Community College, Paralegal Studies Program, Selden, NY;
 Pitt Community College, Paralegal Technology Program, Greenville, NC;
 Sinclair Community College, Legal Studies Program, Dayton, OH;
 University of Cincinnati, Clermont, Law and Paralegal Studies Program, Batavia, OH;
 University of Toledo, Paralegal Studies Program, Toledo, OH;
 Rose State College, Paralegal Studies Program, Midwest City, OK;
 University of Oklahoma Law Center, Legal Assistant Education Program, Norman, OK;
 Central Carolina Technical College, Paralegal Program, Sumter, SC;
 Midlands Technical College, Paralegal Studies Program, Columbia, SC;
 Technical College of the Low Country, Paralegal Program, Beaufort, SC;
 South College, Paralegal Studies Program, Knoxville, TN;
 Tarrant County College, Paralegal Studies Program, Hurst, TX;
 Wharton County Junior College, Paralegal Studies Program, Wharton, TX;
 J. Sargeant Reynolds Community College, Paralegal Studies Program, Richmond, VA;
 Edmonds Community College, Paralegal Program, Lynnwood, WA;
 Chippewa Valley Technical College, Legal Studies/Paralegal Program, Eau Claire, WI;
 Western Technical College, Legal Studies / Paralegal Program, La Crosse, WI;
 Laramie County Community College, Paralegal Studies Program, Cheyenne, WY.

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Respectfully submitted,

Thomas E. McClure
Chair, Standing Committee on Paralegals

August 2022

GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Paralegals

Submitted By: Thomas E. McClure, Chair

1. Summary of Resolution(s).

This Resolution recommends that the House of Delegates grants approval to 1 program, reapproval to 10 programs, withdraws the approval of 9 programs at the requests of the institutions, and extends the term of approval to 47 programs.

2. Indicate which of the ABA's Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

This Resolution seeks to advance Goal 1) Serve our Members and Goal 2) Improve our Profession. Both goals are advanced through the process of approving quality paralegal education programs whose graduates join the legal community and help improve the delivery of legal services.

3. Approval by Submitting Entity.

This resolution was approved by the Standing Committee on Paralegals in April 2022.

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

This resolution has not been previously submitted.

5. 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.

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

N/A

7. Status of Legislation. (If applicable.)

N/A

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8. 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.

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

None

10. Disclosure of Interest. (If applicable.)

N/A

11. Referrals.

None

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

Jessica Watson, Associate Director
ABA Standing Committee on Paralegals
(312) 988-5757
E-Mail: Jessica.Watson@americanbar.org

13. 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.

Thomas E. McClure, Chair
ABA Standing Committee on Paralegals
(309) 438-8797
E-Mail: temcclu@ilstu.edu

EXECUTIVE SUMMARY1. Summary of the Resolution.

This Resolution recommends that the House of Delegates grants approval of 1 program, reapproval to 10 programs, withdraws the approval of 9 programs at the requests of the institutions, and extends the term of approval to 47 programs.

2. Summary of the issue which the resolution addresses.

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

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

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

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON GUN VIOLENCE
NEW YORK STATE BAR ASSOCIATION
COMMISSION ON DOMESTIC & SEXUAL VIOLENCE
SECTION OF STATE AND LOCAL GOVERNMENT LAW
REPORT TO THE HOUSE OF DELEGATES
RESOLUTION

1 RESOLVED, That the American Bar Association urges federal, state, local,
2 territorial, and tribal governments to enact statutes, rules and regulations that
3 provide law enforcement reasonable time to complete a thorough background
4 check of a prospective purchaser of a firearm before the transfer of a firearm can
5 take place;
6

7 FURTHER RESOLVED, That the American Bar Association urges the repeal of 18
8 U.S.C. § 922(t)(1)(B)(ii), also known as the “Charleston Loophole,” that allows for
9 the sale of a firearm to be consummated after three business days have expired,
10 even if the background check has not been completed; and
11

12 FURTHER RESOLVED, That the American Bar Association urges federal, state,
13 local, territorial, and tribal governments to authorize and appropriate sufficient
14 funds to agencies responsible for background checks, in order to ensure timely
15 processing.

REPORT

I. Introduction

Laws requiring background checks on all gun sales enjoy broad public approval.¹ There is widespread agreement that certain individuals should not be allowed to purchase, own, or possess firearms. Federal and state laws set forth the categories of such persons.² Performing a thorough background check is the key to preventing firearms from getting into the hands of those who should not possess them. In February of 2020, the American Bar Association's House of Delegates passed Resolution 20M107B which addressed the private-sale loophole that exists when persons purchase firearms from non-licensed dealers and individuals, including private sellers, at gun shows and online, which can take place without a background check. The Resolution urged authorities to close that loophole by passing laws that require anyone seeking to acquire a firearm to apply for a permit, to have a background check performed, and prohibiting the transfer of the firearm to anyone who does not possess a valid permit.³ The present Resolution seeks to close what has become known as the Charleston Loophole, which occurs as a result of the Federal law which allows the sale of a firearm to be consummated after three business days have expired, even if the background check has not been completed.⁴ This has resulted in numerous tragedies that could have been prevented if additional time had been allowed to complete a thorough background check of a potential purchaser. Twenty-one states have addressed this loophole with the passage of laws that expand the time for

¹ Polling demonstrates overwhelming support for background checks for all gun buyers, including from 87 percent of gun owners and 89 percent of Republicans. Quinnipiac University, *"US Voters Oppose Trump Emergency Powers on Wall 2-1 Quinnipiac University National Poll Finds; 86 Percent Back Democrats' Bill on Gun Background Checks,"* news release (March 6, 2019), <https://poll.qu.edu/Poll-Release-Legacy?releaseid=2604>.

² See 18 U.S.C. § 922(g). For example, it is illegal for persons in the following categories to possess a firearm: convicted of a crime punishable by imprisonment for more than one year (18 U.S.C. § 922(g)(1)); fugitive from justice (18 U.S.C. § 922(g)(2)); unlawful user of, or addicted to, a controlled substance (18 U.S.C. § 922(g)(3)); adjudicated as a mental defective or committed to a mental institution (18 U.S.C. § 922(g)(4)); illegally or unlawfully in the United States (18 U.S.C. § 922(g)(5)); dishonorably discharged from the Armed Forces (18 U.S.C. § 922(g)(6)); U.S. citizens who have renounced their citizenship (18 U.S.C. § 922(g)(7)); subject to a domestic violence restraining order issued after a hearing on notice (18 U.S.C. § 922(g)(8)); convicted of a misdemeanor domestic violence crime (18 U.S.C. § 922(g)(9)). There are state laws that have added to these categories.

³ 20M107B.

⁴ 18 U.S.C. § 922(t)(1)(B)(ii). The law provides: (t) (1) Beginning on the date that is 30 days after the Attorney General notifies licensees under section 103(d) of the Brady Handgun Violence Prevention Act that the national instant criminal background check system is established, a licensed importer, licensed manufacturer, or licensed dealer shall not transfer a firearm to any other person who is not licensed under this chapter, unless – (A) (before the completion of the transfer, the licensee contacts the national instant criminal background check system established under section 103 of that Act; (B)(i) the system provides the licensee with a unique identification number; or (ii) 3 business days (meaning a day on which State offices are open) have elapsed since the licensee contacted the system, and the system has not notified the licensee that the receipt of a firearm by such other person would violate subsection (g) or (n) of this section; and (C) the transferor has verified the identity of the transferee by examining a valid identification document (as defined in section 1028(d) of this title) of the transferee containing a photograph of the transferee.

background checks in various ways.⁵ It is time for all federal, state, local, territorial, and tribal governments to enact statutes, rules and regulations that allow law enforcement a reasonable time to complete thorough background checks to ensure that guns do not get into the wrong hands.

II. Federal Law Requires that if a Background Check is not Completed within Three Business Days a Firearm may be Transferred to the Purchaser by an Authorized Seller⁶

The Federal Gun Control Act of 1968⁷ set forth categories of individuals who are prohibited from possessing guns under federal law.⁸ These categories have been expanded over time. It also required retailers and individuals in the business of selling firearms to obtain a Federal Firearm License (“FFL”). Under the 1993 Brady Handgun Violence Prevention Act (“Brady Act”),⁹ all holders of an FFL are required to run background checks of prospective firearms purchasers.¹⁰ There is no such requirement for private sellers. The Brady Act called for the establishment of the National Instant Criminal Background Check System (“NICS”) to enable FFL holders to access a database that could quickly inform them whether a potential purchaser is prohibited from owning a firearm.¹¹ The NICS was activated on November 30, 1998. Under existing federal law, if

⁵ Everytown for Gun Safety, *2022 Everytown Gun Law Rankings, Which states have closed or limited the Charleston Loophole?*, <https://everytownresearch.org/rankings/law/charleston-loophole-closed-or-limited/>. Many states have extended the time allowed for a background check to be completed by: (1) prohibiting the transfer of a firearm until a background check is completed or after the expiration of time greater than three business days (e.g., Utah has an indefinite amount of time for a background check to be completed (Utah Code Ann. § 76-10-526(5)(b)); New York requires a license to purchase a handgun, and the FFL holder has up to 30 days before the firearm must be transferred, (N.Y. Penal Law §§ 265.00 *et seq.*, 400.00, 400.01); (2) requiring the purchaser to obtain a license or permit prior to the transfer of a gun (e.g., New Jersey requires a permit to purchase a handgun or a Firearms Purchaser Identification Card to purchase a rifle or shotgun (N.J. Admin. Code § 13:54-1.9)); or (3) requiring mandatory waiting periods before transferring the gun to the purchaser (e.g., California has a 10-day waiting period that can be expanded up to 30 days if the background check is not completed, (Cal Penal Code § 28220(f)(1)(A)). See also, Giffords L. Ctr., *Browse State Gun Laws* (Jan. 2020), <https://giffords.org/lawcenter/gun-laws/browse-state-gun-laws/?filter0=,264>; Giffords L. Ctr., *Background Check Procedures*, <https://giffords.org/lawcenter/gun-laws/policy-areas/background-checks/background-check-procedures/>; and Giffords L. Ctr., *Gun Sales, Waiting Periods*, https://giffords.org/lawcenter/gun-laws/policy-areas/gun-sales/waiting-periods/#footnote_6_5633.

⁶		<i>Supra</i>		note		4.
⁷	18	U.S.C.	§	921	<i>et</i>	<i>seq.</i>
⁸		<i>Supra</i>		note		2.

⁹ 107 Stat. 1536, Pub. L. No. 103-159 (1993). The Brady Act amended the Federal Gun Control Act of 1968. The interim provisions (phase I) of the Brady Act went into effect February 28, 1994. The interim provisions applied to handgun purchases only and allowed law enforcement officers a maximum of five business days to conduct presale background checks for evidence of disqualifying information. The NICS became operational when the Brady Act’s permanent provisions went into effect on November 30, 1998.

¹⁰	18	U.S.C.	§	922(t)(1).
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¹¹ The FBI implemented the NICS for Federal Firearms Licensees so that they could instantly determine whether a prospective transferee is eligible to receive firearms or explosives. NICS screens for a wide variety of prohibiting factors that disqualify purchasers from obtaining firearms. See FBI website, *About NICS*, <https://www.fbi.gov/services/cjis/nics/about-nics>; and Criminal Justice Information Services Division of the Federal Bureau of Investigation, U.S. Department of Justice, *National Instant Criminal Background*

a background check has not been completed within three business days, a gun sale may go through without the results of the background check having been obtained.¹²

Most NICS background checks produce results within minutes, and the firearm can be transferred to the potential buyer when the FFL holder receives the results. About 9% need further investigation and review. Most of those are completed within three business days, however, approximately 3% of cases need more than three business days to achieve results,¹³ often because there are issues regarding a potential buyer's qualifications. Locating relevant information from state and local sources frequently takes more than the allotted three business days. Nonetheless, federal law allows the gun to be transferred to the buyer after the three-business day period has expired even if the NICS results have not been received.¹⁴ This can have devastating consequences if the gun gets into the wrong hands.

A fatal and tragic example of such consequences is the horrific shooting that occurred at the Emanuel African Methodist Episcopal Church in Charleston, South Carolina on June 17, 2015. The shooter in that case, Dylann Roof, entered the church and sat through a Bible study group before killing the Pastor and eight parishioners. Roof should not have been allowed to purchase the .45-caliber Glock pistol he used to carry out the killings, due to a prior arrest record which revealed possession of a controlled substance. That would have disqualified him from purchasing the gun.¹⁵ But because the background check was not completed within three business days, the sale went through and Roof was able to gain possession of the firearm.¹⁶ To avoid this and other tragic shootings, the time to complete a background check before a gun is transferred to the purchaser should be extended to a reasonable period of time that allows law enforcement sufficient opportunity to complete a thorough background check.

A. The National Instant Criminal Background Check System

Before a firearm can be purchased, the FFL holder must contact NICS, electronically or by phone, to initiate a background check. The FBI developed the NICS in cooperation with the U.S. Department of Justice Bureau of Alcohol, Tobacco, Firearms and Explosives

Check System (NICS) Section, 2019 Operations Report, <https://www.fbi.gov/file-repository/2019-nics-operations-report.pdf/view>.

¹² *Supra* note 4.
¹³ *Supra* note 11. See also, Giffords L. Ctr., *Background Check Procedures Laws*, <https://giffords.org/lawcenter/gun-laws/policy-areas/background-checks/background-check-procedures/>; #footnote 4 5615.

¹⁴ *Supra* notes 4, 11, 13.
¹⁵ 118 U.S.C. § 922(g)(3).

¹⁶ See Michael S. Schmidt, *Background Check Flaw Let Dylann Roof Buy Gun, FBI Says*, New York Times (July 10, 2015), <https://nyti.ms/2VmlD0y>; Larry Buchanan, Josh Keller, Richard A. Oppel, Jr. and Daniel Victor, *How They Got Their Guns*, New York Times (Feb. 16, 2018), <https://www.nytimes.com/interactive/2015/10/03/us/how-mass-shooters-got-their-guns.html>; Carrie Johnson, *FBI Says Background Check Error Let Charleston Shooting Suspect Buy Gun*, NPR (July 10, 2015), <https://www.npr.org/sections/thetwo-way/2015/07/10/421789047/fbi-says-background-check-error-let-charleston-shooting-suspect-buy-gun>; *Statement by FBI Director James Comey Regarding Dylann Roof Gun Purchase*, FBI Website, Press Releases (July 10, 2015), <https://www.fbi.gov/news/press-releases/press-releases/statement-by-fbi-director-james-comey-regarding-dylann-roof-gun-purchase>.

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(“ATF”), and local and state law enforcement agencies. The NICS provides centralized access to criminal history and other disqualifying records by searching separate national databases.¹⁷ Those databases contain records compiled by the FBI and information that the states, and local, tribal, and territorial jurisdictions voluntarily provide. The relevant databases are: (1) the Interstate Identification Index (“III”), (2) the National Crime Information Center (“NCIC”), (3) the NICS Indices, and (4) Immigration-related databases maintained by the Department of Homeland Security’s Immigration and Customs Enforcement (“ICE”).¹⁸

The potential purchaser must fill out and sign an ATF Form 4473 (Firearms Transaction Record), and the FFL holder communicates the information from that form to the NICS. The form contains identifying information regarding the purchaser that must be verified by the FFL holder. The potential purchaser must certify that he or she is the actual buyer and truthfully answer questions regarding disqualifying conditions.¹⁹ Falsely filling out a Form 4473 is a federal felony punishable by up to 10 years in jail.²⁰ The NICS section, operated by the FBI, provides full service to FFL holders in 31 states, 5 U.S. territories and the District of Columbia; partial service to six states; and the remaining 13 states perform their own checks through the NICS.²¹ More than 300 million background checks have taken place since 1968, with more than 1.5 million purchases being denied.²²

When a background check is requested by an FFL holder, NICS will have one of four responses:

1. Proceed - the seller may proceed with the sale because no prohibiting record was located
2. Denied – the seller may not proceed with the sale because a prohibiting record was located
3. Delayed – information suggesting the prospective purchaser could be prohibited was located
4. Canceled – the request is canceled due to insufficient information being provided²³

¹⁷ See 28 C.F.R. § 25.6.

¹⁸ See Criminal Justice Information Services Division of the Federal Bureau of Investigation, U.S. Department of Justice, *National Instant Criminal Background Check System (NICS) Section, 2019 Operations Report*, <https://www.fbi.gov/file-repository/2019-nics-operations-report.pdf/view>; and William J. Krouse, Cong. Research Serv., R45970, *Gun Control: National Instant Criminal Background Check System (NICS) Operations and Related Legislation* (Oct. 17, 2019), <https://crsreports.congress.gov/product/pdf/R/R45970>.

¹⁹ See ATF website, *ATF Form 4473 – Firearms Transaction Record Revisions*, <https://www.atf.gov/firearms/atf-form-4473-firearms-transaction-record-revisions>; and *Id.*

²⁰ *Id.* 18 U.S.C. §§922(a)(6) and 924(a)(2).

²¹ See FBI website, *Criminal Justice Information Services (CJIS) About NICS*, <https://www.fbi.gov/services/cjis/nics/about-nics>.

²² See FBI website, *Criminal Justice Information Services (CJIS) National Instant Criminal Background Check System (NICS)*, <https://www.fbi.gov/services/cjis/nics>.

²³ *Supra* note 18.

It is this third category where a sale can be finalized if the FBI NICS Section background check is not completed within three business days.²⁴ This category frequently requires the analyst to reach out to state and local authorities to determine whether a disqualifying condition exists. If the information is not received within that three-business day time limit, the gun can be transferred. This is what happened with such devastating results in the Charleston shooting.

If the NICS Section analyst determines after the three-business day period that the buyer was in fact disqualified from purchasing a gun, it will notify the FFL holder of that denial. If the firearm has already been transferred to the disqualified buyer, the NICS Section will then notify the ATF that a prohibited person possesses the firearm and it should be retrieved.²⁵ These referrals are called “firearm retrieval referrals.” In 2016, for those delayed background checks that took longer than 3 business days, there were 4,170 firearm retrieval referrals to the ATF.²⁶ In 2017, there were 4,864 firearm retrieval referrals to the ATF;²⁷ in 2018, there were 3,960 firearm retrieval referrals to the ATF;²⁸ and in 2019 there were 2,989 firearm retrieval referrals to the ATF.²⁹ Out of these 2,989 transfers in 2019, the top three categories involved the transfer of firearms to 672 users of controlled substances, 634 felons and 562 persons convicted of a misdemeanor domestic violence crime.³⁰

In 2018, approximately 276,000 background checks took longer than the default three-business day time limit. That is roughly 3.35 percent of the 8,235,342 background checks performed in 2018.³¹ The chart below sets forth similar data for the period of 2014 through 2018.³²

²⁴ 18 U.S.C. § 922(t)(1)(B)(ii) and 28 C.F.R. § 25.6(c)(1)(iv)(B).

²⁵ *Supra* note 18.

²⁶ Criminal Justice Information Services Division of the Federal Bureau of Investigation, U.S. Department of Justice, *National Instant Criminal Background Check System (NICS) Operations 2016*, <https://www.fbi.gov/file-repository/2016-nics-operations-report-final-5-3-2017.pdf/view>.

²⁷ Criminal Justice Information Services Division of the Federal Bureau of Investigation, U.S. Department of Justice, *National Instant Criminal Background Check System (NICS) Operations, 2017*, <https://www.fbi.gov/file-repository/2017-nics-operations-report.pdf/view>.

²⁸ Criminal Justice Information Services Division of the Federal Bureau of Investigation, U.S. Department of Justice, *National Instant Criminal Background Check System (NICS) Section, 2018 Operations Report*, <https://www.fbi.gov/file-repository/2018-nics-operations-report.pdf/view>.

²⁹ Criminal Justice Information Services Division of the Federal Bureau of Investigation, U.S. Department of Justice, *National Instant Criminal Background Check System (NICS) Section, 2019 Operations Report*, <https://www.fbi.gov/file-repository/2019-nics-operations-report.pdf/view>.

³⁰ *Id.*

³¹ Joshua Eaton, *Exclusive: As Congress considers a fix to gun loophole, new FBI data shows the size of the problem*, THINKPROGRESS (March 6, 2019), <https://thinkprogress.org/exclusive-as-congress-considers-a-fix-to-gun-loophole-new-fbi-data-shows-the-size-of-the-problem-093354b9c31f/>; See also, Joshua Eaton, *Justice Department slow to answer Congress on gun background checks*, Roll Call (October 10, 2019), <https://rollcall.com/2019/10/10/justice-department-slow-to-answer-congress-on-gun-background-checks/>.

³² Joshua Eaton, *Exclusive: As Congress considers a fix to gun loophole, new FBI data shows the size of the problem*, THINKPROGRESS (March 6, 2019), <https://thinkprogress.org/exclusive-as-congress-considers-a-fix-to-gun-loophole-new-fbi-data-shows-the-size-of-the-problem-093354b9c31f/>. See the following link in the article for the chart: <https://docs.google.com/spreadsheets/d/1F9kKtxWwnMMOlv-vAcukn0C-kNwFRLCGBFJOTTBCBK4/edit#gid=0>.

calendar year	federal checks	delayed transactions	not complete over the third business day	percentage of all federal checks
2014	8,256,688	791,850	228,006	2.76%
2015	8,973,538	900,567	271,359	3.02%
2016	9,360,833	1,063,090	303,146	3.24%
2017	8,638,246	998,886	310,232	3.59%
2018	8,235,342	n/a	276,000	3.35%
TOTAL	43,464,647	3,754,393	1,388,743	3.20%

If a background check results in a “proceed” outcome with no disqualifications being found, the background check record must be purged from the NICS system within 24 hours.³³ In situations where the determination is delayed, the NICS system will continue to work on the background check for up to 30 days, even if the 3-business day time limit has elapsed and the firearm has been transferred.³⁴ At 88 days after a potential sale was initiated, all pending background check records are purged from the NICS system, even if they remain incomplete.³⁵ Each year, hundreds of thousands of delayed background checks are deleted before they are ever completed. From 2014 through July 2019, the FBI failed to complete over 1.1 million background checks, making it impossible to know how many people purchased guns with an incomplete background check and how many of those people should have been disqualified.³⁶ A 2016 report issued by the Department of Justice’s Inspector General on the NICS similarly determined that the FBI did not complete 1.3 million background checks from fiscal year 2003 to May 2013 due to the requirement to purge background checks within 90 days.³⁷ According to the 2019 NICS Operations Report, there were 261,312 background requests that could not be resolved within the three business days, and out of those, 207,421 (79%) remained unresolved and were purged from the NICS within 90 days. This figure is consistent with prior years, based upon the yearly volume.³⁸

The COVID Pandemic resulted in a surge of firearm purchases.³⁹ Between March to November of 2020 there was a 43 percent increase in background check requests over

³³ *Supra* note 18; 18 U.S.C. § 922(t)(2)(C). The identifying number assigned to the inquiry, and the date it was assigned, remain in the system, 28 C.F.R. §25.9 (b)(1)(iii).

³⁴ *Supra* note 18.

³⁵ *Id.*; See also 28 C.F.R. §25.9 (b)(1)(iii).

³⁶ Joshua Eaton, *FBI Never Completes Hundreds of Thousands of Gun Checks*, Roll Call (December 3, 2019), <https://rollcall.com/2019/12/03/fbi-never-completes-hundreds-of-thousands-of-gun-checks/>.

³⁷ *Id.*

³⁸ *Supra* note 29. See also Giffords L. Ctr., *Background Check Procedures*, <https://giffords.org/lawcenter/gun-laws/policy-areas/background-checks/background-check-procedures/>.

³⁹ Keith Collins and David Yaffe-Bellany, *About 2 Million Guns Were Sold in the U.S. as Virus Fears Spread*, New York Times (April 1, 2020), <https://www.nytimes.com/interactive/2020/04/01/business/coronavirus-gun-sales.html>; Richard A. Oppel

the same period in 2019, resulting in a total of 30.3 million background checks being commenced.⁴⁰ In excess of 294,000 background checks were incomplete after three business days between March and July of 2020, more than the total number in 2019.⁴¹ This increase in background check requests has put an even greater strain on a system that is already stretched thin. This surge led the Justice Department to ask Congress for more resources to increase the FBI staff performing background checks and the ATF personnel addressing firearm retrievals.⁴²

Incomplete background checks would be reduced if the NICS System analyst were allowed more than three business days to complete the background check, thereby avoiding thousands of guns each year ending up in the hands of disqualified purchasers, and undoubtedly saving lives. It is important that the agencies at the federal and state levels responsible for background checks receive adequate resources to ensure timely processing of background checks.

B. Background Checks Often Take More Than Three Business Days to Complete when Disqualifying Factors Exist

A background check frequently takes longer than three business days because there is information in the potential purchaser's background that disqualifies them from gun possession. According to the FBI's internal report on the Charleston, South Carolina shooting, the main reasons for delays are "[u]ntimely responses and/or incomplete records" from the thousands of law enforcement agencies that provide information into the databases that comprise the NICS system.⁴³

More than 35,000 guns were transferred to prohibited purchasers between 2008 and 2017 because of the three business-day rule.⁴⁴ A review of background checks through NICS between 2015 and 2019 showed that completed background checks that take longer than three days are four times more likely to be denied.⁴⁵

Jr., *For Some Buyers With Virus Fears, the Priority Isn't Toilet Paper. It's Guns.*, New York Times (March 16, 2020), <https://www.nytimes.com/2020/03/16/us/coronavirus-gun-buyers.html>.

⁴⁰ Everytown for Gun Safety, Everytown Research & Policy, Report, *Undeniable: How Long-Standing Loopholes in the Background Check System Have Been Exacerbated by COVID-19* (April 23, 2021), <https://everytownresearch.org/report/background-check-loopholes/>.

⁴¹ *Id.* Everytown's analysis estimated that by the end of 2020, at least 7,500 transfers to prohibited purchasers occurred, more than in 2018 and 2019 combined.

⁴² Betsy Woodruff Swan, *Trump Justice Department Asks for More Resources to Enforce Gun Laws*, Politico (May 12, 2020), <https://politi.co/3fQju6E>.

⁴³ Joshua Eaton, *Charleston mass murderer got his gun because of background check gaps, internal report shows*, Roll Call (October 10, 2019), <https://rollcall.com/2019/10/10/charleston-mass-murderer-got-his-gun-because-of-background-check-gaps-internal-report-shows/>.

⁴⁴ Brady, Resources, *The Enhanced Background Checks Act of 2021 (H.R. 1446)*, <https://www.bradyunited.org/legislation/enhanced-background-checks-act-hr-1446-charleston-loophole>.

⁴⁵ Everytown for Gun Safety, Everytown Research & Policy, *Solutions, Close the Charleston Loophole*, <https://everytownresearch.org/solution/close-the-charleston-loophole/>.

Delays are especially likely when the disqualifying basis involves a misdemeanor domestic violence offense.⁴⁶ A Government Accountability Office July 2016 report documented the difficulty of adequately completing background checks within three business days when domestic violence crimes are involved:

FBI data also show that during fiscal year 2015, the FBI completed 90 percent of denials that involved MCDV [misdemeanor crime of domestic violence] convictions within 7 business days, which was longer than for any other prohibiting category (e.g., felony convictions). The FBI completed 90 percent of denials that involved domestic violence protection orders in fewer than 3 business days. According to federal and selected state officials GAO contacted, the information needed to determine whether domestic violence records—and in particular MCDV convictions—meet the criteria to prohibit a firearm transfer is not always readily available in NICS databases and can require additional outreach to state agencies to obtain information.⁴⁷

Between 2006 to 2015, approximately 30% of NICS background check denials for misdemeanor crimes of domestic abuse took longer than 3 business days to complete, meaning that during that time, licensed dealers were legally authorized under federal law to transfer guns to 18,000 prohibited persons.⁴⁸ Twenty-six percent of those denials were returned within 20 business days.⁴⁹ Between 2006 and 2015, more than 6,000 firearms were transferred to persons with misdemeanor domestic violence convictions because the three-day business period could not be met.⁵⁰ And in 2017, 23% of the cases where a firearm was transferred to a purchaser with a prohibited status because the background check exceeded three business days involved someone with a misdemeanor conviction of domestic violence or a domestic violence restraining order.⁵¹

These compelling statistics highlight the importance of repealing 18 USC § 922(t)(1)(B)(ii), the Charleston Loophole, and extending the three-business day time limit to enable law enforcement reasonable and sufficient time to conduct a thorough and complete background check through NICS before a firearm sale is consummated.

III. Pending Federal Legislation

On March 11, 2021, The U.S. House of Representatives again passed two bills regarding background checks, one to require background checks on all firearm sales and transfers,

⁴⁶ *Supra* note 32.

⁴⁷ See U.S. Gov't Accountability Off., GAO-16-483, *Gun Control: Analyzing Available Data Could Help Improve Background Checks Involving Domestic Violence Records*, (July 2016), <https://www.gao.gov/assets/680/678315.pdf>.

⁴⁸ *Id.* No other prohibited category had more than 20% of its denials delayed beyond the three business days.

⁴⁹ *Supra* note 44.

⁵⁰ *Id.*

⁵¹ *Id.*

and the other to expand the 3-business day time limit on Federal background checks before a sale can go through.⁵² Similar bills had been passed by the House in the 116th Congress, but were never passed by the Senate. The Enhanced Background Checks Act of 2021, H.R. 1446 (117th Congress), was introduced by Representative Jim Clyburn of South Carolina to close the Charleston Loophole. The bill increases the time from three business days to ten business days for the initial background check review. If a background check has not been completed after the ten-day period, the potential purchaser may submit a petition for a final firearms eligibility determination. They must certify that they are not prohibited from purchasing or possessing a firearm when making this request. The FBI will then have an additional 10 business days to complete the background check. If after the ten-day period the background check is still not complete, the FFL holder may transfer the firearm. If the potential purchaser does not petition for an expedited review, they will have to wait until their background check is completed before the sale can go through. As soon as the background check is finalized the firearm may be transferred. This legislation is pending in the Senate.⁵³ The bill seeks to balance public safety with a purchaser's lawful right to purchase and possess a firearm.

IV. Extending the Time to Complete Background Checks Beyond Three Business Days Does Not Violate the Constitution

As noted in the Report from the Standing Committee on Gun Violence that accompanied Resolution 107B, adopted by the ABA House of Delegates in February of 2020,⁵⁴ under our federal system of government, states can pass their own laws regulating firearms, as long as those laws do not conflict with the Second Amendment of the Constitution or federal law. States have enacted gun regulation laws that expand upon federal law in the following areas: categories of prohibited purchasers; allowing more than three business days to complete a background check; requiring a license or permit for possession and purchase of a firearm; and requiring waiting periods beyond a three-day period before a firearm can be transferred to a purchaser.⁵⁵

In the seminal case of *District of Columbia v. Heller*,⁵⁶ the Supreme Court, while upholding the right under the Second Amendment to have a firearm in the home for self-defense, cautioned that the Second Amendment right it recognized is “not unlimited,” and does not confer “a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”⁵⁷ The Court noted that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the

⁵² See Bipartisan Background Checks Act of 2021, H.R. 8, 117th Cong. (as passed by House, Mar. 11, 2021); Enhanced Background Checks Act of 2021, H.R. 1446, 117th Cong. (as passed by House, Mar. 11, 2021). See also, Congress*GOV, *H.R. 1446 – Enhanced Background Checks Act of 2021*, <https://www.congress.gov/bills/117th-congress/house-bill/1446>; and Michael A. Goster, CONG. RESEARCH SERV., R46958, *Federal Firearms Law: Selected Developments in the Executive, Legislative, and Judicial Branches* (Nov. 3, 2021), <https://crsreports.congress.gov/product/pdf/R/R46958>.

⁵³ *Id.*

⁵⁴ *Supra* note 3.

⁵⁵ *Supra* note 5.

⁵⁶ 554 U.S. 570 (2008).

⁵⁷ 554 U.S. at 626.

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.”⁵⁸

Generally, lower courts engage in a two-step inquiry when analyzing Second Amendment claims. First, the courts ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment. If the court finds that the regulation does not impose such a burden, no further inquiry is needed and the challenge fails. If the court finds that a regulation implicates conduct protected by the Second Amendment, the second step of the analysis is required, which is to determine and apply the appropriate level of scrutiny. Courts, in general, determine the appropriate level of scrutiny based on the challenged law’s burden on Second Amendment rights. Most of the federal courts of appeal have applied intermediate scrutiny in reviewing Second Amendment challenges.⁵⁹ The inquiry under intermediate scrutiny is whether the law is substantially related to an important or significant governmental interest, and does not burden more conduct than is reasonably necessary to protect that interest.⁶⁰

Courts have consistently upheld laws that prohibit possession of guns by persons who are in a disqualified category, e.g., convicted of a felony or a domestic violence offense, subject to an order of protection, or involuntarily committed to a mental institution.⁶¹ Indeed, these are the types of prohibitions that the court in *Heller* would consider “longstanding” and “presumptively lawful.” Given that it can take more than three business days to screen for these types of prohibitions, especially in domestic violence and mental illness cases, it is illogical to contend that extending the time allowed for a background check to be completed beyond three business days before a firearm can be transferred to a potential purchaser would violate the Second Amendment.

The *Heller* Court stated that “nothing in our opinion should be taken to cast doubt on . . . laws imposing conditions and qualifications on the commercial sale of arms.”⁶² In reliance on *Heller*, courts have routinely upheld state laws that have placed additional restrictions beyond those required by federal law, for example, imposing a waiting period in excess of three business days before a firearm sale can be consummated.⁶³ There are several

⁵⁸ 554 U.S. at 626-27.

⁵⁹ See Giffords L. Ctr., *Post-Heller Litigation Summary* (Feb. 9, 2022), <https://giffords.org/lawcenter/gun-laws/litigation/post-heller-litigation-summary/#footnote> 28 4141. See, e.g., *Silvester v. Harris*, 843 F.3d 816, 822-823 (9th Cir. 2016), noting that “This court has applied intermediate scrutiny in a series of cases since *Heller* to uphold various firearms regulations,” and “Our intermediate scrutiny analysis is in line with that of other circuits.” *Silvester* upheld the constitutionality of California’s 10-day waiting period, even in cases where a background check has been completed. See also, *Tyler v. Hillsdale Cty. Sheriff’s Dep’t*, 837 F.3d 678, 692 (6th Cir. 2016) (en banc): “A non-exhaustive review of [post-*Heller*] cases reveals a near unanimous preference for intermediate scrutiny.”

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Supra* note 58.

⁶³ See *Silvester v. Harris*, 843 F.3d 816 (9th Cir. 2016). The court upheld a ten-day waiting period which applied even if a potential purchaser had a permit and cleared a background check in less than 10 days. The Court said it did not need to determine if the regulation was sufficiently longstanding to be presumed lawful because, in applying an intermediate scrutiny analysis, the ten-day waiting period was reasonable

states that have closed the Charleston Loophole by ensuring sufficient time for a background check to be finished before a firearm sale can be processed, whether by extending the time for background checks to be completed, requiring a license or permit before a purchase can occur, or imposing waiting periods.⁶⁴ It is time for federal law to close the Charleston Loophole by repealing 18 U.S.C. § 922(t)(1)(B)(ii), and allowing law enforcement reasonable time to complete a thorough background check of a prospective purchaser of a firearm before the sale or transfer of a firearm can take place.

V. The Federal Law Which Imposes a Three-Business Day Time Limit on Background Checks Must Be Repealed

The three-business day restriction on federal background checks has resulted in innumerable firearms getting into the hands of persons who are not entitled to possess them under the law. As discussed above, a tragic example of what can happen when this occurs is the heartbreaking shooting of a Pastor and eight parishioners at the Emanuel African Methodist Episcopal Church in Charleston, South Carolina on June 17, 2015, when they were gathered together for a Bible study group. It is clear from reliable data that in countless instances, three business days is frequently insufficient to perform a thorough background check, especially when the potential purchaser has a disqualifying event that must be verified at the state or local level, often in cases involving domestic violence convictions. Early on, the FBI acknowledged that NICS could be improved and the number of prohibited purchasers who obtain guns reduced, if the three-business day period were extended.⁶⁵ Notably, the sponsors of the Brady Act initially proposed a seven-day waiting period for handgun transfers, and under the interim provisions of the Act, five business days were allowed to determine eligibility before a transfer had to take place. The three-business day provision went into effect when the permanent provisions of the Brady Act became effective.⁶⁶ Extending the three-business day time limit will not delay the sale to potential purchasers who have no prohibiting condition, since most background checks where the purchaser is not disqualified are completed within minutes and the firearm can be transferred.⁶⁷

and did not violate the Second Amendment. The Supreme Court denied certiorari in this case on February 20, 2018, No. 17-342.

⁶⁴ *Supra* note 5 and note 45.

⁶⁵ See Giffords L. Ctr., *Background Check Procedures*, <https://giffords.org/lawcenter/gun-laws/policy-areas/background-checks/background-check-procedures/>; U.S. Gov't Accounting Off., GAO-00-64, *Gun Control: Implementation of the National Instant Criminal Background Check System* (February 2000), <https://www.gao.gov/assets/ggd/aimd-00-64.pdf>; U.S. Gov't Accounting Off., GAO-00-56, *Gun Control: Options For Improving the National Instant Criminal Background Check System* (April 2000), <https://www.gao.gov/assets/ggd-00-56.pdf>; and U.S. Gov't Accounting Off., Testimony Before the Committee on the Judiciary, U.S. Senate, *Gun Control, Improving the National Instant Criminal Background Check System*, Statement for the Record of Laurie E. Ekstrand, Director, Administration of Justice Issues, General Government Division (June 21, 2000); <https://www.govinfo.gov/content/pkg/GAOREPORTS-T-GGD-00-163/pdf/GAOREPORTS-T-GGD-00-163.pdf>.

⁶⁶ William J. Krouse, Cong. Research Serv., R45970, *Gun Control: National Instant Criminal Background Check System (NICS) Operations and Related Legislation* (Oct. 17, 2019), <https://crsreports.congress.gov/product/pdf/R/R45970>.

⁶⁷ *Supra* note 13.

Government has a significant interest in keeping people safe and ensuring that firearms do not end up in the hands of disqualified persons. Delaying the transfer of a firearm by a reasonable period of time which is greater than three business days does not impinge on a person's Second Amendment rights. Rather, it promotes the legitimate and important governmental interest of protecting people and not allowing firearms to be purchased by those who should not have them under the law.

Allowing law enforcement a reasonable period of time to complete a thorough background check will save lives. The concept of reasonableness is one that is used often in the law. In this context, it should be determined based on the data with respect to how much time it takes to complete thorough background checks in situations where individuals have disqualifying conditions in their history, including conditions that require contacting state and local authorities to ascertain the facts. Many states have passed laws to close the Charleston Loophole and expanded the period of time during which background checks can be completed.⁶⁸ The time frames differ, with some states imposing no specific time limit, and only allowing a sale to proceed when the background check is complete.⁶⁹ Jurisdictions can determine which requirements work best for their own particular localities, based on research and data, to ensure protection of the public while at the same time honoring a person's Second Amendment rights.

Interestingly, Walmart, which has a huge retail presence in the United States, issued a policy statement in 2018 on firearm sales at its stores. It noted that it does not sell hand guns (except in its Alaska stores), nor bump stocks, high-capacity magazines and similar accessories. The statement references its 2015 decision to stop selling modern sporting rifles, including AR-15s. It also highlighted the fact that although federal law allows the sale of a firearm to go through without a background check if there is no response within three business days, their policy prohibits the sale until they receive an approval. It explains: "We take seriously our obligation to be a responsible seller of firearms and go beyond Federal law by requiring customers to pass a background check before purchasing any firearm."⁷⁰

Scholarly research published in the *Journal of Law, Medicine and Ethics* in 2021 indicates that Walmart's decision to suspend handgun sales at all of its 1,975 stores in 1994 was responsible for preventing on an annual basis between 500 - 1,000 gun suicides.⁷¹ If large

⁶⁸ Supra note 5.

⁶⁹ *Id. Egs.*: Colorado - background check must be complete before transfer; Florida - minimum of three business days or until background check is complete, whichever is later; Utah - background check must be complete before transfer.

⁷⁰ See the February 28, 2018 *Walmart Statement on Firearms Policy*, <https://corporate.walmart.com/newsroom/2018/02/28/walmart-statement-on-firearms-policy>. In 2002, Walmart first implemented the rule that customers had to be approved by a background check before they could purchase rifles and shotguns (it did not sell handguns) regardless of how long it took to get the results; see Associated Press, *Wal-Mart toughens background-check policy for gun sales*, *DeseretNews*, July 4, 2002, <https://www.deseret.com/2002/7/4/19664325/wal-mart-toughens-background-check-policy-for-gun-sales>.

⁷¹ Ian Ayres, Zachary Shelley, and Fredrick E. Vars, *The Walmart Effect: Testing Private Interventions to Reduce Gun Suicide*, *The Journal of Law, Medicine and Ethics*, (January 6, 2021). The study also found evidence, although not as strong, that Walmart's later decision to end rifle and shotgun sales at some of

private commercial establishments can take responsible steps to prevent disqualified individuals from gaining access to firearms, then certainly Government can do the same.

VI. Conclusion

Extending the three-business day time limit under federal law to provide reasonable time for law enforcement to complete a thorough background check before a firearm is transferred to a purchaser will save lives. Doing so is consistent with the Second Amendment and case law, and promotes ABA policies passed over the years that seek to keep guns out of the hands of disqualified individuals. For these reasons, the ABA urges: federal, state, local, territorial, and tribal governments to enact statutes, rules and regulations that provide law enforcement reasonable time to complete a thorough background check of a prospective purchaser of a firearm before the transfer of a firearm can take place; repeal of 18 U.S.C. § 922(t)(1)(B)(ii), also known as the “Charleston Loophole,” that allows for the sale of a firearm to be consummated after three business days have expired, even if the background check has not been completed; and federal, state, local, territorial, and tribal governments to authorize and appropriate sufficient funds to agencies responsible for background checks, in order to ensure timely processing.

Respectfully Submitted,

Angela Adkins Downes
Chair, ABA Standing Committee on Gun Violence

August 2022

its stores reduced the firearms suicide rate in states in which Walmart did not subsequently change this policy. Finally, it found an association between stronger state gun laws with substantial and statistically significant reductions in suicide.

GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Gun Violence, New York State Bar Association, and Commission on Domestic & Sexual Violence

Submitted By: Angela Adkins Downes, Chair, Standing Committee on Gun Violence

1. Summary of the Resolution(s).

Urges federal, state, local, territorial, and tribal governments to enact statutes, rules and regulations that provide law enforcement reasonable time to complete a thorough background check of a prospective purchaser of a firearm before the transfer of a firearm can take place; further urges the repeal of 18 U.S.C. § 922(t)(1)(B)(ii), the “Charleston Loophole,” that allows for the sale of a firearm to be consummated after three business days have expired, even if the background check has not been completed; and further urges federal, state, local, territorial, and tribal governments to authorize and appropriate sufficient funds to agencies responsible for background checks in order to ensure timely processing.

2. Indicate which of the ABA’s Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

Advance the Rule of Law (Goal 4)– This Resolution will improve existing law to enable law enforcement to complete thorough background checks before a firearm can be transferred to a potential buyer to ensure that the potential buyer is not prohibited under federal and state law from purchasing, possessing or owning a firearm. This Resolution will thereby serve the public good by keeping firearms out of the hands of persons who should not have them, and will save lives.

Eliminate Bias (Goal 3)- This resolution also advances the goal of eliminating bias. It should be noted that the church that brought the loophole into the public eye is the Emanuel African Methodist Episcopal Church, which predominately serves a diverse community. In addition, while mass shootings are more widely reported on the news, gun violence, a public health crisis, significantly impacts minority communities on a daily basis. Gun violence in our cities has seen dramatic increase in recent years.

3. Approval by Submitting Entity.

The Standing Committee on Gun Violence approved the Resolution on May 4, 2022

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

None

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

The proposed Resolution is consistent with, and complementary to, existing Association policy regarding gun violence and federal and state firearms laws.

Policy 75A109.1, *Recommended Amendments to the Gun Control Act of 1968*, among other things, supported legislation that included provisions to mandate a waiting period prior to firearms purchases so that a criminal background check could be performed by the Bureau of Alcohol, Tobacco and Firearms.

Policy 11A10A, *NICS Accuracy and Funding*, among other things, supported legislation that included provisions urging the government to take all appropriate measures to ensure that NICS records are as complete and accurate as possible with respect to persons prohibited from buying firearms, and urged the government to devote adequate resources to fund complete and accurate implementation of the NICS system.

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

N/A

7. Status of Legislation. (If applicable)

Although the Resolution and Report do not endorse any specific legislation, the Report does describe proposed federal legislation, "H.R. 1446-117th Congress: Enhanced Background Checks Act of 2021," passed in the House of Representatives and currently pending in the Senate, that would extend the time in which a federal background check can be conducted by an initial ten business day period.

8. 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.

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

None

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10. Disclosure of Interest. (If applicable)

N/A

11. Referrals.

Criminal Justice Section
Commission on Youth at Risk
Government & Public-Sector Lawyers Division
Section of Civil Rights and Social Justice
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
Commission on Hispanic Rights and Responsibilities
Commission on Racial and Ethnic Justice
Commission on Sexual Orientation and Gender Identity
Law Student Division
GP Solo Division

12. 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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13. 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.

Urges federal, state, local, territorial, and tribal governments to enact statutes, rules and regulations that provide law enforcement reasonable time to complete a thorough background check of a prospective purchaser of a firearm before the transfer of a firearm can take place; further urges the repeal of 18 U.S.C. § 922(t)(1)(B)(ii), the “Charleston Loophole,” that allows for the sale of a firearm to be consummated after three business days have expired, even if the background check has not been completed; and further urges federal, state, local, territorial, and tribal governments to authorize and appropriate sufficient funds to agencies responsible for background checks, in order to ensure timely processing.

2. Summary of the issue that the resolution addresses.

Many background checks cannot be completed within three business days as required by Federal Law 18 U.S.C. § 922(t)(1)(B)(ii), also known as the Charleston Loophole, resulting in firearms being transferred to purchasers in a prohibited category for gun possession, e.g., persons: convicted of a felony; convicted of a domestic violence misdemeanor; who are unlawful users of a controlled substance; subject to a domestic violence restraining order issued after a hearing on notice; adjudicated as a mental defective or committed to a mental institution; among other categories.

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

The proposed policy will allow additional time for a background check to be completed through the NICS (National Criminal Background Check System) in order to ensure that persons in prohibited categories under federal and state laws do not purchase or possess firearms, and will provide funding for the agencies that administer background checks to ensure timely processing of those background checks.

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

None known

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ELECTION LAW
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
SECTION OF STATE AND LOCAL GOVERNMENT LAW

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association adopts the revised American Bar
2 Association Election Administration Guidelines and Commentary ("Guidelines and
3 Commentary"), dated August 2022;

4
5 FURTHER RESOLVED, That the American Bar Association urges all election officials to
6 ensure the integrity of the election process through the adoption, use, and enforcement
7 of these Guidelines and Commentary; and

8
9 FURTHER RESOLVED, That the American Bar Association urges that federal, state,
10 local, territorial and tribal governments provide election authorities with adequate funding
11 to implement the Guidelines and Commentary.
12

**AMERICAN BAR ASSOCIATION
ELECTION ADMINISTRATION GUIDELINES AND COMMENTARY
August 2022**

- 1.0 *Voter Education, Rights and Responsibilities***
 - 1.1** Voter Rights and Responsibilities
 - 1.2** Voter Education Programs
 - 1.3** Provision of Sample Ballots and Voting Instructions
 - 1.4** Misinformation, Disinformation and the Voting Process
- 2.0 *Accessibility***
 - 2.1** Independence
 - 2.2** Polling Locations
 - 2.3** Ballot
 - 2.4** Election Administration
 - 2.5** Budget/Properly Resourced
- 3.0 *Voter Registration***
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 - 3.2** Registration Procedure
 - 3.3** Voter Verification
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 - 3.5** Reactivation
 - 3.6** Cancellation
 - 3.7** Public Records
- 4.0 *Voting by Mail/Absentee Voting***
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 - 4.3** Processing and Counting Mail Ballots
 - 4.4** Counting, Observation, and Observers
 - 4.5** “Cure” of Mail Ballots
 - 4.6** Resource Allocation
 - 4.7** Tracking the Status of Ballots
- 5.0 *Alternative Voting Methods***
 - 5.1** Early Voting
 - 5.2** Vote Centers
- 6.0 *Election Administration***
 - 6.1** Election Planning
 - 6.2** Election Funding
 - 6.3** Election Staffing
 - 6.4** Training
 - 6.5** Coordination with Appropriate Government Agencies
 - 6.6** Public Information, Consultation, and Outreach

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1.0 Voter Education, Rights and Responsibilities

1.1 Voter Rights and Responsibilities

State and local election authorities should be tasked with the responsibility of ensuring that voters are informed of their rights and responsibilities in participating in the electoral process through dissemination of information prior to Election Day, through various means of outreach, and at polling places on Election Day. All educational information should be translated into as many languages as practicable, and at a minimum those languages required by state or federal law.

Civic and political organizations can provide supplemental information, but the primary source of voter education and materials should be state and local election authorities.

At a minimum, voters should be informed that they have the following rights and responsibilities:

a. The Right to:

1. Inspect a sample ballot
2. Receive a demonstration or further instruction from a poll worker/officer of election of the voting mechanism at the polls
3. Receive language and accessibility assistance at the polls
4. Cast a provisional ballot if your status as a qualified voter is in question
5. Request a replacement ballot if you make a mistake or if your ballot is damaged
6. Vote if you are in line by the time the polls close
7. Vote for the candidate or issue of your choice on the ballot
8. Ask for help, at any point in the process, if you have questions

b. The Responsibility to:

1. Know your local voter registration requirements and register to vote
2. Notify the registrar of any change of address or circumstance that might affect your registration status

3. Figure out the voting option that will best suit your needs
4. Find out the hours and location of your polling place
5. Bring your identification or other supporting documentation to the polls, if required
6. Make sure that you get information on the voting process from reliable sources
7. Vote

1.2 Voter Education Programs

Voter education programs should be created to teach all citizens that voting is a responsibility as well as a right of citizenship. State and local election officials, working with schools, civic and political organizations, should have primary responsibility for creating and implementing these programs. Such programs should include instruction on the fundamental rights of voters, as outlined in § 1.1 a., voter registration, maintenance of registration, operation of the particular voting mechanism in that locality, language and accessibility assistance, and information on when and where to vote, including the options of early and absentee voting, as well as the potential dissemination of misinformation and disinformation regarding the voting process. Such programs should be made available and translated into as many languages as practicable, and at a minimum those languages required by state or federal law.

1.3 Provision of Sample Ballots and Voting Instructions

- a. In each jurisdiction the local election authority should send a sample ballot and voting instructions, translated into as many languages as practicable, and at a minimum those languages required by state or federal law, to each registered voter within a reasonable period of time before the election.
- b. Sample ballots and voting instructions should be made available at locations easily accessible to the general public. Copies should also be made available to civic organizations for dissemination.
- c. Sample ballots and voting instructions should be visibly posted at each polling place.

1.4 Misinformation, Disinformation and the Voting Process

Communication regarding the voting process takes many forms and can involve many sources, not just the official election administration authority. Special care should be taken to ensure public awareness of potential misinformation and disinformation regarding the voting process.

- a. Election administrators should proactively monitor and respond to known instances of the dissemination of false information regarding the voting process. Such responses must be made in an effective manner, including in the appropriate language(s) and through the appropriate avenue(s) of communications, especially if specific communities were targeted by the misinformation or disinformation.
- b. Voters should be educated about and made aware of the potential for misinformation and disinformation regarding the voting process.
- c. A mechanism should be developed that allows for the forwarding of misinformation and disinformation to appropriate election administration authorities to ensure a rapid response and public correction.

Commentary – 1.0 Voter Education, Rights, and Responsibilities

It is every citizen's civic responsibility and right to vote for the candidate or issue of their choice. State and local election officials have an obligation to make sure that all voters are informed of their rights and responsibilities as voters. Voter education should encompass all aspects of the voting process, including the fundamental rights of voters; voter registration; all methods available for voting; time, location and deadlines for registration and voting; language and accessibility assistance and information, as covered under Section 203 of the Voting Rights Act, the American with Disabilities Act, and other federal or state laws; and a basic understanding of the rights and responsibilities associated with voting. Voters have a right to choose their assistor, so long as the assistance is not provided by the voter's employer or union representative. Election officials should disseminate such information, translated in as many languages as practicable, at a minimum in those languages required by state or federal law, through a variety of means prior to an election, such as via mailings, email, the internet, and social media. Materials should also be readily available and in visible locations at polling places. The importance of voter education and all voter education materials should also be a component of online and in-person training of election officials.

Though state and local election administrators should bear the primary responsibility of providing voter education materials, the provision of such materials and information need not be limited to election officials. Schools, civic, and political organizations should also be involved the process. Voter education drives could be held in

conjunction with voter registration and get out the vote drives. Additionally, a voter's "rights and responsibilities card" could be distributed during the registration process, at get out the vote drives, and at polling places. Although specific rights and responsibilities may vary slightly by jurisdiction, the American Bar Association believes that, at a minimum, voters should be informed of the basic rights and responsibilities afforded to all voters, as outlined in § 1.1 of these Guidelines.

The provision of comprehensive, translated, and accessible voter education materials is critical to the success of the voting process. Studies and statistics have shown that first time voters, those likely to need the most education and resources, are less likely to vote again if they have a poor or unsuccessful experience voting.

The integrity of, and public confidence in, our electoral process is crucial to ensuring an engaged citizenry, which is the backbone of our democracy. Toward this important end, voters must be educated not only about their rights and responsibilities, but also about the voting process and any potential actions that would sow misinformation and disinformation about their cherished right to vote. Communication regarding the voting process takes on many forms, from the more traditional -- television, radio, telephone calls, and postal mailings -- to electronic communication, such as Email, social media, messaging apps, and websites. Consequently, special care should be taken to ensure an awareness of potential misinformation and disinformation regarding the voting process. Election administrators should put in place mechanisms to monitor and proactively react to election misinformation and disinformation. Voters can also play a role in ensuring the integrity of the process by remaining alert to potential instances of misinformation and disinformation and reporting it as appropriate.

To be clear, owing to First Amendment considerations, these Guidelines only address misinformation and disinformation related to the voting process (e.g., voter registration deadlines, voting times and locations, and requirements for voting). They do not address opinions and viewpoints addressed by candidates, voters, or political, social, or civic organizations. Likewise, criticism and critiques of the process itself should not be considered misinformation or disinformation. The First Amendment right to freedom of speech is a fundamental right, but we must remain cognizant and vigilant about efforts that seek to adversely affect the right to vote. Misinformation and disinformation about the voting process undermines an individual voter's fundamental right to vote and creates a perception that our voting process is not reliable and open to all who are qualified to vote. Such actions are damaging to our democracy and our greater civil society.

2.0 Accessibility

A. State and local election authorities must ensure their voting processes and procedures are accessible to all voters, including voters with disabilities, language minority voters, voters with low literacy levels, minority voters, voters from Tribal reservations and Native American communities, as well as voters from traditionally underserved communities and should take the necessary steps to meet the needs of all their voters.

2.1 *Independence*

Every voter has the right to a secret ballot and to vote as independently as possible. State and local election authorities must establish policy and procedures that promote this principle for all voters. (See also § 4.0)

2.2 *Polling Locations*

When establishing where, how many, and how polling locations are established, state and local election authorities must take into consideration what needs to be done to ensure accessibility for all voters. (See also § 8.0)

State and local election authorities must locate accessible polling locations in buildings that are ADA-accessible; to the extent the polling location is located in a building that is not ADA-accessible, the polling location itself must be accessible. State and local election authorities should also locate at least one polling location easily accessible to and located on or within Native American reservations and communities to ensure access to the ballot for Native American voters.

State and local election authorities should set up polling locations in ways that accommodate voters with disabilities and language minority voters through proper placement and spacing of voting equipment and materials.

At a minimum where required by law, state and local election authorities must ensure to properly staff polling locations with bilingual poll workers and make clearly visible and easily accessible translated voting materials.

2.3 *Ballot*

With respect to the ballot, state and local election authorities must ensure accessibility for all voters in how they design and offer ballots. (See also § 7.0)

State and local election authorities must design ballots that increase ease of usability, understanding, accessibility, and readability for all voters, including voters with disabilities, voters with low literacy levels, and language minority voters. For language minority voters, state and local election authorities must provide quality translations, including the use of human processing of translations, at a minimum where required by law.

2.4 *Election Administration*

State and local election authorities must ensure accessibility for all voters in how they administer elections, including through how they set up their election procedures to address the needs of marginalized communities,

such as ensuring vote-by-mail processes accommodate, and poll worker trainings encompass, the needs of voters with disabilities, language minority voters, voters with low literacy, and Native American voters. (See also §§ 1.0, 4.0, and 5.0)

2.5 *Budget/Properly Resourced*

State and local election authorities must be properly resourced to achieve the goals of this section. Budget authorities must prioritize accessibility in developing election administration budgets and appropriators must prioritize providing adequate resources to election administrators.

II. **Commentary - 2.0 Accessibility**

Every aspect of the voting process must be accessible to all voters if we are to achieve the democratic ideals of this country. In order to ensure every voter has access to a secret ballot and can vote as independently as possible, extra consideration must be taken to address the needs of certain voters, including voters with disabilities, language minority voters, voters with low literacy, Native American voters, and voters from traditionally underserved communities. Federal laws exist to ensure accessibility for some of these communities. It is important to note that these federal laws should serve as a floor to ensuring access to these communities – states and localities can, and should, seek to go beyond what is provided in federal law either by codifying in state law or through practices (as discussed further below).

As the U.S. Department of Justice notes: “[F]or too long, many people with disabilities have been excluded from this core aspect of citizenship[, voting]. People with intellectual or mental health disabilities have been prevented from voting because of prejudicial assumptions about their capabilities. People who use wheelchairs or other mobility aids, such as walkers, have been unable to enter the polling place to cast their ballot because there was no ramp. People who are blind or have low vision could not cast their vote because the ballot was completely inaccessible to them.” Federal laws that protect the right to vote for voters with disabilities include: Americans with Disabilities Act (ADA) (Title II of the ADA requires state and local governments (“public entities”) to ensure that people with disabilities have a full and equal opportunity to vote); Voting Accessibility for the Elderly and Handicapped Act of 1984 (VAEHA) (requiring accessible polling places in federal elections for elderly individuals and people with disabilities, or in the event there are no accessible locations available to serve as a polling place, requiring the provision of an alternate means of voting); National Voter Registration Act of 1993 (NVRA) (requiring all offices that provide public assistance or state-funded programs that primarily serve persons with disabilities to also provide the opportunity to register to vote in federal elections); and Help America Vote Act of 2002 (HAVA) (requiring provision of at least one accessible voting system for persons with disabilities at each polling place in federal elections that provide the same opportunity for access and participation, including privacy and independence, that other voters receive). See U.S. Department of Justice, Civil Rights Division, Disability Rights Section, “The Americans with Disabilities Act and Other

Federal Laws Protecting the Rights of Voters with Disabilities” factsheet at https://www.ada.gov/ada_voting/ada_voting_ta.htm for more information.

The language minority population, that is people who speak a language other than English at home, is a fast and growing community in the country today. Congress has found that “through the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the electoral process. Among other factors, the denial of the right to vote of such minority group citizens is ordinarily directly related to the unequal educational opportunities afforded them resulting in high illiteracy and low voting participation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting these practices, and by prescribing other remedial devices.” Indeed, voter participation rates of language minority voters have consistently and persistently lagged behind other voters. Federal law provides protections primarily for language minority voters through the Voting Rights Act (VRA). Section 203 of the VRA, enacted in 1975, applies to four language groups (Latinos, Asian Americans, American Indians, and Alaskan Natives) and requires covered jurisdictions to provide language assistance during the voting process, including through written translations, bilingual poll workers and publicity of assistance to the covered community. Jurisdictions are covered through a determination process conducted every five years by the Census Bureau, which assess which jurisdictions (state or political subdivision) meet a specific threshold of a sizeable LEP citizen-voting age population of a single language minority group. A jurisdiction becomes covered under Section 203 if the voting-age citizens of a single language minority i) make up more than 5 percent in a jurisdiction, ii) number more than 10,000, or iii) exceeds 5 percent of all reservation residents on an Indian reservation, and the illiteracy rate of the citizens in the language minority is higher than the national illiteracy rate. Section 208 of the VRA is also an important nationwide provision for ensuring access to the ballot for not only language minority voters but also for voters with disabilities and voters with low literacy. Section 208 requires election officials to allow a voter who is blind or has another disability, is a language minority, or otherwise is unable to read or write, to receive assistance from a person of the voter’s choice (other than the voter’s employer or its agent or an officer or agent of the voter’s union). Additionally, the VRA also prohibits conditioning the right to vote on a citizen being able to read or write, attaining a particular level of education, or passing an interpretation “test.”

“Despite Congress’ decision to grant Native Americans Federal citizenship, and with it the protections of the Fifteenth Amendment, with passage of the Act of June 2, 1924 (Public Law 68–233; 43 Stat. 253) (commonly known as the “Indian Citizenship Act of 1924”), States continued to deploy distinct methods for disenfranchising Indians by enacting statutes to exclude from voter rolls Indians living on reservations, requiring that Indians first terminate their relationship with their Indian Tribe, restricting the right to vote on account of a Tribal member’s “guardianship” status, and imposing literacy tests.” See Native American Voting Rights Act of 2019 as introduced (116th Congress). As documented by the Native American Voting Rights Coalition’s field hearings in Indian Country and 4-State survey of voter discrimination, ongoing barriers to voter access for

Native Americans persist today, including obstruction of voter access such as a lack of accessible registration and requiring off reservation voting and remote or hard to access polling sites, the absence of reliable and affordable broadband connectivity, restrictions on the time and place that people can register and vote, the manner in which people can register and vote (including unequal opportunities for absentee, early, mail-in, and in-person voting), and voter identification laws that discriminate against Native Americans. Additionally, nontraditional addresses for residents on Indian reservations make voter registration, acquisition of mail-in ballots, and securing required identification difficult, if not impossible. Finally, Native American voters suffer from inadequate language assistance, lack of basic infrastructural needs such as running water or electricity, inadequate funding earmarked for their communities, and 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. The Indian Commerce Clause and the Election Clause give Congress broad authority to enact legislation to safeguard the voting rights of Native American voters, and Congress should advance such legislation.

For all of these communities, it is critical that their needs are taken into consideration when developing voting policy and designing how elections will be administered. For example, in designing the election website, jurisdictions should take into consideration whether the website is accessible for voters with disabilities, can support multiple languages, including those that are character-based, and whether the content provided is in plain language and easily understandable by those of all literacy levels. The same types of considerations should go into designing ballots, such as considering the use of large font and voting assistive devices such as tactile ballot guides. Additionally, jurisdictions should engage with these communities, such as through advisory groups, so that they better understand the concerns and needs of community members. In order, to advance these accessibility goals, election officials must include these activities in their budgets and appropriators must prioritize investing into these proactive solutions and activities in order to provide election officials the tools they need to achieve these goals.

As noted, federal laws provide the bare minimum for accessibility that jurisdictions must meet. Jurisdictions across the country have gone beyond to provide more either due to state or local requirements or simply through policy decisions to do more. For example, in 2016, Mayor de Blasio announced that New York City had translated the state voter registration form into 11 new languages—Russian, Urdu, Haitian Creole, French, Arabic, Albanian, Greek, Italian, Polish, Tagalog, and Yiddish—bringing the total number of translated forms to 15 languages in addition to English. In another example, California state law requires language assistance be provided for precincts in which at least 3 percent of voting-age citizens are LEP, or where stakeholders can otherwise demonstrate to the satisfaction of county election officials or the secretary of state the existence of significant local need for materials and assistance in languages other than English. After the determinations made in 2016, The Fairfax County VA Electoral Board decided that in addition to providing language assistance in the Section 203-covered Vietnamese, they would also voluntarily provide Korean language assistance as a community that came close to meeting the coverage formula. There are different ways to achieve expanding

assistance to voters and election officials should utilize as many tools as they have at their disposal to address the needs of their voters.

3.0 Voter Registration

3.1 Lists

- a. State and local election authorities should maintain a current and accurate roll of registered voters, including a centralized, electronic list maintained by the state government and readily accessible to all election officials at each polling place. States should authorize and encourage the use of modern technologies for this purpose. Applicants should be asked to supply an email address if they have one. The public should have broad access to voter registration lists, with appropriate limitations for privacy and security concerns. Any cost associated with obtaining a list should be limited to the cost of copying.

b. Pre-Election Day Challenges to Voter Lists

States should develop specific procedures related to pre-Election Day challenges to voter lists.

1. Any registered voter who resides within the jurisdiction of the applicable challenge should be allowed to challenge the registration of a registered voter.
2. The challenge should be made in writing to the chief election officer. The challenge must also be signed and affirmed by the challenger.
3. The challenge should be made no later than 5 days after the close of registration. A challenger may only challenge a particular voter once.
4. The challenge should be resolved in a hearing that is open to the public. The individual whose registration is being challenged and the individual who initiated the challenge should receive notice of the hearing and the disposition of said challenge.
5. If the voter does not receive notice of the hearing and contests the challenge at the polling place, he or she should be permitted to cast a provisional ballot.

3.2 Registration Procedure

- a. Voter registration applications should require the signature of the applicant.

Alternative methods of verification should be offered to those unable to sign their name. In addition, information bearing on the applicant's eligibility to vote and contact information should be required fields on the application. Applicants should also be asked to supply an email address.

b. Each election authority should take the following steps to encourage and increase voter registration:

- improve and simplify state and local voter registration procedures;
- streamline voter registration by mail and online;
- enact preregistration for 16 and 17-year olds;
- authorize and support voter registration efforts by civic and political organizations, including allowing such organizations to distribute voter registration applications and materials and return them to election officials;
- provide for same-day voter registration during any early voting period and on Election Day;
- explore new technology that improves the registration process;
- extend the hours and time frame for voter registration (A minimum of thirty days is required by federal law.);
- provide additional registration facilities at locations that are easily accessible and open during convenient times;
- increase voter registration through state and local agencies that have direct contact with the public (Federal law requires that motor vehicle, public assistance, and disability services agencies offer voter registration and that states designate additional agencies); and
- provide simple methods to update voter registration information, including at the polling place.

c. Voter Registration Drives

Voter registration drives conducted by individuals or community organizations should be encouraged and regulated only to the extent necessary to protect the public.

1. Individuals or organizations submitting voter registration forms on behalf of more than 25 voters should be required to register with the

state election authority as volunteer registrars. Organizations that do so should be required to identify an agent who will be responsible if the election authority needs to contact the organization. All volunteer registrars should be required to satisfactorily complete a training on voter registration drives and sign an oath or affidavit of good faith.

2. The organization should exercise quality control over its volunteer registrars and keep records of basic information from each registration form, including who collected it.
3. Volunteer registrars should not duplicate, copy, or otherwise make use of information provided on the completed voter registration form, except basic contact information for the purpose of "Get Out the Vote" activities.
- d. Applications for voter registration should request the last address at which the voter was registered. Upon recording the new registration, the election authority should cancel the prior registration if within the same jurisdiction. If outside the jurisdiction, the election authority should notify the prior jurisdiction that the voter has registered in the new jurisdiction so that the prior registration may be cancelled. States, counties, and local jurisdictions should work cooperatively to achieve this goal.
- e. After receipt of a registration application, the election authority should mail to the voter a non-forwardable, return postage guaranteed notice containing a voter registration card if the registration is accepted. If the application is rejected, the applicant should be informed why and instructed how to remedy it (if the problem is not one of eligibility, such as age or citizenship),
- f. Election officials should issue registration cards to each registered voter. The card should advise the voter that registration is complete and provide polling place information and contact information for the local election authority. Voters should not be required to present their voter registration card at the polling place as a prerequisite to voting, but the card may be used by the voter as an acceptable means of identification at the polls, if the state requires identification.

3.3 Voter Verification

Current and correct registration lists of eligible voters should be maintained by the election authority through periodic voter verification programs. Failure to vote should not be the reason for initiating the voter verification process and may never be a factor in cancelling a voter's registration. State election authorities should widely disseminate advance public notice of an upcoming list maintenance procedure and how it will be conducted.

- a. An on-going verification program should seek to identify unqualified voters. It should be uniform, non-discriminatory, and in compliance with the Voting Rights Act. It must be completed at least 90 days before an election.
- b. The verification program should solely rely on address data gathered from the National Change of Address (NCOA) system maintained by the Postal Service, the Electronic Registration Information Center (ERIC), a cooperative program in which 30 states and Washington, DC, share data that is based on the states' motor vehicle records and voter rolls that indicate interstate moves, or some comparable program. In addition, routine mailings from the election authority that are returned as undeliverable may be the basis for initiating a verification process. Death, incapacity, and criminal conviction records, where applicable, should be supplied by the appropriate government agencies.
- c. State election authorities should provide clear and consistent guidance to local election officials for voter verification activities. Guidance may include appropriate sources of information on eligible voters and protocols for notice, reactivation and cancellation. State election officials should provide easy access to all directives and advisories for reference by local election officials and the public on the agency's official website.

3.4 *Notice of Inactive Status*

A voter who appears to have changed address, as indicated by the NCOA, the ERIC system, or another comparable program, or mail returned to the election authority as undeliverable as addressed, should have his or her registration put on an inactive list, unless the voter moves to a different address within the same jurisdiction and the election authority has the authority to automatically update the voter's address for registration purposes. If a voter's registration is designated as inactive, a notice with forwarding instructions to the post office, should be sent promptly to the address of registration. The notice should also be sent by email, if available. The notice should advise the voter of the inactive designation, state the reason for the change, and list the steps the voter can take to reactivate the registration. A postage prepaid postcard pre-addressed to the election authority should be included with the notice. It may be used by the voter to reactivate the registration at the same address if an error was made or to request a transfer of address if the voter has moved to a new address within a jurisdiction that does not automatically update a voter's address for registration purposes. A voter who has not moved may so indicate and return the postcard, and the registration will be reactivated.

If the voter has moved to a location outside the election jurisdiction and

confirmed in writing that he or she has moved from the jurisdiction, the voter should be removed from the voter roll and should be instructed how to register in the new jurisdiction.

3.5 *Reactivation*

An inactive voter who has not moved to a new address or has moved within the same election jurisdiction may be reactivated at the polling place during early voting or on election day simply by voting. The voter should be permitted to cast a regular ballot.

3.6 *Cancellation*

A voter may be removed from the voter roll only after the voter has not voted or otherwise interacted with the election authority for a period comprising two federal general elections following the voter's failure to respond. The voter should then be sent a notice of the cancellation at the last known address and by email, if available, and advised how to re-register. A public record of cancelled registrations should be maintained by the election authority for at least two years.

3.7 *Public Records*

Election authorities should maintain all records related to voter verification activities, including advance notices of the list maintenance procedure and cancelled registrations for at least two years and make these records available to the public to the fullest extent permitted by state law. Any fee charged for obtaining records should be limited to the cost of copying. Statewide voter registration databases should maintain the records of names removed from voter registration lists, including a record of who authorized removal. Lists of inactive and cancelled voters should be made available to third parties upon request, in the same manner as voter registration lists, and should be brought to the polls by an election official on Election Day.

III. ***Commentary - 3.0 Voter Registration***

Applications for voter registration should require a signature and ask for data relating to the applicant's eligibility, as well as contact information. Email and cell phone (SMS) information should also be sought as they provide multiple options to reach voters. The postcard registration form included in the National Voter Registration Act provides a model for the content of the application.

Available modern technologies permit rapid addition, deletion, or cancellation of names

from voter registration lists. Copies of the registration lists should be available to the public at reasonable or no cost, depending on the format of the list. The cost, if any, should reflect the cost of reproduction and should not be used to discourage availability.

Certainly, the Internet allows for many cost-efficient methods that can be used to make such lists available to the public. These methods must be balanced, however, against legitimate privacy and security concerns of registered voters and must be restricted to non-commercial usage. States should also be encouraged to develop standards for pre-Election Day challenges to voter lists.

Voter registration drives conducted by political parties, nonprofit organizations, and other interested individuals and organizations have served to increase the number of people registering to vote. In some instances, federal and state laws already govern the conduct of third-party voter registration drives, on issues such as permissible conduct and procedures. In the instance where a volunteer registrar submits the voter registration form for the prospective voter, states should adopt more stringent guidelines in order to ensure that there is some measure of accountability and safeguard that the registration forms will in fact be delivered and submitted in the appropriate manner. Voters who register through voter registration drives should also check with the appropriate election authority to verify their registration.

As more steps are being taken to increase voter registration, there is a concomitant responsibility on local election officials to verify the identity of people registering to vote. Verification of the eligibility of the registrant is necessary to protect the integrity of the election system. There are numerous suggested methods of verifying registration, including requiring the applicant to sign at registration. Difficulties in verification procedures arise partly because of mail registration, the desire to maintain the privacy of the individual seeking registration, and costs. Additional problems occur when voters, either because of social circumstance, illiteracy, or disability, do not possess a photo identification or are unable to sign and whose registration must be authenticated by others. In such instances, alternative verification procedures should be devised. States should not create an overly onerous verification process. States may prefer one form of identification over another, but should be forgiving of circumstances that may not allow a particular voter to conform to the preferred method. For instance, if a state requires a photo identification and a voter does not possess one, the voter should have an opportunity to provide what he has and sign a document attesting to his or her identity.

There is a legitimate interest in verifying the identification of voters, but the process should not be one of repeated verification, which could be interpreted as a form of intimidation or harassment.

Voter verification programs should be dependable, accurate, and conducted with precision, care, consistency, and transparency. A person's failure to vote, even over multiple election cycles, should not raise an inference that the voter has moved or is otherwise ineligible to vote. Any process to verify a voter's address or other eligibility factors should not emanate from voter history, but rather from reliable public records,

including change of address, death, criminal convictions, or returned mail from the Post Office. This being said, in 2018, the U.S. Supreme Court ruled that a jurisdiction may send return cards to registrants who have not engaged in certain “voter activity” for two consecutive years, while reiterating that in no circumstance may a registration be cancelled by reason of the person’s failure to vote. An inactive voter who interacts with the election authority—whether by voting, attempting to vote, returning mail, or appearing at the election office for any reason—is no longer in inactive status.

The following should not be factors in initiating the voter verification process: (i) minor mismatches in a registrant’s name across government records; (ii) similarities among registrants’ names; or (iii) a registrant’s failure to update Division of Motor Vehicle records upon being granted U.S. citizenship. State election authorities should not rely on data sources that have not been independently verified as reliable, such the Social Security Administration’s Death Master File.

Election authorities should also consider the use of new technologies to ensure the integrity of the registration lists. If there is a discrepancy with an individual’s registration, election officials should flag and investigate the registration and require supplemental evidence of residence from that individual, if appropriate. If an election authority contracts with an outside vendor to verify the eligibility of registered voters, standards and safeguards must be adopted to ensure the reliability of such information.

Automatic voter registration has been adopted by a number of states and is gaining popularity. The principle -- that state databases already in existence provide lists from which eligible people may be registered unless they explicitly opt out -- certainly promotes the goal of universal registration. However, it does have pitfalls that must be addressed in the interest of both the security of elections and the protection of unwitting “registrants.” If a jurisdiction provides for automatic voter registration, an ineligible person who is mistakenly registered should be held harmless for the error. For example, if the automatic process using a motor vehicle database registers a non-citizen who legally holds a drivers’ license, the non-citizen who thinks he is properly registered to vote should not suffer any penalty for the mistake of the election authority in registering him. States must develop preventative measures and effective remedies to address this problem before automatic voter registration can be endorsed without qualification.

These guidelines do not take the position that registration should be a required procedure. It is recognized that some jurisdictions have not found a need for registration or may adopt an enrollment system in the future.

4.0 Voting by Mail/Absentee Voting

4.1 Voting Procedures

Voting by mail has become the predominant method of voting, among an increasing cafeteria menu of options that have been adopted by states to increase accessibility to voting by Americans. The term Voting by Mail is

more inclusive of current practices and is used here together with the term “absentee” to reflect that development.

- a. All registered voters should be allowed to vote by mail regardless of cause.
- b. Mail/absentee voting procedures and instructional materials should be as simple as possible for those authorized to vote by mail. Mail ballots should be distributed early enough to accommodate the deadlines for return of the ballots.
- c. To assure the rights of persons who are blind or otherwise disabled to vote privately and independently, each election authority must provide the option of a ballot marking tool that allows voters to mark an electronic version of the Mail/absentee ballot on devices such as computers, tablets, or smart phones. Voters must still print and mail in these ballots or deliver the ballots to the election headquarters, designated official election precinct, vote center or ballot drop box.
- d. Each election authority should authorize and support requests for Mail/absentee ballot voting applications by civic and political organizations.
- e. To confirm their identity, Mail/absentee ballot applicants should be required to provide basic Personal Identifiable Information, including an address, date of birth, signature, and an identifying number such as their driver’s license number, state or tribal identification card number, the last four digits of their social security number, or other identification number provided at the time of their registration.
- f. States should implement an electronic verification process in connection with their voter database maintenance requirements under federal law, similar to that used for online voter registration, which would instantaneously confirm the identifying number of the voter, with either the state voter registration database or the driver’s license system, in the process of a voter requesting a Mail/absentee ballot.
- g. To reduce the number of individuals touching or handling voted or sealed Mail/absentee ballots and to lessen the potential for coercion of voters, states should by law or regulation enhance alternative convenience voting alternatives to third party assistance in the collection and return of voted mail/absentee ballots, through special, official mobile election services or voting centers so as to extend official voting outreach in appropriate situations, such as nursing homes, jails holding detainees who are eligible to vote, and tribal jurisdictions where voters are greatly distant from regular election offices.

- h. To the extent states cannot or do not provide greater alternatives to third party assistance in the collection and return of voted mail/absentee ballots such as enhanced mobile voting locations, as outlined in § 4.1.g. above, to better reduce the potential for coercion of voters, states by law or regulation should authorize only an identified class of persons, as well as caregivers or other persons who assist people with disabilities to vote, to collect the Mail//absentee ballots of such voters and return them to election offices for counting and tabulation. With or without such limitations, states should by law provide “chain of custody” disclosure requirements to identify all persons entrusted by the voter to collect and return their Mail//absentee ballots.
- i. State and local election officials should develop new ways to confirm the identity of voters, such as using identification information provided by the voter, as suggested in § 4.1.e. above, when the voter registered to vote, prior to counting the ballot.
- j. Technology has improved the capabilities of state and local election officials to compare voters’ voter registration signatures with their signatures on petitions and other types of official documents, including mail/absentee ballot applications and voted ballots. Signature verifications remain the primary method to protect the integrity of mail/absentee voting at present and other proof is used as a supplement. Alternate proof of identity methods, if the identity information is sufficient (such as those listed in § 4.1.e. above and referenced in § 4.1.i.), should offer comparable reliability to that of the enhanced signature verification methods discussed in this section. Election officials should not require both signature verification and other proof of identification.
- Where traditional signature checking is used, even where digital means allow for more reliable initial screening and verification, final_resolution of signature validity should continue to be made by designated supervisory election officers.
- k. Motor voter registration and re-registration should provide a regular, periodic opportunity for voters to update their current signatures for voter registration and voters who do not avail themselves of DMV registration should be encouraged voluntarily to update their registration signatures if the voters feel that their signatures have changed significantly over time.
- l. The mail/absentee ballot return envelope should indicate whether the voter had assistance and, if so, the assisting party should be identified and both the voter and assisting party should be required to certify in

writing that no coercion or influence was involved and that the ballot was cast secretly.

- m. Lists of mail/absentee ballot applicants should be available to the public prior to Election Day and to the precinct officials by Election Day. A voter who has requested a mail/absentee ballot may vote in person on Election Day by surrendering the voter's unvoted mail/absentee ballot and voting a regular ballot. A voter who has requested a mail/absentee ballot may vote in person on Election Day by casting a provisional ballot at the polling place if the voter subscribes in writing that he or she did not return a voted mail/absentee ballot, or if the records of the election authority show that it has not received the voter's mail/absentee ballot by Election Day.
- n. The deadlines to request and to mail ballots should be set well in advance of Election Day to allow for the mail system to return for processing to election officials voted mail/absentee ballots by the close of business and the polls on Election Day. Many states have vote by mail/absentee application periods from 45 days to 7 days before Election Day to ensure voters can readily apply for, receive and return their vote by mail/absentee ballots in time for the ballots to be received on or before election day. Advancing the earliest date for requesting such ballots may reduce the need for last minute court interventions that have contributed to increased voter confusion.

4.2 *Return of Mail/Absentee Ballots*

Consistent with affording election officials to distribute mail/absentee ballots to voters earlier, as recommended in § 4.1.n., and as a standard practice, election authorities should require that mail/absentee ballots be received by the close of polling hours on Election Day or if mailed, postmarked or Intelligent Mail bar-coded no later than Election Day in order to be counted.

However, if states allow for return of absentee ballots, including military and overseas voters' ballots, *after* Election Day, they should provide clear standards for postmarking or Intelligent Mail barcoding of such ballots.

a. Ballot Drop Boxes

As a convenience to vote by mail voters, election jurisdictions should deploy drop boxes for the receipt of voted mail ballots.

Regarding drop boxes:

- Drop boxes must be fabricated so that the deposited ballots are secure and protected from theft, vandalism, tampering, and the

elements.

- Drop boxes must be designed so that they are distinguishable and clearly marked.
- Drop boxes must be appropriately monitored at all times when they are available for receiving ballots.
- Information as to the locations and availability of drop boxes should be widely communicated to voters.
- Drop boxes must be secured with locks and sealed with numbered security seals whenever they are available for accepting ballots.
- During times when the drop boxes are not available for accepting ballots, the opening for receiving ballots should be locked shut.

At least once each day during the time that drop boxes are deployed the returned ballots should be removed from the drop boxes by election officials and placed in secured carriers for transportation to an election ballot receiving station to await processing. The opening for receiving ballots in drop boxes should be locked shut on election night simultaneously with the closing of the polls, with the ballots received to that point removed

4.3 *Processing and Counting Mail Ballots*

State law should provide election officials the opportunity to process but not count mail/absentee ballots they have received, beginning 10 days before the election, to allow for prompt counting and reporting of the vote on election night and to reduce the burden that delays processing and reporting election results without such advance-processing opportunities. The processing of mail/absentee ballots by election officials should start well in advance of Election Day, although no preliminary or unofficial results should be released to the public or political parties. To speed up the counting and release of unofficial results on election night, the envelopes of mail/absentee ballots should be evaluated promptly to confirm identifying or required information, and the canvassed ballots should be scanned prior to Election Night and the first reporting of results.

States should determine based on their particular circumstances how long after Election Day to accept timely postmarked voted mail/absentee ballots for processing.

Early processing also will afford election officials and voters the opportunity to 'cure' mail/absentee ballots received without the voter's signature or where the voter's signature on the ballot envelope appears to differ from comparable (voter registration affidavit or mail/absentee ballot application) signatures.

4.4 *Counting, Observation, and Observers*

Observers representing candidates, political parties, ballot measure proponents and civic organizations should be permitted to observe the counting of absentee ballots and to challenge individual absentee ballots as well as the processes by which such ballots are processed. Observers should be afforded access that allows for effective access to observe the counting. Hours for the conduct of ballot processing should be publicly posted and not modified without notice and approval of the chief election officer of the jurisdiction. Challenged ballots should remain segregated until the validity of the challenge is determined.

4.5 *"Cure" of Mail Ballots*

State laws should provide that if there is an error or omission by the voter, a signature that does not match the signature on file for the mail/absentee ballot voter, or the identifying number does not match the registrant, the election officials should notify the voter of the discrepancy and allow the voter to cure the problem by providing the missing information, a missing signature or a signature that matches the voter's registration signature. The notice to the voter should be accomplished by mail and, if possible, also by email or text. "Curing" should be allowed for mail/absentee ballots timely received, within a reasonable time period after the election and before the canvass of the vote is completed.

4.6 *Resource Allocation*

In addition, as the number of mail/absentee ballots delivered close to Election Day increases, an election office must be prepared to increase personnel and resources to promptly process and tabulate mail/absentee ballots and release results in a timely manner. This process should be transparent while protecting the secrecy of the mail/absentee ballots and assure that the ballot processing and tabulation process is open to observers representing the political parties, candidates and other interested members of the public in the election.

4.7 *Tracking the Status of Ballots*

To improve voter confidence in voting by mail, state and local election officials should provide online access to mail/absentee ballot processing information that will allow a voter to closely track the status of their ballot in all stages of the process – ballot request, ballot transmittal, ballot return, and ballot counting – to permit voters to know if their ballot was received and counted, and if not, how the voter may attempt to remedy the problem.

Commentary - 4.0 Voting by Mail/Absentee Voting

Voting by mail has become the predominant method of voting, among an increasing cafeteria of options that have been adopted by states to increase accessibility to voting by Americans. The term Voting by Mail or Mail voting is more inclusive of current practice known traditionally as absentee voting and is used to reflect that development.

Mail/absentee voting has become the most important method of voting in American elections in the past three decades. Mail/absentee voting has become the “main course” in the cafeteria of voting methods that have increased accessibility and turnout opportunities for registered voters. “No excuse” mail/absentee voting has increasingly replaced the traditional practice requiring voters to provide an “excuse” to obtain a mail/absentee ballot. This process must be secure and as uncomplicated as possible. States and localities must ensure that applications for mail/absentee voting and ballots are distributed as early as possible, so as not to unduly burden the right of those entitled to vote in that manner.

Mail ballot voting takes place outside official election locations (traditional precincts, vote centers or election headquarters) and lacks the fundamental transaction of an election official handing the voter a ballot and the voter voting secretly and returning that ballot to a ballot box in the official's presence. Thus, since the 2005 Presidential Commission Report, there has been a consensus that mail/absentee voting presents a greater potential for various types of fraud and thus requires a higher standard of ballot integrity, including proactive measures to assure verifiable identification provided by the voter on applications for mail/absentee ballots and voted mail/absentee ballot envelopes. Further, to protect voters from potential coercion and preserve the secrecy of their ballots, limitations on third party handling of mail/absentee ballots, “chain of custody” requirements to identify persons who collect and return voters’ ballots, and enhanced voter identification requirements may be important. Third parties, such as political or civic organizations, should continue to be encouraged to participate in the mail voting process to the extent that they facilitate requests for mail/absentee ballots. States should adopt laws and regulations to allow for earlier application and processing of mail/absentee ballot application requests, and allow for election officials to provide blank mail/absentee ballots and to receive and process voted mail/absentee ballots earlier and for long time periods, e.g., from 45 days before the election through a deadline upon receipt of the mail/absentee ballot application must mail the ballot directly to the registered voter and the completed ballots must be returned only by the registered voter or an identified relative or household member of the voter.

Technology has improved the capabilities of state and local election officials to compare voters’ voter registration signatures with their signatures on petitions and other types of official documents, including mail/absentee ballot applications and voted ballots. Signature verifications remain the primary method to protect the integrity of mail/absentee voting at present. Other proof of identity methods, if the identity information is sufficient

(such as those listed in § 4.1.e. above and referenced in § 4.1.i.), may come to offer comparable reliability to that of the enhanced signature verification methods discussed in this section. Traditional signature checking should be maintained, particularly where digital means allow for more reliable initial screening and verification. However, final resolution of signature validity should continue to be made by designated supervisory election officers.

Observer rules for candidates, political party representatives, ballot measure campaign representatives and civic organizations' representatives need to be clarified and should provide for specific observer rights as well as notifications of all times ballot processing and counting will be conducted.

Consideration must be given to military and overseas voters whose return of the ballot may be complicated by circumstances beyond their control, such as reliance on foreign mail service. Methods that might be considered to expedite the return of ballots include, but are not limited to, internet voting and a reduction in the time of transmittal of ballots back to the locality administering the election. Specifically, the Department of Defense should examine ways to facilitate the prompt return of ballots cast by service members.

The use of drop boxes has become a popular method for receiving voted mail ballots without having to rely on the Postal Service. However, drop boxes must be fabricated so that the deposited ballots are secure and protected from theft, vandalism, tampering, and the elements. As such, metal drop boxes should be encouraged, and cardboard drop boxes should be avoided. As some voted mail ballot drop boxes have been known to receive trash, mail and even library books, drop boxes should be clearly marked and designed to only receive items as small as a ballot return envelope. Laws and regulations should be considered that prohibit the deployment of voted mail ballot drop boxes by anyone except the appropriate election authority. Drop boxes should be appropriately monitored at all times when they are available for receiving ballots. Appropriate monitoring may include placing drop boxes within election jurisdiction offices and early voting sites during hours of operation, or by placing drop boxes in locations where they can be under constant live or electronic surveillance by election officials, or security or police personnel. So as to prevent vandalism or tampering when the drop boxes are not being monitored, and to prevent voted mail ballots from being deposited after the polls have closed on election day, drop boxes should be designed so that the ballot opening can be locked shut by election officials.

There should be methods to allow voters to cure problems with timely-delivered absentee ballots, such as absence of a signature or mismatched signatures, with notice to the voter of the deficiency and a defined deadline for the voter to correct the problem.

Methods should be adopted to allow the voter to ascertain whether the voter's mail/absentee ballot was received and counted, to increase voter confidence in the absentee ballot process.

5.0 Alternative Voting Methods

As innovations in voting and emerging technology create opportunities for improved voter participation and voting systems, election officials should periodically review and upgrade voting procedures and equipment, as necessary.

5.1 *Early Voting*

States and localities that allow early voting should create specific guidelines in order to ensure that:

- a. Based on anticipated demand, an adequate number of polling places is assigned to each jurisdiction, with such polling places large enough and located so as to afford reasonable and equitable access to all voting populations, including easy access to public transportation.
- b. Adequate notice of polling hours and locations of polling places is given.
- c. An appropriate time frame for early voting is allowed, with an end point that both maximizes the time to vote and ensures that election officials have the time to denote on the voter rolls those voters who voted before Election Day.
- d. There is no tallying of early voting ballots nor announcement of results until after the close of polls on Election Day.
- e. Laws and regulations that govern activity at polling places are applied and enforced during the early voting period.
- f. If mail/absentee ballot drop boxes are located at early voting locations, the drop boxes should be placed in an easily accessible location with proper signage and in a manner that does not interfere or disrupt the process of in person voting.
- g. Voter accessibility for disabled voters is provided as required by federal law and according to standards set forth in § 5.

5.2 *Vote Centers*

- a. Where states employ vote centers in lieu of traditional precinct voting, vote centers should be linked by secure electronic connection to election offices to facilitate voters' casting a ballot for all appropriate offices, and resolving registration, re-registration, or other issues that might affect the voter's ability to cast a regular, rather than a provisional, ballot.
- b. Vote centers should be located and be large enough to afford reasonable and equitable access to all voting populations based on anticipated demand and should be accessible by means of public

transportation.

- c. States implementing vote center systems should consider phasing in their use and should provide ample public notice and education so as to minimize voter confusion.
- d. Voter accessibility for disabled voters is provided as required by federal law and according to standards set forth in § 5.8.
- e. Vote centers that service jurisdictions covered by Section 203 of the Voting Rights Act must provide language assistance in all of the covered languages.

Commentary - 5.0 Alternative Voting Methods

Alternative voting methods that serve to increase citizen access and participation should be supported, provided that issues of technology and funding can be adequately addressed. Authorities should also take care to assure that voting procedures and systems are reliable and do not increase opportunities for fraud. We recognize that efforts are already being undertaken in this area, such as early voting, mail voting, and vote centers, and we would encourage further study, testing, and careful implementation of new efforts to ensure that voters understand the changes being implemented and that implementation not result in voter confusion or discouragement. Methods such as telephone voting and Internet voting have been studied in the last decade, and the studies indicate challenges to administrative security and integrity of such voting methods under current technological standards.

As instances of early voting have become a more popular alternative to in person voting on Election Day, states should develop guidelines in order to assure that the same laws and regulations that govern Election Day voting are applied to early voting. In order for early voting to become a fair and successful method of voting, guidelines should be developed that ensure adequate notice, number and equitable distribution of polling places, and time to vote and to assure that polling places are accessible to all voters. Additionally, the laws governing conduct at early voting locations should be the same as those that govern Election Day polling places (e.g., prohibitions on campaigning too close to or inside a polling place).

Vote center systems have evolved from early voting procedures as a substitute for traditional precinct-based voting. Many of the same recommendations applicable to early voting should apply to operation of vote centers. Studies indicate voters have difficulty transitioning from traditional precinct voting to vote center methods, and this difficulty threatens to affect voter turnout rates, so States that choose to adopt vote centers as a substitute for traditional precinct voting should phase in such programs and undertake substantial voter education about the transition to this new voting process.

6.0 *Election Administration*

Election Planning

- a. Election authorities should conduct inclusive, consultative planning processes well in advance of elections to support effective election administration and mitigate fraud and negligence vulnerabilities. Planning should also encompass emergency management of elections (discussed in § 13.0)

6.2 *Election Funding*

- a. Federal, state, local, and territorial governments should allocate adequate funding for electoral processes. In particular, funding allocation should be sufficient to allow election authorities to meet the needs of all voters (as set out in § 2.0), to protect the security and integrity of the electoral process, and to respond to contingencies.
- b. Temporary election officials should be adequately compensated for their services through the voting period.
- c. Election administration funding and spending should be transparent and accountable, and election officials should adhere to federal, state, and local auditing and procurement standards and principles.

6.3 *Election Staffing*

- a. All officials responsible for administering elections, whether permanent or temporary, should discharge that responsibility with professionalism, competence, impartiality, efficiency, and transparency.
- b. Any officials supervising or certifying elections, recounts, or challenges should not be involved in any official capacity in any election in which they may be called upon to exercise their duties or in which they are a candidate.
- c. Members of canvassing commissions should be prohibited from being active in partisan political activity in any election in which they may be called upon to exercise their duties as a member of such an entity.
- d. Temporary election officials should be representative of diverse political parties. The official responsible for appointing temporary personnel should solicit recommendations of civic and political organizations and should utilize civic and political organizations to recruit for temporary officials, especially bilingual Election Day officials. Recruitment

processes should encourage diversity and inclusion, and states should provide reasonable accommodations for election officials with disabilities.

- e. Temporary election officials should utilize a “service model” approach to working poll sites. Additionally, bilingual temporary election officials in jurisdictions with language assistance requirements should be prepared to proactively assist voters.

6.4 *Training*

- a. All states should provide ongoing training and professional development for election officials, with a specific focus on changes in electoral procedures and technology and emerging threats to the electoral process.
- b. States should provide temporary election officials with formal training. Provisions also should be made to provide formal training for poll watchers.
- c. Training for temporary election officials should include fundamental principles and applicable federal and state laws relating to voting rights. It should also include basic administrative requirements of state and federal voting laws and procedures, including but not limited to those serving language minority voters and voters with disabilities. In jurisdictions with language assistance requirements, training must include compliance and what that means for temporary election officials.
- d. Training should include cultural competency training around assisting voters with disabilities and limited English proficiency. Training should include a role- playing component in order for temporary election officials to best understand how to properly engage with voters.
- e. Temporary election officials must attend at least one training per election cycle in order to stay current on changing voting laws. Jurisdictions should offer online opportunities for training in addition to in-person trainings.

6.5 *Coordination with Appropriate Government Agencies*

- a. Election authorities should establish effective coordination mechanisms and maintain regular communication with relevant federal, state, local, territorial and tribal government agencies to streamline election administration and protect election integrity. Regular coordination and communication are particularly important to prepare for emergency management situations (as set out in § 13.0)

6.6 *Public Information, Consultation, and Outreach*

- a. Election authorities should ensure that key information for voters and other electoral stakeholders is easily accessible and disseminated effectively and in a timely manner.
- b. Election authorities should conduct ongoing consultations with civic and political organizations to facilitate transparent and inclusive electoral processes.
- c. Election authorities should proactively monitor misinformation and disinformation that is disseminated during an election cycle and issue corrections as necessary. (discussed in § 1.4)

6.7 *Personal Security*

- a. All officials, whether permanent or temporary, responsible for administering elections should feel safe from physical attack, harassment, threats, invasion of privacy, or intimidation. Appropriate resources should be dedicated, with adequate funding, to ensure such safety.
- b. All voters approaching, at, or leaving polling places should be free from physical attack, harassment, threats, invasion of privacy, or intimidation. Appropriate resources should be dedicated, with adequate funding, to ensure such safety.

Commentary 6.0 – Election Administration

Public confidence in the electoral process depends in large measure on both the actual and perceived impartiality and competence of the election authorities. The ability of an election authority to deliver a credible election is directly linked to how well election officials – whether permanent, temporary, or seconded from other agencies – understand and discharge their duties and are guided by principles such as impartiality, transparency, and efficiency.

In order to protect the integrity of the electoral process, there must be no appearance of bias on the part of those involved in the administration of elections. Any election official who will be involved in an election dispute or recount must avoid any apparent conflict of interest. Any election official who is a candidate in the election must be recused. Statewide standards should be established that clearly delineate the forms of partisan activity, if any, in which election administration officials may participate. If an official is unsure of whether or not a particular activity is permitted under the standards of the state, that official should consult the appropriate governing body.

Strong training initiatives will help both permanent and temporary personnel take control and ownership over their mandate and better understand and perform their assigned tasks. Training is also necessary to help election officials prepare for contingencies and to respond effectively to challenges or threats to the process.

Election authorities must have the necessary infrastructure, human and budgetary resources, systems and processes to support planning, implementation and evaluation of election processes. State and local election authorities must be properly resourced to be able to effectively discharge their mandate. Budget authorities must prioritize accessibility in developing election administration budgets and appropriators must prioritize providing adequate resources to election administrators.

Successful election administration requires the reliable, secure, and rapid movement of large volumes of materials, equipment, and officials. Because they are such massive logistical exercises, elections require good planning to ensure the election timetable is respected with the least number of problems. In addition to the planning of the elections themselves, election authorities must also work on the professionalization of their own structures. Strengthening organizational integrity will depend on continuous refinement of management, financial, human resources, procurement, information technology (IT), and other operational systems, along with mechanisms that provide for transparency and accountability. Inclusive planning requires engagement with the community, for example, through community advisory boards or committees.

Successful election administration also requires effective coordination and communication with relevant federal, state, local, territorial and tribal government agencies. Regular mechanisms for coordination and communication help to streamline election administration and protect election integrity.

The provision of voter information by election officials to a wide range of stakeholders is critical to ensuring electoral transparency and integrity. Public information provides necessary details about the rules governing elections, the work and decisions of election authorities, election preparations, and voting processes. Public outreach also serves a confidence-building function, by helping build public trust in election authorities and practices, and by mitigating threats to information integrity in elections. Proactively responding to misinformation and disinformation regarding the voting process, as well as educating voters about the potential for such actions, is another way to bolster public confidence in the electoral process.

The individuals involved in the administration of elections are in several categories. Some are permanent employees of state, local or territorial governments, others are temporary employees, and some work as volunteers. The administration of elections involves a myriad of rules and regulations that each locality has developed to best ensure a successful voting process for its citizenry. These rules are often revisited and revised owing to such factors as changes in technology, size of the electorate, and even current events. Recently, disasters and COVID-19 have necessitated changes in the electoral process. Any change to election administration is not created at the whim

of a single election administrator, rather they are the result of research and thought as to how best to ensure an orderly and efficient voting process.

There has been a disturbing trend to excoriate and threaten the physical safety of election administrators and their families if the outcome of an election does not have the desired result for some. These Guidelines seek to add to the public's understanding that election administrators are simply doing their jobs; they do not have the ability to change the outcome of an election. They are following rules and procedures that have been approved in their localities. There must be assurances of personal security for all involved in the electoral process. This should extend not only to election administrators, but to voters, members of canvassing boards, post-election auditors, registrars, and to anyone involved in the electoral process (e.g., voter registration, and the casting, counting, certifying, and audit of ballots).

The hallmark of our democracy is that voters should be able to cast their ballots freely and without fear of reprisal. Accordingly, a similar courtesy must be extended to election administrators. They stand on the front line of our democratic process. Unfounded attacks on our election administrators only serve to denigrate and cast aspersions on the integrity of our electoral process and must not be allowed to continue.

Funding of election administration should be a priority in all jurisdictions. Our fundamental right to vote deserves no less. There must also be adequate funding to respond to actions that place our voting process in harm's way by impugning the integrity or public perception of our electoral process (e.g., misinformation and disinformation about the voting process, threats to election administrators and those involved in the electoral process).

7.0 Ballots

7.1 Ballot Design

a. Simplicity of Ballot

Ballots should be designed to be as simple and clear as possible in order to avoid voter confusion. Ballot designs that have been shown to have a high error rate should be eliminated.

b. Uniform Ballot Design

Jurisdictions should strive to present a uniform ballot design to the electorate. For each voting mechanism used, the ballot design for that mechanism should be the same throughout the jurisdiction.

c. Testing and Publication of Ballots

The ballots should be tested for usability by the appropriate election

authority and made available for public inspection prior to approval of the ballots. Where electronic voting machines are used, usability standards also should be approved by the state election officer.

d. Approval of Ballots

Local ballot design standards should be approved by the state election officer.

e. Translation Issues

In jurisdictions where a significant percentage of the voting population is non- English speaking, translated ballots and assistance must be provided, at a minimum, as required by law, during the voting process.

7.2 *Ballot Machinery*

- a. States should implement testing programs to certify voting machines and vote counting machines and the software programs used in the systems for efficacy, security and for accessibility for disabled voters. States should require local election officials over whom they have general jurisdiction or supervision to submit for approval operational plans for election administration, voter outreach, conduct of canvass and audit programs, and compliance with federal and state cybersecurity best practices to ensure the integrity of voting systems.
- b. Electronic voting machines should be required to have a voter-verified paper record of each vote or non-vote cast by the voter that will be used for audit purposes. The voter-verified paper record should not contain any personally identifiable information.
- c. Voting machinery should identify an invalid vote or non-vote prior to the voter's final submission of the ballot; once identified, however, the voting machinery should allow a non-vote, and the non-vote should be reflected in the final tally. If the voting system is technologically unable to do that, the system should have a ballot design that allows the voter to see the actual votes cast.
- d. Election officials should eliminate voting mechanisms that have been shown to have a high error rate (e.g., undervote, overvote).
- e. States and the federal government should provide adequate funding to upgrade voting machinery and personnel to assist voters in understanding such machinery.

- f. Voting machinery should be appropriately maintained and tested for accuracy prior to an election.
- g. States should be encouraged to adopt and apply appropriate voluntary minimum standards for voting machinery and software.
- h. States should ensure that the right to cast a secret ballot is effectively implemented.

7.3 Pre-Vote Checking

- a. Precinct Election Day officials should certify that ballot receptacles are empty prior to voting.
- b. Precinct Election Day officials should certify that all mechanical and electronic vote counters are set at "0" prior to voting.
- c. All vote counting equipment should be certified as to its accuracy in counting and reporting votes cast for all offices, candidates, and issues.

7.4 Observers

- a. Observers should be allowed to observe all official tests and certifications.
- b. Observers should be permitted to observe ballot counts and canvass of vote at the polling place or central counting location.
- c. The vote count should be publicly posted at the place of counting for at least 24 hours after the count is completed. A permanent record must be maintained.

Commentary – 7.0 Ballots

There are many components that make up the ballot that will be cast, such as the actual design of the ballot, individual ballot machinery, and the counting of the ballots. The successful integration of these components should result in a polling place where a voter casts a ballot with certainty as to the candidates or issues for which the voter intended to vote.

One important method of minimizing voter confusion is the development of uniform voting mechanisms, both ballots and machinery, within a jurisdiction. Statewide standards should be developed to provide a sense of uniformity, and thus less confusion, within the voting system, as well as a check and balance on local election official ballot designs

(e.g., the butterfly ballot). The federal Election Assistance Commission and various other entities have developed and continue to update voting system standards that should be adopted by the states. At a minimum, an adequate number of poll workers must be available to provide assistance with voting machinery. States and localities must provide adequate funding to improve voting machinery and personnel at the polls. Certainly, there must be careful consideration of potential confusion on the part of the voter with respect to designing the ballot. For instance, punch cards should generally be discouraged, and ballots should be designed to ensure that all candidates running for the same office are included on the same page. The selection of voting mechanism should be made with an eye toward changes and improvements in technology.

Voter education is another key element to a successful ballot. Voters must receive assistance in operating voting machinery if necessary, and voters must also be informed that they are not required to vote for all issues or all candidates on the ballot.

In situations that require a judicial review on Election Day, the reviewing body must be adequately prepared to deal with such matters. The Supreme Court has adopted a prudential rule that last-minute orders modifying election processes should be avoided unless absolutely necessity is demonstrated.

8.0 Election Day

For purposes of this section, “Election Day” refers to the entire period during which a voter can vote in-person at a designated location (see also, Section 5.1 Early Voting).

8.1 Poll Watchers

Qualified political parties and candidates should be authorized to designate poll watchers at each polling place and central counting station. If poll watchers have not been designated by qualified political parties or candidates, then stakeholders in referenda or ballot initiatives should be authorized to designate poll watchers at each polling place and central counting station. Interested parties should also be authorized to designate poll watchers at each polling place. The numbers of poll watchers at each location should be limited to avoid undue crowding. Parties or candidates designating poll watchers should certify in writing that each designee has been instructed as to the responsibilities of the position. Poll watchers should not be limited to those who reside in the precinct or election jurisdiction. Poll watchers should be issued credentials by the election authority.

8.2 Observation by Poll Watchers

Poll watchers should be permitted to observe all official acts and records used at the polling places, to challenge unqualified voters, and to challenge

improper voting practices. Poll watchers should present all objections and challenges directly to the Election Day officials and affirm that the information provided is true and correct.

Poll watchers should not confront or harass voters. National origin or language ability shall never be a valid rationale to challenge a voter as unqualified. Methods should be developed to minimize the disruption and delay of challenge procedures. Election Day officials should keep a record of all challenges by poll watchers, including the names of the challenging poll watchers. States and the federal government should ensure that voters are not challenged in contravention of the Civil Rights Act of 1964 and Voting Rights Act.

Credentialed members of the media should be permitted to observe all official acts and records used at the polling places and central counting stations. Members of the media should not disrupt the procedures at polling places and central counting stations. Members of the media should not record images that would show how a particular voter marked a ballot, nor any voter who wishes not to be recorded.

8.3 *Provisional Ballot*

A voter must be allowed to vote with a provisional ballot in situations where the individual claims to be properly registered and eligible to vote at the election district, but whose name does not appear on the general register and whose registration cannot be determined by the election officials; the individual voter who is unable to produce required identification; the individual has applied for an absentee ballot but has not returned the absentee ballot; the individual presents a judicial order to vote; or an election official asserts the individual is not eligible to vote. The provisional ballots should be segregated and secured until a determination of validity is made. Where mechanical or electronic voting machines are used, an alternative method for segregating the provisional ballots should be established. Election officials should provide assurance that eligibility issues will be dealt with promptly and that voters will be notified of the disposition of the ballot in question.

See *Appendix A, Model Statutory Language on Provisional Balloting and Commentary, dated August 2021* for specific details and model language.

8.4 *Challenged Ballot*

Challenged ballots should be counted and segregated and marked as such for purposes of appeal. Where mechanical or electronic voting machines are used, an alternative method for segregating the challenged ballots should be established.

Election officials should provide assurance that eligibility issues will be dealt with promptly and that voters will be notified of the disposition of the ballot in question.

8.5 *Voting Assistance*

- a. Any voter who requires assistance to vote for reason of disability or due to an inability to read or write should be given assistance by a person of the voter's choice and offered the choice to use an accessible voting system.
- b. All voting places should be accessible. Any disabled or elderly voter assigned to an inaccessible polling place, should, upon advance notice by the voter, be assigned to an accessible polling place or provided alternative means of casting a ballot. Finally, all voting places must provide at least one accessible voting system for persons with disabilities and the accessible voting system must provide the same opportunity for access and participation, including privacy and independence, that other voters receive. Accordingly, such accessible voting systems that produce printed paper ballots must provide ballots of the same design and size as paper ballots that other voters receive.
- c. Voting materials should be provided by States or political subdivisions, at a minimum in the language of the statutorily-mandated minority language groups.

8.6 *Polling Hours*

States should undertake appropriate measures to ensure that polls are open to the public and that all registered voters are able to go through the voting process with minimal delay for the entire voting period.

Jurisdictions should be provided with appropriate funding to ensure that:

- a. polling hours are sufficient to allow all registered voters an opportunity to vote at a time convenient to their schedules;
- b. adequate polling equipment, locations, and personnel are provided; and
- c. registered voters who are in line by the time the polls close are allowed to vote.

8.7 *Polling Locations and Equipment*

- a. Jurisdictions must designate polling locations, including vote centers, for the entire voting process that equitably serve all voters and provide

ample notice of these locations. Polling locations, including vote centers, during the entire voting process must be convenient and easily accessible to voters by different modes of transportation, including public transportation, and do not introduce additional physical or psychological barriers to access (e.g. not located in a gated community or a police station).

- b. Jurisdictions must limit changes to polling locations barring extraordinary circumstances and must notify the public of any changes through various channels, including use of traditional, social, and ethnic media, as well as through stakeholder partners. (See § 13.0)
- c. Jurisdictions must equitably deploy their materials, Election Day officials, and equipment to polling locations in order to ensure each polling location is well- equipped to deal with the flow of voters, thus limiting the time needed to vote and lines of voters waiting to vote.

8.8 Election Day Troubleshooting

Jurisdictions should designate a person or process that will provide the public a mechanism to notify the election authority about problems on Election Day and receive real-time responses from the election authority.

Commentary - 8.0 Election Day

Election Day encompasses the merging of different individuals and machines with often differing roles. Voters, election officials and election observers each play a different role in the election, although they all share the same goal: ensuring and participating in an election that allows each registered voter to vote in an environment that is secure and free from intimidation and harassment. For example, in order to best serve American Indian populations, it may require that a polling location be located on a reservation.

Furthermore, in recognition of jurisdictions providing more days for in-person voting through early voting, the provisions in this section apply to the entire period during which a voter can vote in-person.

The processes involved on Election Day should be as seamless as possible. Training should be provided to Election Day officials and poll watchers in order to facilitate their understanding of their appropriate role and duties at the polling place and applicable state and federal voting laws. Election Day officials should be properly trained to assist language minority voters and voters with disabilities and should proactively seek to assist them.

Adequate funding of the electoral process is a key aspect of successful elections. States

and localities must provide adequate polling hours, equipment, and personnel as a necessary component of any election. At the same time, it is critical that these resources are provided in an equitable manner across a jurisdiction in order to ensure that there are not certain segments of the population that experience long lines due to an insufficiency of equipment and materials in their polling locations. Additionally, jurisdictions with a history of excessive delay in the voting process should provide additional equipment and personnel in order to better facilitate the process. A study on factors contributing to delays in the voting process should also be conducted. For example, states could undertake studies to see if a per capita standard of voters per type of voting machinery can be established.

Additional concerns about equity require that polling locations must be located equitably within a jurisdiction, must be conveniently located and easily accessible to voters by different modes of transportation, including public transportation, and do not introduce additional physical or psychological barriers to access. Furthermore, ample notice must inform voters about where the polling locations are and, barring extraordinary circumstances, the polling locations should not be changed before the election. In the rare instance where a change to the polling location must be made due to extraordinary circumstances, the jurisdiction is required to notify the public of any changes through various channels, including use of traditional, social, and ethnic media, as well as stakeholder partners.

Another important aspect of an election is the security of the ballots being cast. Poll watchers are tasked with the important role of challenging unqualified voters and improper voting practices. This role is a part of ensuring the integrity of the polling place, but most importantly, these duties must be carried out in a manner that is consistent with the Voting Rights Act and the Civil Rights Act of 1964. In no instance should selective challenges and minority voter intimidation be allowed to occur.

Voting assistance is an integral aspect of election administration. The right to assistance at the polls by a person of the voter's choice, as required by Section 208 of the Voting Rights Act and other applicable law, ensures that voters who require assistance to vote for reason of disability or due to an inability to read or write can exercise their right to vote without intimidation or manipulation. All voting places should be accessible, any disabled or elderly voter assigned to an inaccessible polling place should be assigned to an accessible polling place or provided alternative means of casting a ballot. Further, all voting places must provide at least one accessible voting system for persons with disabilities that provides the same opportunity for access and participation, including privacy and independence, that is afforded to voters without disabilities. Voters with a disability must be able to fully and freely exercise their fundamental right to vote as required by the Americans with Disabilities Act; the Voting Accessibility for the Elderly and Handicapped Act of 1984 (VAEHA); the Help America Vote Act of 2002, and other applicable laws. For example, ensuring that the size of ballots utilized for persons with disability is the same as those used by other voters regardless of the type of voting system used is critical to privacy for voters with disabilities. Finally, the provision of language assistance, including translated voting materials, as required by Section 203 of the Voting

Rights Act and other applicable laws, ensures that voters who are not fully proficient in English are afforded the opportunity to be effectively informed of and fully participate in voting. The proper implementation of voting assistance will not only ensure all voters are able to fully exercise their fundamental right to vote but will also provide a more efficient and smoothly run Election Day.

9.0 Voter Verification

States should take necessary steps to ensure that the voter is the person registered to vote.

- a. In jurisdictions where a signature is required, voters unable to sign because of disability or illiteracy should be verified by other reliable means, such as by producing acceptable identification, or by a registered voter in the same precinct signing a verification on the individual's behalf.
- b. In jurisdictions where some sort of voter identification is required, only one piece of identification should be required. A variety of forms of identification should be accepted in order to meet this requirement. In the event that the voter is unable to produce a particular piece of identification, then the voter should be allowed to sign an affidavit of identity.

Commentary - 9.0 Voter Verification

To prevent multiple voting and voting by those not qualified to do so, methods should be devised to verify that the person voting is the same person who is registered. One method is to obtain the voter's signature at the polling place. Other methods must also be developed so that the rights of the disabled and nonreaders to vote will not be abridged.

Election officials should develop procedures to minimize disruption at the polls created by verification and challenge procedures and to reduce delay and other adverse impacts such procedures may have on those waiting to vote. The maintenance of a centralized list of registered voters that is broadly accessible to the public would improve the process. For example, voters could find out if they were properly registered prior to appearing at the polling place; a voter who appears at the improper polling place could be directed to the proper polling location. (See § 3.1.a.)

A variety of forms of identification should be permissible in jurisdictions that require identification. A voter registration card may be used as a method of voter verification, although a voter should not be required to present the card in order to vote.

10.0 Ballot Collection and Counting

- Paper ballots voted in a polling place should be placed in the ballot box in the

presence of the election official.

- The number of voters who requested absentee ballots and the number of absentee ballots cast should be recorded before counting the votes.
- The number of voters who voted provisionally because they did not receive a requested absentee ballot or because they decided to vote in person rather than absentee should be recorded before counting the votes.
- To be valid, absentee ballots should be postmarked or bar-coded on or before Election Day.
- A reasonable number of nonpartisan and party-designated observers may witness all counting and audit procedures. Observers should be positioned so that they can view the proceedings but not so as to interfere with election officials performing their duties.

10.1 Computerized Vote Counting

- a. Blank ballots and test decks should be available to qualified observers who should be allowed to observe accuracy tests. Verification of the computer accuracy of vote counting should be conducted before and after the official count.
- b. Where contract programmers are employed, they should be required to certify under oath to the accuracy of the program they have written or are operating. The election authority should certify the accuracy of any vote counting program both before and after the election.
- c. Where a computer counting error is discovered, a complete report should be given to the public, political parties, and candidates.
- d. A random sample manual recount of the computer count should be a part of the canvass of votes cast.

10.2 Ballot Audit

A system of ballot auditing for each polling place should be established. The audit should account for all ballots or punch cards issued, the number of spoiled ballots, the number of ballots counted, and the number of ballots returned unused. Entries should be recorded in the poll book to account for spoiled ballots or voting machine failures. All voted ballots, unused ballots, spoiled ballots, and poll books should be returned to the election authority under seal with a copy of the results of the audit.

10.3 Physical Security of Ballots and Voting Equipment

Election officials should ensure ballot security. In particular, voting equipment, ballots, and other election materials should be kept secured during the counting process and until the time for contesting the election has passed.

10.4 Availability of Election Day Remedies

Courts of competent jurisdiction and review should be available during all hours when the polls are open, on both Election Day and the early voting period, to handle expedited actions relating to the election.

10.5 Risk-Limiting Audits

To enhance voter confidence in reported election results, election authorities are encouraged to conduct post-election risk-limiting audits on all contested election races.

Commentary: 10.0 Ballot Collection and Counting

The security and accounting for ballots and election equipment during the time for voting, counting, auditing and contesting is of utmost importance. Many election jurisdictions publish handbooks detailing the protocols and step-by-step procedures to be used by election officials; this is encouraged.

Where computerized equipment is used for vote counting, tests of the accuracy of each piece of equipment should be conducted both before and after the election.

Each polling place, as part of their closing process after the polls close, should conduct an audit of all ballots used, unused, counted and spoiled in order to account for all ballots. The figures should be recorded and reported to the election authority.

Appropriate measures should be taken to physically secure all voting equipment, ballots, and other election materials. This may include locked cabinets, locked transfer cases, numbered seals and security tape. A log book should be maintained to record whenever a security seal is broken and a new security seal reapplied.

Arrangements should be made in advance of any voting, both for election day and during early voting, to have a judge or judges of the appropriate jurisdiction on call so that any matters requiring judicial involvement can be handled expeditiously. Arrangements should also be made with officials of the court clerk's office, so that all necessary filings can be conducted efficiently.

To enhance voter confidence in reported election results, election authorities should

conduct post-election risk-limiting audits (RLA's) on all contested election races in order to establish a statistical level of confidence that the reported outcomes of elections are correct. Election authorities should begin by conducting pilot RLAs to determine the optimal protocols for conducting such audits depending on the particular voting equipment used and other parameters.

11.0 Recounts

11.1 Availability of Recounts

- a. States should establish a threshold for an automatic recount based on statistically sound data.
- b. Candidates not meeting the threshold for an automatic recount should be allowed to request a recount after certification. States should permit a defeated candidate to request that a recount be suspended.
- c. State statutes should make clear the circumstances under which candidates or interested parties, in the case of a ballot initiative, may request a recount and, at a minimum, should explain the timing, form of filing, venue, and procedural steps required for the request and recount.
- d. The cost of a recount should be reasonable and not cost-prohibitive to those seeking a recount.

11.2 Methods of Recounts

- a. States should permit sufficient time to complete the recount. In setting the time frame, consideration should be given to the total number of votes to be counted, the method in which the votes were cast, and the manner in which the recount will be conducted.
- b. States should establish uniform recount standards for each separate voting technology.
- c. States should mandate that, generally, recounts should be performed for the entire jurisdiction affected by the race. If a recount is ordered as a remedy to an election challenge, then only those jurisdictions named in the order must participate in the recount.
- d. States should permit each candidate affected by the recount to have observers present throughout the entire process.
- e. States should specify the circumstances that would warrant a manual recount or a machine recount.

Commentary - 11.0 Recounts

Recounts are ordered after the certification of election results. The “trigger” that determines the threshold for establishing an automatic recount should be based on closeness of the race in question. Examples of situations that could trigger a recount include, but are not limited to, an election where there was a significant “undercount” (i.e., falloff in votes cast for down ticket candidates as compared with top-of-the-ticket candidates), different results are found during the auditing process, or the difference between the votes cast for each candidate in a race is 0.5% or less than the total number of votes cast.

12.0 Challenges to Election Results

State statutes should make clear under what circumstances candidates or interested parties may challenge an election result. At a minimum, the language should contain reference to the timing, form of filing, venue, procedural steps, and available remedies.

Commentary - 12.0 Challenges to Election Results

Challenges are made post-election. A challenge is made to the certified election results on the basis of alleged irregularities during the voting process. States and localities must establish clear and uniform standards within the jurisdiction regarding challenges.

13.0 EMERGENCY MANAGEMENT OF ELECTIONS
13.1 Emergency Planning

State, local, territorial, and tribal governments should develop, enact, and disseminate written plans to preserve the election process in the event of an emergency.

13.2 Characteristics of Emergency Planning

a. Emergency plans should include, at a minimum, the following components:

1. Designation of alternative locations, times, and manner of conducting elections, including the voter registration process and methods of voting that differ from originally scheduled methods of voting, while balancing the need to ensure that such changes do not serve to

- 1975 further disenfranchise underrepresented or vulnerable populations
 1976
 1977
 1978 2. Clear designation of the individual (for example the governor,
 1979 secretary of state, or director of elections) or individuals who are
 1980 given the statutory power to delay or reschedule an election or to
 1981 enact emergency election procedures and authorization of one or
 1982 more election officials to modify procedures and deadlines related to
 1983 ballot access qualification
 1984
 1985 3. Provision for the back-up and preservation of election and voter data,
 1986 including paper precinct registers in lieu of electronic poll books
 1987
 1988 4. Storage and testing of back-up of voting equipment to be used in an
 1989 emergency, including paper ballots in lieu of touch-screen
 1990 technology
 1991
 1992 5. Procedures to ensure the physical safety of polling places for voters
 1993 and poll workers/officers of elections
 1994
 1995 6. Evacuation procedures for polling places
 1996
 1997 7. Establishment of systems that will assure continued reliable
 1998 communication between election administrators and poll
 1999 workers/officers of elections
 2000
 2001 8. Development of effective plans for communicating with voters
 2002 through various media during emergencies
 2003
 2004 9. Recruitment and training of additional poll workers/officers of
 2005 elections in the event of an emergency
 2006
 2007 10. Consideration of individuals who require additional assistance, due
 2008 to either language or disability, to vote
 2009
 2010 11. Consideration of individuals directly impacted by an emergency or
 2011 who are responding to an emergency
 2012
 2013 b. Emergency plans should be developed for different emergencies, as the
 2014 remedy may vary depending on the situation, in order to maintain the
 2015 safety and integrity of the electoral process.
 2016
 2017 c. Emergency plans should balance the safety of the public and election
 2018 workers with ensuring that elections are conducted in as timely a manner
 2019 as possible.
 2020

13.3 *Types of Emergencies*

- a. Natural or manmade disaster
- b. Public health emergency
- c. Cyber attack
- d. Armed conflict

13.4 Coordination with Appropriate Governmental Agencies

Depending on the scale of the emergency, there should be open communication and coordination with relevant federal, state, local, territorial, or tribal government agencies.

Commentary - 13.0 Emergency Management of Elections

The act of voting is a crucial element of any democracy and is a core component of the rule of law in a democratic society. The management of elections in the United States is not a federal function; instead election authority is vested at the local government level. Accordingly, state, local, territorial, and tribal governments should take steps to ensure that the management of the electoral process may continue unimpeded in the face of an emergency.

Most states have adopted emergency Election Day plans, which have traditionally been reactions to local or regional disasters, such as hurricanes or even the horrific 9/11 terrorist attack. Thus, most plans generally revolve around finding different locations for polling places, due to the inability to access or wholesale destruction of existing polling places. For example, following Hurricane Katrina, New Orleans, Louisiana set up an enormous vote center in the Super Dome, which enabled voters to cast ballots in a central location that was accessible to all. The COVID-19 pandemic, which started globally in 2019 and became a national pandemic in 2020, revealed that a public health emergency presents different obstacles that must be surmounted in order to ensure that elections are able to be held on schedule, or at least as close to on time as possible. Simply put, how do you hold an election if voters are ordered to stay at home for their own health and welfare? How do you maintain the safety of the polling place? How do you contain the possible spread of a virus from human contact to polling machinery, ballots, or even pens and paper? Is all mail voting the solution? How do you reconcile the fact that historically, vote by mail has not been practical for all segments of the population? The rub lies in the fact that elections are not always a one-size fits all situation. Any remedy to conduct elections in an alternative fashion should consider methods of voting that will not further disenfranchise our most vulnerable populations, such as the elderly, language minorities, individuals with disabilities, or low-income communities.

It is indisputable that the challenge to ensure that elections can be conducted in close proximity to an emergency prior to or on Election Day is extremely difficult and a complex undertaking. It is for this reason that states, localities, territories, and tribal election authorities should take the proactive steps necessary to ensure that elections, under any circumstance, are conducted in the safest manner possible, for both the public and those administering our electoral process. Our democracy is at its most successful when our citizens can participate freely and without fear. It is also equally important to ensure that any changes to our electoral process allow ample opportunities for notice and communication, through timely and comprehensive education drives from all media platforms to inform voters of any changes and the options that are available to them.

14.0 Penalties and Notices

- a. Appropriate sanctions should be established and enforced for violations of voter registration, balloting, and election procedures.
- b. Election officials should post notice of the penalties for violation of election laws and procedures at all polling places. Such notice should be placed on all voter registration forms, applications for ballots, and absentee ballots and envelopes. The notices should be coordinated for uniformity within the state.
- c. All election officials, deputies, and employees (including contract employees) should be advised as to the penalties that exist for violating election rules, laws and procedures and should subscribe in writing under oath to perform their duties.

Commentary - 14.0 Penalties and Notices

The vigorous enforcement of election laws may be necessary to ensure the efficacy of any voting system. Prosecution, even in isolated cases, may be necessary to create an environment in which norms of election conduct are established and to guarantee civil liberties.

15.0 Bar Associations

- a. Bar Associations should assign qualified attorneys on a voluntary basis to assist in development of local programs to ensure the integrity of the electoral process.
- b. Bar Associations at every level should encourage attorneys to serve as Election Day officials, including by coordinating with the National Association of Secretaries of State and the National Association of State Election Directors or

state-level officials.

Commentary - 15.0 Bar Associations

The American Bar Association has long been on record in urging all lawyers to register and vote and that all lawyers should encourage and assist employees in their offices and firms to participate in the electoral process by registering and voting in federal, state, local, and territorial elections. These Guidelines seek to take that commitment a step further and encourage state, local and territorial bar associations to assist in the development of programs that will ensure the integrity of the electoral process. Lawyers understand the need for due process and equal protection as a part of the electoral process and thus are well suited to serve as Election Day officials.

16.0 DEFINITIONS

16.1 Ballot

A presentation by paper or other method (e.g., touch screen) that lists the candidates or issues to be voted on in an election.

16.2 Challenge

A motion made in dispute of the certified election results on the basis of alleged irregularities during the voting process.

16.3 Challenge to Voter

A voter's registration is questioned by an election official.

16.4 Challenged Ballot

A voted ballot which is questioned by a poll watcher on the basis of an improper voting practice on the part of the voter.

16.5 Election Authority

A clerk or a Board of Elections appointed and charged with the duty of conducting elections.

16.6 Election Day

The entire period during which a voter can vote in-person at a designated location (e.g., a traditional polling place or a vote center), which may also include the early voting period.

16.7 Election Day Official

A person appointed by election officials and assigned Election Day duties.

16.8 Election Official

- 2159 A person assigned any official duty or function in the electoral process.
 2160
- 2161 **16.9 Mail Voting**
 2162 Voting by Mail has become a more prevalent and standard method of
 2163 voting and is more inclusive of current practices and is used in the
 2164 Guidelines together with the term “absentee” to reflect that development.
 2165
- 2166 **16.10 Jurisdiction**
 2167 A political boundary of precincts which encompasses the entire scope of an
 2168 election (e.g., the entire state for an election for the U.S. Senate, the district
 2169 for an election for the U.S. House of Representatives).
 2170
- 2171 **16.11 Observer**
 2172 An observer of elections is a credentialed individual representing a
 2173 nonpartisan, party-designated, or media interest in observing all official
 2174 action and records of the electoral process (including preparation, Election
 2175 Day, and counting, recount, or audit processes). Observers are
 2176 distinguished from poll watchers who may challenge unqualified voters and
 2177 improper voting practices.
 2178
- 2179 **16.12 Poll Watcher**
 2180 An observer of all official actions and records at the polling place and
 2181 challenger of unqualified voters and improper voting practices at the polling
 2182 place.
 2183
- 2184 **16.13 Provisional Ballot**
 2185 A voted ballot that is kept segregated and sealed and not counted until a
 2186 voter’s qualifications to vote have been determined. If the voter is
 2187 determined qualified, the ballot is unsealed and counted in the canvass.
 2188
- 2189 **16.14 Recount**
 2190 A process to verify the vote count in an election. A recount is ordered or
 2191 requested after the certification of election results.

**Model Statutory Language
on Provisional Balloting and Commentary
(August 2021)**

I. Provisional Ballots and Envelopes

A. At all elections, the following individuals shall be permitted to cast a provisional ballot:

1. an individual who claims to be properly registered and eligible to vote at the election district, but whose name does not appear on the general register, and whose registration cannot be determined by the election officials; or
2. an individual voting at the election district, but who is unable to produce required identification; or
3. an individual who has applied for an absentee ballot, but who has not returned the absentee ballot; or
4. an individual who presents a judicial order to vote; or
5. an individual whom an election official asserts is not eligible to vote.

B. Prior to casting the provisional ballot, the elector shall be required to sign a uniform affidavit, that shall be used by all jurisdictions within the state, on the provisional ballot envelope.

1. Each jurisdiction shall provide to each provisional voter printed information on the provisional ballot envelope notifying the voter that in order for the provisional ballot to be evaluated by the canvassing board, the elector must print his/her name and address and sign and date the affidavit.
2. A jurisdiction may place notice of penalties for violations of election laws and procedures on the provisional ballot envelope.
3. A jurisdiction may allow an elector to provide additional information, such as date, location or means of registration, on the provisional ballot envelope in order to facilitate the evaluation by the canvassing board, so long as the provision of such information is voluntary.

C. After the provisional ballot has been cast,

1. the elector shall

- 2236 a) place the provisional ballot in a secrecy envelope, and
 2237
 2238 b) place the secrecy envelope in a sealed provisional ballot
 2239 envelope;
 2240
 2241 2. the election official shall
 2242
 2243 a) provide written information to the elector explaining the
 2244 system for verifying ballots as well as a provisional ballot envelope
 2245 number,
 2246
 2247 b) ensure that all provisional ballots shall remain sealed in their
 2248 provisional ballot envelopes for return to the canvassing board, and
 2249
 2250 c) certify the number of provisional ballots delivered to the
 2251 polling place and the number of sealed provisional ballot envelopes
 2252 containing voted ballots.
 2253
 2254 D. Prior to the certification of the election, the canvassing board shall examine
 2255 each provisional ballot envelope to determine if the individual voting that ballot was
 2256 entitled to vote at the election district in the election. One authorized representative
 2257 of each candidate in a primary or election, who is an elector in the county, shall be
 2258 permitted to remain in the room in which the determination is being made if he
 2259 does not impede the orderly conduct of the determination. Uniform standards shall
 2260 be developed and applied for the purposes of verifying provisional ballots within a
 2261 state.
 2262
 2263 E. If it is determined that the individual was registered and entitled to vote at
 2264 the election district where the ballot was cast,
 2265
 2266 F. the ballot should be placed with other ballots that are eligible to be counted,
 2267
 2268 G. the tabulation of eligible ballots should not occur until a determination of
 2269 eligibility has been made for all provisional ballots submitted, and
 2270
 2271 H. such tabulation should be made in accordance with the rules governing
 2272 normal ballot tabulation.
 2273
 2274 I. If it is determined that the elector voting the provisional ballot was not
 2275 registered or otherwise failed to establish his or her qualifications to vote under
 2276 applicable state law,
 2277
 2278 J. the provisional ballot shall not be counted and the ballot shall remain in the
 2279 provisional ballot envelope and shall be reflected as rejected as ineligible; and
 2280 K. a photocopy of the provisional ballot envelope shall be used by the election
 2281 authority as a voter registration form if the information is properly submitted in

accordance with state voter registration requirements.

L. If it is determined that the elector voting the provisional ballot was eligible to vote but not at the election district where the ballot was cast, the canvassing board shall open the envelope, with due regard to secrecy of the ballot, and only count the portion of the ballot that the elector would have been eligible to vote in the proper election district and at the election district where the vote was cast.

M. The election authority shall establish a World Wide Web site and a toll-free telephone number to permit an elector who cast a provisional ballot to determine, by means of a unique, non-public personal identification number, whether the vote was counted and, if the vote was not counted, the reason that it was not counted.

II. Determining Eligibility of Provisional Ballots

A. Prior to accepting any provisional ballot, the election official shall determine that the information provided on the provisional ballot envelope by the elector is properly completed.

B. When ballots are transferred from polling places to the election authority for tabulation, provisional ballot envelopes

1. should be segregated from other ballots and placed in separate containers; and

2. should be photocopied, upon delivery to the canvassing board, by teams of election officials, with a representative from each major political party, for purposes of determining the eligibility of the elector; and

3. should then be placed in a sealed container until tabulation.

C. The counting of provisional ballots shall not begin until the canvassing board has determined the eligibility of all provisional voters according to applicable state laws.

D. Determinations as to whether provisional ballots will be counted should be based on

1. the statewide voter registration database, or

- 2322 2. other state and local voter registration records, or
 2323
 2324 3. where an elector has registered through an agency authorized to
 2325 conduct voter registration pursuant to the National Voter Registration Act of
 2326 1993, the election authority should make an inquiry of the registration
 2327 agency.
 2328
 2329 E. Once the canvassing board has made a determination as to whether or not
 2330 a provisional ballot is eligible to be counted, the canvassing board shall provide
 2331 documentation on the copy of the provisional ballot envelope verifying the eligibility
 2332 or ineligibility of the elector. Such documentation should include
 2333
 2334 1. name of elector casting a provisional ballot,
 2335
 2336 2. name of reviewer,
 2337
 2338 3. date and time of review, and
 2339
 2340 4. description of evidence that supports eligibility or ineligibility of
 2341 elector.
 2342
 2343 F. The canvassing board should record on a provisional ballot disposition list
 2344 the provisional ballot identification number and notation marking it as accepted or
 2345 rejected.
 2346
 2347 G. Once a review has been made by the canvassing board, determining
 2348 eligibility or ineligibility of all provisional ballots, the provisional ballots and copies
 2349 of provisional ballot envelopes, shall be delivered to bi-partisan counting teams for
 2350 review and tabulation. A record of such delivery should be kept and shall include
 2351 a signed receipt from two election officials, one from each major political party.
 2352
 2353 H. Challengers and watchers, as provided by applicable state law, may be
 2354 present at all times that the bi-partisan counting team is reviewing and/or counting
 2355 provisional ballots, provisional ballot envelopes and copies of provisional ballot
 2356 envelopes. The election authority must give proper notification to the county chairs
 2357 of each major political party in advance of the review and counting of provisional
 2358 ballot materials.
 2359
 2360 I. If the elector is found to be duly qualified and registered to vote, the ballot
 2361 envelope should be opened and the ballot placed in a ballot box to be counted with
 2362 other eligible provisional ballots.
 2363
 2364 J. If the elector is found not to be duly qualified and registered to vote, the
 2365 ballot envelope should not be opened and the ballot should not be counted.
 2366

1. The copy of the provisional ballot envelope should be submitted as an application for voter registration for future elections, so long as:

a. The information serving as an application for voter registration is easily separated from the information requested to cast a provisional ballot (e.g., insufficient information on the voter registration application should not disqualify an otherwise sufficiently completed application to cast a provisional ballot); and

b. The provisional ballot envelope contains identical information that is required for voter registration in the applicable state.

K. Following the determination of eligible provisional ballots:

1. All eligible provisional ballot materials should be sealed in a container, dated and signed by each member of the reviewing team and marked as "voted provisional ballots and ballot envelopes;"

2. all rejected provisional ballot materials should be sealed in a container, dated and signed by each member of the reviewing team, and marked as, "rejected provisional ballots and ballot envelopes;" and

3. upon receipt of the returned materials, the election authority should tabulate the eligible provisional vote.

III. Definitions

A. **Canvassing Board** means the entity established by state law that is charged with determining the validity of voter registration for purpose of counting provisional ballots or certifying elections, recounts, or challenges in an election.

B. **Election Authority** means the state, local, territorial, or tribal entity responsible for the administration of elections (e.g., Department of Elections, Board of Election Commissioners, County Clerk, or Canvassing Board).

C. **Election Official** means an official sworn to conduct an election.

D. **Elector** means an individual who is eligible to vote.

E. **Jurisdiction** means a political boundary of election districts in which the election is administered (e.g., the entire state for an election for the U.S. Senate, the congressional district for an election for the U.S. House of Representatives).

F. **Provisional Ballot** means a ballot issued by an election official on Election Day to an individual who claims to be a registered elector when the individual's name does not appear on the general register or the individual's registration cannot

2413 be verified or where the individual is determined to be ineligible.

2414

2415 G. **Provisional Ballot Envelope Number** means the number assigned to the

2416 provisional ballot envelope.

2417

2418 **Commentary to Model Statutory Language on Provisional Balloting**

2419

2420 A balance must be struck between encouraging participation in the electoral process and

2421 encouraging the orderly and fair administration of elections. When a provisional ballot is

2422 cast, an affidavit stating that an individual is registered to vote in the jurisdiction where

2423 the individual desires to vote and that the individual is eligible to vote is required by the

2424 Help America Vote Act of 2002 (P.L. 107-252, § 302(a)(2)). Accordingly, the affidavit

2425 should not require any additional information in order to verify the information contained

2426 on the provisional ballot envelope.

2427

2428 By way of example, the affidavit may state the following:

2429

PROVISIONAL BALLOT ENVELOPE NUMBER **XXX**

I affirm, that I am:

i) registered to vote in this jurisdiction

and ii) eligible to vote in this election.

Printed Name

Signature

Street Address

Date

City, State, Zip Code

The information in this box must be completed in order to process your provisional ballot.

2430

2431

2432 Jurisdictions should, however, allow individuals to voluntarily provide additional

2433 information, such as date, location, and method of registration, and/or the precinct

2434 in which the voter believes he or she is registered to vote, in order to facilitate the

2435 work of the canvassing board. Election officials should post notice of the penalties

2436 for violation of election laws and procedures on provisional ballot envelopes. The

2437 notices should be coordinated for uniformity within the state.

2438

2439 The presentation of affidavits should be uniform across the state. Uniform

2440 standards for verifying provisional ballots should be developed and applied to all

2441 ballots within a state in order facilitate the verification process and prevent

2442 confusion within the system.

2443
2444
2445
2446
2447
2448

As in all aspects of the electoral process, the secrecy of the ballot must be maintained during the provisional balloting process. The provisional ballot envelope number should only be associated with the provisional ballot envelope, including the verification of whether or not the ballot was counted, and not the provisional ballot itself.

REPORT

The American Bar Association has traditionally been an active and guiding voice in matters involving the electoral process. The Standing Committee on Election Law, whose members represent a balance of political party, non-partisan, and independent views, is charged with developing and examining ways to improve the electoral process. As changes in the electorate and the electoral process occur, the Standing Committee continues to offer cogent responses to emerging electoral issues on behalf of the Association. In particular, the Standing Committee has maintained a strong and historic interest in improving the level of participation and integrity of the electoral process.

Association History on Electoral Reform

One constant area of study for the Standing Committee has been that of election reform. The Association first covered the subject of the administration of the electoral process with Ballot Integrity Standards Applying to Election Officials, dated August 1989 (“Standards”) which were developed on the rationale that the success of a democratic system of government depends in part on the integrity of its election process. In 1989, the Standing Committee and the Association determined that an election system must have several attributes in order to preserve the integrity of the electoral process: 1) that citizens who are eligible to vote be provided with a fair opportunity to vote; 2) that the ability to vote should be confined to those eligible to vote; 3) that voters be able to cast ballots freely without intimidation or improper influence; and 4) that the ballot be secure from the time it is cast to the time it is counted. The Standards, subsequently archived and supplanted by newer policies, were developed as a means of creating an electoral system that would protect the integrity of the ballot, without deterring political participation and voting by eligible citizens.

The 2000 presidential election necessitated a revisiting of the issue. Election Administration Guidelines and Commentary, dated August 2001 (“Guidelines”) covered a broad range of electoral issues, including such topics as voter education, registration, voting, provisional balloting, and post-election issues, that are applicable to all elections. Although these Guidelines cover federal, state, local, territorial, and tribal elections, they are directed at the election administrators and officials at the state, local, territorial, and tribal level, who hold primary responsibility for election activities, both before, during, and after the actual election. The Guidelines are meant to enhance the integrity and public perception of the electoral process. As aspirations for the necessary reform of our electoral process, they are intended to ensure that all citizens who are eligible to vote have unfettered access to the ballot box. The Guidelines are updated as necessary to keep pace with changes in election law, technology, society, and the actual administration of elections. The most recent revision to the Guidelines was in 2021 in response to the effects of the COVID-19 pandemic on the administration of elections.

Purpose of Current Report and Resolution

Based on the Standing Committee’s examination of the issue for the last two decades, and in light of ongoing trends in voting and voter registration, advancements in

technology, the current COVID-19 pandemic, and the recent 2020 presidential election and upcoming 2022 midterm election cycle, the Standing Committee has determined that it is necessary to revisit the existing Guidelines with a fresh eye and seeks to adopt Election Administration Guidelines and Commentary, dated August 2022 (“2022 Guidelines”) to replace all earlier versions of the Guidelines.

New Features of the 2022 Guidelines

In general, this year’s amendments to the Guidelines focus on two very timely and important issues, 1) election misinformation and disinformation related to the voting process, and 2) personal security of election administrators and voters during the voting process.

Elections as usual seem a thing of the past. Rather, some disturbing behaviors and actions seem to be the “new normal.” These trends are posing a serious threat to the integrity of our electoral process, the backbone of our democracy. Interestingly, these threats are somewhat intertwined. Threats and harassment of election officials seem to go hand in hand with misinformation and disinformation about the voting process. Recently the Pew Charitable Trusts reported that election officials fear that misinformation and disinformation are becoming the new normal and that more efforts and transparency about the electoral process are necessary to combat these falsehoods.¹ We have added a new §1.4 (Election Misinformation, Disinformation and the Voting Process) to address these concerns. The Guidelines now call for an acknowledgement that misinformation and disinformation are affecting our electoral process: that 1) voters should be educated and made aware of such efforts, and 2) election administrators should proactively respond to known misinformation and disinformation regarding the voting process. Owing to First Amendment considerations, the Guidelines, and accompanying Commentary, only apply to misinformation and disinformation regarding the voting process.

Unfortunately, the country is also seeing a commensurate rise in physical threats to election administrators and workers. According to a March 2022 survey of local election workers², conducted by the Brennan Center for Justice, 77% of election workers report an increase in threats to election officials and that one in six has personally experienced a threat. Additionally, there is a corollary concern that the recruitment and retention of election workers will be difficult in upcoming election cycles. In order to address this troubling issue, the Standing Committee has added new §6.7 (Personal Security). The Guidelines seek to educate the public that election officials are simply doing their jobs, in order to preserve and safeguard the democratic process. In fact, this is best understood through the vantage point of Chris Walker, an election official from Medford, Oregon, “[w]e are normal, everyday people. We’ve been charged with an extraordinary task. We have

¹ Matt Vasilogambros, *Disinformation May Be the New Normal, Election Officials Fear*, Stateline, Pew Charitable Trusts (Sept. 21, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/09/21/disinformation-may-be-the-new-normal-election-officials-fear>.

² *Local Elections Survey (March 2022)*, The Brennan Center for Justice (March 10, 2022), <https://www.brennancenter.org/our-work/research-reports/local-election-officials-survey-March-2022>.

to continue to do our work. We've not let it control what we do here.”³ The Guidelines and Commentary, are clear that the safety of voters and election administrators in the voting process is crucial to maintaining the integrity of the voting process and that such efforts must be funded appropriately.

Conclusion

Federal, state, local, territorial, and tribal governments are constantly working to improve the administration of elections to ensure public confidence and trust in the electoral system. The Standing Committee believes that the 2022 Guidelines and Commentary, submitted for adoption by the House of Delegates, represent the best practices in light of ongoing changes and trends in elections and will serve to enhance the administration and integrity of the franchise.

This Resolution intends that the Guidelines and Commentary will be disseminated widely to Secretaries of State and other election officials responsible for the ongoing review and improvement of the election process in their states and localities, as well as to the United States Congress, which has authority to enact legislation governing federal elections.

The administration of elections is among the most underfunded of government activities, and this Resolution encourages the appropriation of necessary funding to election administration to ensure the integrity and efficiency of the electoral process, which is the foundation of democratic society.

Respectfully Submitted,

Estelle H. Rogers, Chair
Standing Committee on Election Law
August 2022

³ Vasilogambros, *supra* note 1.

GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Election Law

Submitted By: Estelle Rogers, Chair

1. Summary of the Resolution(s).

Recommends that all election officials ensure the integrity of the election process through the adoption, use, and enforcement of these updated Guidelines and Commentary and provide adequate funding in order to ensure the integrity and efficiency of the electoral process.

In light of ongoing trends in voting and voter registration, advancements in technology, the current COVID-19 pandemic, and the recent 2020 presidential election and upcoming 2022 midterm election cycle, the amendments to the Guidelines and Commentary focus on two very timely and important issues: 1) election misinformation and disinformation related to the voting process, and 2) personal security of election administrators and voters during the voting process.

2. Indicate which of the ABA's Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

The Guidelines and Commentary advance Goal 4 by seeking to ensure the integrity of the election process, and advance Goals 1 and 2 by equipping ABA members and the legal profession with recommendations to support their advocacy and work in the election law and voting rights arena.

3. Approval by Submitting Entity.

Approved at May 4, 2022 Spring Meeting of the Standing Committee on Election Law

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

The Guidelines and Commentary are updated as necessary to keep pace with changes in election law, technology, society, and the actual administration of elections. The most recent revision to the Guidelines and Commentary was in 2021 in response to the effects of the COVID-19 pandemic on the administration of elections (21A610).

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

This would replace 21A610, the *ABA Election Administration Guidelines and Commentary*.

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

n/a

7. Status of Legislation. (If applicable)

There are numerous pending bills in Congress and in state legislatures regarding matters of election administration that are relevant to this resolution.

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

They will be disseminated widely to Secretaries of State and other election officials responsible for the ongoing review and improvement of the election process in their states and localities, as well as to the United States Congress, which has authority to enact legislation governing federal elections. The Committee encourages their use by the ABA Governmental Affairs Office and Amicus Curiae Committee in advocacy on behalf of the Association.

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

none

10. Disclosure of Interest. (If applicable)

none

11. Referrals.

Section of Civil Rights and Social Justice
 Administrative Law Section
 Section of State and Local Government Law
 Government and Public Sector Lawyers Division
 Commission on Disability Rights
 Young Lawyers Division
 Law Student Division
 Senior Lawyers Division
 Standing Committee on Law and National Security
 Criminal Justice Section

12. 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.)*

602

Estelle H. Rogers
Tel.: (202) 337-3332
E-mail: 1estellerogers@gmail.com

13. 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
Tel.: (202) 337-3332
E-mail: 1estellerogers@gmail.com

EXECUTIVE SUMMARY

1. Summary of the Resolution.

In light of ongoing trends in voting and voter registration, advancements in technology, the current COVID-19 pandemic, and the recent 2020 presidential election and upcoming 2022 midterm election cycle, the amendments to the Guidelines and Commentary focus on two very timely and important issues: 1) election misinformation and disinformation related to the voting process, and 2) personal security of election administrators and voters during the voting process.

2. Summary of the issue that the resolution addresses.

Threats and harassment of election officials seem to go hand in hand with misinformation and disinformation about the voting process. The Standing Committee added a new §1.4 (Election Misinformation, Disinformation and the Voting Process) to address these concerns. The Guidelines and Commentary now call for an acknowledgement that misinformation and disinformation is affecting our electoral process and that 1) voters should be educated and made aware of such efforts, and 2) election administrators should proactively respond to know misinformation and disinformation regarding the voting process. The Guidelines and Commentary only apply to misinformation and disinformation regarding the voting process.

In order to address the rise in physical threats to election administrators and workers, the new §6.7 (Personal Security) of the Guidelines and Commentary seek to educate the public that election officials are simply doing their jobs, in order to preserve and safeguard our democratic process. The Guidelines and Commentary are clear that the safety of voters and election administrators in the voting process is crucial to maintaining the integrity of our voting process and that such efforts must be funded appropriately.

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

The Standing Committee believes that the 2022 Guidelines and Commentary, submitted for adoption by the House of Delegates, represent the best practices in light of ongoing changes and trends in elections and will serve to enhance the administration and integrity of elections. The Standing Committee will work to disseminate the Guidelines and Commentary widely to Secretaries of State and other election officials responsible for the ongoing review and improvement of the election process in their states and localities, as well as to the United States Congress, which has authority to enact legislation governing federal elections.

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

None known.

AMERICAN BAR ASSOCIATION
CENTER FOR HUMAN RIGHTS
RULE OF LAW INITIATIVE
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
SECTION OF INTERNATIONAL LAW
REPORT TO THE HOUSE OF DELEGATES
RESOLUTION

- 1 RESOLVED, That the American Bar Association urges federal, state, local, territorial, and
- 2 tribal governments and agencies to implement, as appropriate, the *Principles on Effective*
- 3 *Interviewing for Investigations and Information Gathering* (May 2021) in devising and
- 4 conducting custodial interrogations, interviews, investigations, and information-gathering,
- 5 and to do so equally with respect to suspects, victims, witnesses and informants.

REPORT

The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Convention Against Torture” or “CAT”) entered into force in June 1987.¹ It defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.²

Under the CAT, the right to be free from such treatment is non-derogable, meaning “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”³

The United States acceded to the Convention Against Torture in 1994.⁴ Following the terrorist attacks of September 11, 2001, however, the U.S. tortured suspected 9/11 perpetrators at various “black sites” across the globe and, most notoriously, at the military prison in Abu Ghraib, Iraq.⁵ In response, the ABA issued a comprehensive policy resolution condemning these acts and urging the U.S. to comply fully with international law prohibiting the use of torture, including the CAT.⁶

In 2009, President Obama banned the use of torture by U.S. personnel in all circumstances. The U.S. CAT report issued in 2021 contains the most recent statement of U.S. policy regarding torture.⁷

It is well-settled that torture and other cruel, inhuman or degrading treatment or punishment, aside from being illegal under international law, is, as an interrogation method, ineffective.⁸ In fact, it can be counter-productive, perhaps generating faulty

¹ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter “Convention Against Torture” or “CAT”), GA RES 39/46, 10 December 1984; *entered into force* 26 June 1987, *available at* <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>.

² *Id.*, Art. 1, Sec. 1.

³ *Id.*, Art. 2, Sec. 2.

⁴ UN Office of the High Commissioner for Human Rights (OHCHR), <https://indicators.ohchr.org/>.

⁵ See generally ABA Resolution 04A10B (Revised) (hereafter Resolution 10-B), *available at* https://www.americanbar.org/content/dam/aba/administrative/international_law/torture8_04.pdf.

⁶ *Id.*

⁷ https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/USA/CAT_C_USA_6_7602_E.pdf

⁸ See, e.g., Human Rights First, “Facts on Torture,” *available at* <https://www.humanrightsfirst.org/campaigns/never-torture/facts-torture>, *accessed* 21 July 2021. “Experienced interrogators and intelligence experts say that using torture and abuse in interrogations is not

information that can lead astray the justice-seeking or disaster-preventing investigations often invoked to justify it.⁹ To the extent, however, that questions persist regarding which interrogation methods *are* effective, the *Principles on Effective Interviewing for Investigations and Information Gathering* (“*Principles*”)¹⁰ helps to answer them.

The *Principles* are the outgrowth of a 2016 report to the UN General Assembly by then-UN Special Rapporteur on Torture, Juan Mendez, in which he observed that “the most frequent setting where torture and coercion takes place [despite legal prohibitions] is in the course of the interrogation of suspects and for the purpose of obtaining confessions or declarations against others.”¹¹ His report thus recognized “an opportunity and offered a path forward,” manifested in the *Principles*, to eliminate the practice of torture as mandated by law.

Issued in May 2021, the *Principles* were developed by a Steering Committee of experts co-chaired by Mendez and Mark Thomson, a former Secretary-General of the Association for the Prevention of Torture. The *Principles* are the culmination of four years of consultations with more than 100 investigators, academics, and human rights lawyers worldwide, and were drafted by a multi-disciplinary, gender balanced, and geographically representative group of international experts,¹² although the group did not include any representatives from the Federal Bureau of Investigation or other federal law enforcement agencies.

According to Mendez and Thomson, the *Principles* “aim to transform the relationship between States and their citizens. They are intended to change how State authorities conduct interviews and as a result improve civic trust in the State.”¹³

[T]raditional techniques of interrogation are often unreliable and abusive of the rights of individuals, for example by using coercion to obtain confessions. The *Principles* — grounded in science, law and ethics — provide guidance on how to conduct rapport-based interviewing, which is more effective in obtaining accurate information and more respectful of the human rights of persons being interviewed. The *Principles* provide concrete guidance for States to better respect their existing human rights obligations regarding the administration of justice and the rule of law. Grounded in

an effective way to elicit reliably truthful information. According to a statement by 25 former interrogators and intelligence professionals from the U.S. military and other federal agencies (including the CIA, FBI, DEA, and NCIS), “The application of psychological, emotional, and/or physical pressure can force a victim of torture to say anything just to end the painful experience. The challenge of interrogation is not ‘to make people talk’; instead, it is to obtain precise and credible information.”

⁹ *Id.*

¹⁰ Juan Mendez, Mark Thomson, et al, *Principles on Effective Interviewing for Investigations and Information Gathering*, May 2021 (hereafter *Principles*) available at https://www.apt.ch/sites/default/files/inline-files/apt_PoEI_EN_08.pdf.

¹¹ A/71/298, Report of the Special Rapporteur on Torture, 5 August 2016. See also, A/HRC/RES/31/31, Resolution of the Human Rights Council, 24 March 2016.

¹² Juan Mendez and Mark Thomson, Letter to Alberto Mora, ABA Associate Executive Director for Global Programs, 7 June 2021.

¹³ *Id.*

practical experience and scientific study, the *Principles* are presented in a manner that enables them to be applicable and affordable throughout the world and across legal traditions. They are intended to inspire policymakers to take the measures necessary to review and reform the interviewing practices and criminal justice procedures within their jurisdiction.¹⁴

As outlined below, the *Principles* (linked in footnote 10) are organized by six thematic principles covering specific subtopics to “integrate law with the robust and growing scientific research on the questioning methods that most effectively elicit accurate and reliable information from”¹⁵ custodial interrogations:

Principle 1 – On Foundations

Effective interviewing is instructed by science, law and ethics.

- Scientific Foundations
- Legal Foundations
- Professional Ethics Foundations

Principle 2 – On Practice

Effective interviewing is a comprehensive process for gathering accurate and reliable information while implementing associated legal safeguards.

- A Comprehensive Process
- Accurate and Reliable Information
- Legal Safeguards
- Before the Interview – Ensuring a Non-coercive Environment
- During the Interview – Establishing and Maintaining Rapport
- Concluding the Interview – Assessment and Analysis

Principle 3 – On Vulnerability

Effective interviewing requires identifying and addressing the needs of interviewees in situations of vulnerability.

- The Interview as a Situation of Vulnerability
- Persons in Situations of Heightened Vulnerability
- Assessing and Addressing Situations of Heightened Vulnerability

Principle 4 – On Training

Effective interviewing is a professional undertaking that requires specific training.

- Specific Training

¹⁴ *Principles*, *supra* n.13.

¹⁵ *Id.* at 1.

- Continuous Professional Development

Principle 5 – On Accountability

Effective interviewing requires transparent and accountable institutions.

- Institutional Procedures and Review
- Effective Record Keeping
- Prevention and Reporting
- External Oversight and Independent Monitoring
- Complaints and Investigations
- Redress and Reparations

Principle 6 – On Implementation

The implementation of effective interviewing requires robust national measures.

- Domestic Legal Frameworks
- Institutional Culture and Capacity
- Judicial Authorities
- Dissemination

As the Steering Committee states, these *Principles* are necessary because “[a]round the world, false confessions and the unreliability of tainted information arising from abusive practices have led to flawed decision-making, wrongful convictions, and gross miscarriages of justice.”¹⁶

Due to the widespread misconception that ‘torture works,’ questioning, in particular of suspects, is inherently associated with risks of intimidation, coercion and mistreatment. The use of such practices during interviews is both ineffective and counterproductive, with potentially devastating costs to the victims, perpetrators, institutions, and society at large; when they amount to torture, cruel, inhuman or degrading treatment or punishment (other forms of ill-treatment), they are absolutely prohibited by international law.¹⁷

Accordingly,

There is a need to move questioning culture away from accusatory, coercive, manipulative and confession-driven practices towards rapport-based interviewing. This includes the application of legal and procedural safeguards throughout the interview process, which reduces the risks of ill-treatment, produces more reliable information and helps to ensure a lawful outcome of the investigation or intelligence operation.¹⁸

¹⁶ *Id.*, para. 3.

¹⁷ *Id.*

¹⁸ *Principles*, *supra* n.11, para 4.

In these ways, the *Principles* ultimately

promote an approach that helps ensure that the presumption of innocence is respected and operationalised, that convictions against guilty persons are obtained, that wrongly accused persons are acquitted, and that justice is served for victims and society at large.¹⁹

It bears emphasizing, however, that, as reflected by its advisory language, the Resolution is not intended to, nor will it, supplant existing ABA policy pertaining to custodial interrogation or investigation practices in either terrorism or criminal cases, whether domestic or international.²⁰ Rather, the Resolution urges relevant authorities to take the *Principles* under advisement in crafting, improving, and implementing their approaches to interrogation and investigation in such cases and enhancing the desired outcomes thereof. Nonetheless, leaders and expert staff of the Criminal Justice Section, which is responsible for the ABA Criminal Justice Standards, including custodial interrogation techniques, find no conflict between the Resolution and those standards.²¹

In sum, the *Principles* comport with and promote existing ABA policy opposing the use of torture and other forms of cruel, inhuman or degrading treatment or punishment in custodial interrogations (or any other context). Beyond, however, simply recognizing that torture is illegal – what *not* to do – the *Principles* outline what *to do* to elicit information in a manner that is both legal and effective, thus enhancing prospects of securing justice through custodial interrogations, which is their true purpose under a just rule of law.

¹⁹ *Id.* at 2, para. 6.

²⁰ See ABA Resolution 07A10B, which states, in pertinent part:

RESOLVED, That the American Bar Association urges Congress to enact legislation that would:

(b) Ensure that whenever foreign persons are captured, detained, interned or otherwise held within the custody or under the physical control of the United States, or interrogated in any location by agents of the United States (including private contractors), they are treated in accordance with the minimum protections afforded by Common Article 3 and in a manner fully consistent with the standards of treatment and interrogation techniques contained in FM 2-22.3, the U.S. Army Field Manual on Intelligence Interrogation of September 2006.

By its terms, Resolution 603 does not supplant the above policy, which cites relevant international law and established U.S. standards, nor will it be so advocated. Indeed, the *Principles* are advisory and, while consistent with it, do not in themselves constitute international law. Rather, this Resolution enables the ABA to advocate consideration of the *Principles* by relevant authorities as a resource to inform and, perhaps, improve existing practices and potential outcomes.

²¹ Linda Britton, Director of Criminal Justice Standards in the ABA Criminal Justice Section (CJS), has observed, “These *Principles* are very well done I found nothing in the CJS Standards that would conflict with the proposed resolution.” E-mail from Linda Britton to Michael Pates, Director, ABA Center for Human Rights, May 17, 2022. In a separate email the same day, Neal Sonnett, former CJS Chair, concurred in Britton’s assessment.

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Respectfully submitted,

Hon. James A. Wynn, Chair
Center for Human Rights

August 2022

GENERAL INFORMATION FORM

Submitting Entity: Center for Human Rights (CHR)

Submitted By: Hon. James A. Wynn, Chair

1. Summary of the Resolution.

The Resolution supports principles researched and published by preeminent experts on effective methods of custodial interrogation that comport with international law prohibiting torture.

2. Indicate which of the ABA's Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

This Resolution will Advance the Rule of Law (Goal IV) by supporting custodial interrogation methods that are both effective and comport with international law.

3. Approval by Submitting Entity.

The CHR Board approved the proposed Resolution on Oct. 18, 2021. (Its filing was deferred to the 2022 Annual Meeting to give the International Law Section time for further study.)

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

None. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

The Resolution would augment longstanding ABA policy opposing torture by identifying effective methods of custodial interrogation that comport with international law:

04A10B
07A10B

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 Center for Human Rights and relevant entities will advocate for the policy as appropriate before governments and international organizations.

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

None

9. Disclosure of Interest. (If applicable)

Not applicable

10. Referrals.

The Resolution has or will be referred to the:

Center for Public Interest Law
Civil Rights and Social Justice Section
Criminal Justice Section
International Law Section
Rule of Law Initiative
Standing Committee on National Security Law
United Nations Representatives and Observers

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.)*

Michael Pates, CHR Director
O: 202.662.1025 / C: 240.476.1870 / michael.pates@americanbar.org

12. Name and Contact 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.*

Hon. James Wynn, CHR Chair / jim_wynn@ca4.uscourts.gov
Michael Pates, CHR Director
O: 202.662.1025 / C: 240.476.1870 / michael.pates@americanbar.org

EXECUTIVE SUMMARY1. Summary of the Resolution.

The Resolution supports principles researched and published by preeminent experts on effective methods of custodial interrogation that comport with international law prohibiting torture.

2. Summary of the issue that the resolution addresses.

The use of torture in custodial interrogation has long been a violation of international law under the UN Convention Against Torture and other instruments. The Resolution builds on ABA policy supporting the torture ban by urging consideration of effective methods of custodial interrogation that do not employ prohibited physical or psychological duress.

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

By recommending well researched and comprehensive methods of custodial interrogation, the Resolution will promote evolving best practices in seeking information from persons subject to official interrogation rather than simply what to avoid in terms of mistreatment by law enforcement or national security agents.

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

None currently identified

AMERICAN BAR ASSOCIATION
WORKING GROUP ON BUILDING PUBLIC TRUST IN
THE AMERICAN JUSTICE SYSTEM
STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENSE

RESOLUTION

- 1 RESOLVED, That the American Bar Association adopts the ABA Nine Principles on
2 Reducing Mass Incarceration, black letter and commentary, dated August 2022; and
3
4 FURTHER RESOLVED, That the American Bar Association urges federal, state, local,
5 territorial and tribal legislative and other governmental bodies to adopt policies consistent
6 with the ABA Nine Principles on Reducing Mass Incarceration.

ABA NINE PRINCIPLES TO REDUCE MASS INCARCERATION

AUGUST 2022

Introduction

Two million people are incarcerated in prisons and jails in the United States.¹ “The United States has less than 5 percent of the world’s population, yet nearly 25 percent of its prisoners.”² Over the last 40 years, the prison population has increased 500 percent.³ “In Texas, for example, the state incarceration rate quadrupled: In 1978, the state incarcerated 182 people for every 100,000 residents. By 2003, that figure was 710.”⁴

“Mass incarceration has crushing consequences — racial, economic, social — and it doesn’t make us safer.”⁵ Increasing incarceration has little, if any, impact on crime rates. Research consistently shows that higher incarceration rates are not associated with lower violent crimes rates.⁶ One report found that “[o]f the 1.46 million state and federal prisoners, an estimated 39 percent (approximately 576,000 people) are incarcerated with little public safety rationale.”⁷ Moreover, “[t]he weak association between higher incarceration rates and lower crime rates applies almost entirely to property crime.” Indeed, research suggests that incarceration often has the *opposite* effect, creating a cycle of crime, as high incarceration rates in communities correspond with *higher* crime rates.⁸

¹ The Sentencing Project, Criminal Justice Facts, available at <https://www.sentencingproject.org/criminal-justice-facts/>.

² End Mass Incarceration, Brennan Center for Justice, available at <https://www.brennancenter.org/issues/end-mass-incarceration>; Emily Widra & Tiana Herring, States of Incarceration: The Global Context 2021, Prison Policy Initiative (September 2021), available at <https://www.prisonpolicy.org/global/2021.html>.

³ The Sentencing Project, *supra* n. 2.

⁴ James Cullen, The History of Mass Incarceration, Brennan Center for Justice (July 20, 2018) available at <https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration>. As another example, from 1978 to 2016, Hawai’i’s population increased by only 53%. During the same time period, however, Hawai’i’s incarceration rate exploded by 670%, with the number of incarcerated people increasing from 727 to 5,602. HCR 85 Task Force, *Creating Better Outcomes, Safer Communities: Final Report of the House Concurrent Resolution 85 Task Force on Prison Reform to the Hawai’i Legislature 2019 Regular Session*, (Dec. 2018) (“HCR 85 Task Force Report”), p. 1, available at https://www.courts.state.hi.us/wp-content/uploads/2018/12/HCR-85_task_force_final_report.pdf.

⁵ End Mass Incarceration, Brennan Center for Justice, available at <https://www.brennancenter.org/issues/end-mass-incarceration>.

⁶ Don Stemen, The Prison Paradox: More Incarceration Will Not Make Us Safer, at 2 Vera Institute for Justice (July 2017) (citations omitted), available at https://www.vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf; see also Austin, How many Americans are unnecessarily incarcerated?, at 4-6.

⁷ Dr. James Austin, et. al., How many Americans are unnecessarily incarcerated?, at 2, Brennan Center for Justice (2016), available at https://www.brennancenter.org/sites/default/files/2019-08/Report_Unnecessarily_Incarcerated_0.pdf. Note, this report examined individuals in prison, and not jails.

⁸ *Id.* (describing a tipping point “after which future increases in incarceration lead to higher crime rates”).

To be clear, incarceration does not simply hurt the individual who is jailed. It devastates families and destabilizes communities.⁹ These impacts are born disproportionately by Black and Latinx communities. “Black Americans are incarcerated in state prisons across the country at nearly five times the rates of whites, and Latinx people are 1.3 times more likely to be incarcerated than non-Latinx whites.”¹⁰ These racial disparities pervade every aspect of the criminal legal system and must be a particular focus of reform efforts.

The American Bar Association has already adopted policies aimed at reforming numerous aspects of the criminal legal system that contribute to mass incarceration, including policies related to sentencing, pretrial detention, and court fines and fees. To reverse the tragedy of mass incarceration in the United States, however, a unified approach is required. The criminal legal system is the sum of its many parts. Thus, these Principles articulate nine critical steps, which, in combination, would help to combat the drivers of mass incarceration and ultimately reduce the number of people in jails and prisons nationwide.

It is imperative that jurisdictions across the country immediately begin reversing the devastating trend of mass incarceration. Federal, state, local, territorial, and tribal governments should immediately begin reducing the number of people they incarcerate. Building on existing ABA policies, these Principles—organized roughly in the sequence of a typical criminal case—seek to provide guidance for jurisdictions on how to achieve that goal.

PRINCIPLE 1: Strictly and uniformly limit use of pretrial detention.

Commentary:

At any given time, over 500,000 people are incarcerated in pretrial detention in the United States, the vast majority of whom, by definition, have not been convicted of a crime. Although reliable nationwide statistics on pretrial detention are hard to come by,¹¹ the Prison Policy Initiative estimates that, on average, over 440,000 individuals are being held in pretrial detention in state and local jails each day, and over 60,000 are held in federal pretrial detention.¹² Those numbers have grown exponentially over the last 40 years. The number of pretrial detainees held in local jails alone skyrocketed 433 percent between 1970 and 2015, from 82,922 people to 441,790.¹³ And although there has been some

⁹ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, (Oct 13, 2001), available at <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

¹⁰ *Id.*

¹¹ Until 2009, the State Court Processing Statistics provided data on the criminal justice processing of persons charged with felonies in 40 jurisdictions representative of the 75 largest counties. <https://bjs.ojp.gov/data-collection/state-court-processing-statistics-scps>. A new National Pretrial Reporting Program is in development. See 87 Fed. Reg. 8607 (Feb. 15, 2022). See also <https://www.prisonpolicy.org/reports/pie2022.html#datasection> (describing difficulties in aggregating data across numerous jurisdictions).

¹² Wendy Sawyer & Peter Wagner, *The Whole Pie 2022*, The Prison Policy Institute, March 14, 2022, available at <https://www.prisonpolicy.org/reports/pie2022.html>

¹³ Léon Digard & Elizabeth Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention* (April 2019), <https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf>.

reduction in pretrial detention during the pandemic, prosecution rates and pretrial detention rates appear to be returning to pre-pandemic levels.¹⁴

Although much attention has been paid to the injustices of state monetary bail systems, it is the federal system where the highest rates of pretrial detention exist. As of 2010, whereas 42% of defendants in state court were detained pretrial, 64% of federal defendants were detained pretrial.¹⁵ Again, this is against the backdrop of the “presumption of innocence,” which “although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice.”¹⁶

To make matters worse, the racial disparities in pretrial detention are stark. One study found that courts were 66 percent more likely to order pretrial detention if the defendant was Black than white.¹⁷ Even controlling for criminal charges and criminal histories, Black defendants generally face higher bail amounts than white arrestees.¹⁸ And pretrial detention can actually promote future criminal activity.¹⁹ Even a brief stay in pretrial detention increases the likelihood that a defendant will reoffend.²⁰

In short, the massive rise in pretrial detention has substantially contributed to the rates at which Americans, particularly Black and brown Americans, are held behind bars—often with devastating consequences for already-disadvantaged communities. Although pretrial detention is certainly justified in some cases, longstanding ABA policy calls for minimizing its use.²¹ Researchers and advocates have identified a range of strategies to identify ways to diminish pretrial detention while ensuring that defendants appear for court and

¹⁴ *Compare Mass Incarceration: The Whole Pie 2022*, <https://www.prisonpolicy.org/reports/pie2022.html> (445,000 persons held pretrial in local jails and 64,000 in U.S. Marshals custody), *with Mass Incarceration: The Whole Pie 2020*, https://www.prisonpolicy.org/factsheets/pie2020_allimages.pdf (470,000 persons held pretrial in local jails and 60,000 in U.S. Marshals custody). See also U.S. Marshals Service FY 2021 Annual Report, <https://www.usmarshals.gov/foia/annual-report-2021.pdf>, at 43 (Figure 15 – Average Daily Prisoner Population, showing an increase in average daily prisoner population every year from FY2017 to FY2021).

¹⁵ U.S. Department of Justice, Bureau of Justice Statistics, *Pretrial Release and Misconduct in Federal District Courts, 2008-2010* (Nov. 2012), <https://bjs.ojp.gov/content/pub/pdf/prmfdc0810.pdf>

¹⁶ *Estelle v. Williams*, 425 U. S. 501, 503 (1976).

¹⁷ Stephen DeMuth, *Racial and Ethnic Differences in Pre-trial Release and Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees*, 41 CRIMINOLOGY 873, 895 (2003).

¹⁸ Cynthia E. Jones, “Give us Free”: Addressing Racial Disparities in Bail Determinations, 16 Leg. & Pub. Policy 919, 942 (2013),

https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1922&context=facsch_lawrev;

Shawn D. Bushway & Jonah B. Gelbach, Testing for Racial Discrimination in Bail Setting Using Nonparametric Estimation of a Parametric Model (Nat’l Sci. Found., Working Paper No. SES0718955, 2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990324.

¹⁹ See, e.g., Paul Heatton, *et al.*, The Downstream Consequences of Misdemeanor Pretrial Detention, 69 Stan. L. Rev. 711 (2017),

https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3409&context=faculty_scholarship;

Christopher T. Lowenkamp, *et al.*, The Hidden Costs of Pretrial Detention (Nov. 2013), 3, 11, 22, https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf

²⁰ Leon Digard, Justice Denied: The Harmful and Lasting Effects of Pretrial Detention, at 6 Vera Institute for Justice (April 2019), available at <https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf>.

²¹ 2017AM112C, available at <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2017/2017-am-112c.pdf> (urging jurisdictions to favor release of defendants upon their own recognizance).

protecting communities, including training programs for judges and bail commissioners on the fundamentals of bail, requirements that bail determinations be evidence-based, and oversight and accountability measures for bail determinations.²² Accordingly, those with control over pretrial detention decisions—particularly legislators, prosecutors, and judges—should push to substantially reduce rates of pretrial detention.

PRINCIPLE 2: Increase use of diversion programs and other alternatives to criminal prosecution

Commentary:

When used appropriately, diversion programs, which often require an individual to complete education, training and/or treatment in lieu of prosecution and incarceration, can better help individuals to surmount underlying issues that place them at risk for ongoing criminal justice system involvement.²³ For this reason, ABA policy has long encouraged jurisdictions to create and use a wide scope of diversion programs for all types of offenders in the criminal and juvenile legal systems.²⁴

Use of diversion should be expansive and include programs that range from social safety nets that law enforcement can use to avoid arresting people for minor offenses, to residential treatment programs that are intended to assist people with addiction and mental health issues, to intensive programs that help people who have been arrested for serious offenses.²⁵

Unfortunately, the existence of diversion programs has often had the unintended and damaging effect of *increasing* the number of individuals under government supervision, which, in turn, can contribute to the very increase in incarceration these Principles seek to avoid.²⁶ Thus, to be clear, “diversion” programs should be considered only where a person charged with a crime would *otherwise* be detained—*i.e.*, where, among other things, probable cause exists to believe that they have committed a criminal offense and that a criminal charge would otherwise be warranted.

Further, courts must ensure that participants’ due process rights and right to counsel are protected, and that no participant is treated more harshly than a person who was not diverted.

²² *Id.* at 956-57, 959-60.

²³ Fair and Just Prosecution, *Issues: Diversion and Alternatives to Incarceration*, <https://fairandjustprosecution.org/issues/diversion-and-alternatives-to-incarceration/>

²⁴ See, e.g., 2011MY107B (urging use of restorative justice alternatives for youth and teens).

²⁵ IACP/UC Center for Police Research and Policy, *Assessing the Impact of Law Enforcement Assisted Diversion (LEAD): A Review of Research*, i-vii <https://www.theiacp.org/sites/default/files/IDD/Review%20of%20LEAD%20Evaluations.pdf>; Vera Institute of Justice, *What is Diversion* (June 21, 2016) <https://www.vera.org/the-human-toll-of-jail/judging-without-jail/what-is-diversion>; Center for Prison Reform, *Diversion Programs in America’s Criminal Justice System* (Aug. 2015) <https://centerforprisonreform.org/wp-content/uploads/2015/09/Jail-Diversion-Programs-in-America.pdf>

²⁶ Melissa Labriola, Warren A. Reich, Robert C. Dais, Priscilla Hunt, Michael Rempel, and Samantha Cherney, *Prosecutor-Led Pretrial Diversion: Case Studies in Eleven Jurisdictions 2* (April 2018), <https://www.ojp.gov/pdffiles1/nij/grants/251664.pdf>

PRINCIPLE 3: Maximize alternatives to incarceration such as probation and community release, with the fewest restrictions consistent with rehabilitation and public safety

Commentary:

The term “community supervision” describes the practice of allowing a person who has been convicted of a crime to serve their sentence in the community. A sentence that is imposed in lieu of imprisonment is called probation. Parole or supervised release is a term that follows a period of imprisonment. All three fall under the umbrella of community supervision. According to the Department of Justice, an estimated 3.9 million adults were under community supervision at the end of 2020.²⁷ With appropriate standards, limitations, and resources, community supervision is an alternative to incarceration that can help solve the mass incarceration problem without compromising public safety. However, if overused or misused, community supervision programs can contribute to the mass incarceration these Principles seek to combat.

Community supervision often requires participants to abide by a lengthy set of conditions, or rules. These rules often include reporting regularly to a probation or pre-trial officer; attending work, classes, or treatment programs; submitting to random drug tests; avoiding new criminal conduct; and complying with any other discretionary restrictions set by the probation or pre-trial officer. To be successful at promoting rehabilitation, these conditions should be specific to the individual and crime charged and should create the fewest restrictions possible consistent with the goals of the program and public safety.

Such programs should also minimize the number of people who are reincarcerated. Based on data from 2018, “only about half of people who exit parole or probation do so after successfully completing their supervision terms; annually, nearly 350,000 people are shifted from community supervision to prison or jail.”²⁸ A report by the Pew Public Safety Performance Project notes that, “Historically, probation and parole were intended to provide a less punitive, more constructive alternative to incarceration, but a growing body of evidence suggests that a frequent emphasis on surveillance and monitoring of people under supervision rather than on promoting their success, along with the resource demands of ever-larger caseloads, has transformed community supervision into a primary driver of incarceration.”²⁹ A 2006 DOJ study showed that 35% of all state prison admissions were offenders returned to incarceration as a result of parole violations, not for new convictions.³⁰

²⁷ DOJ - <https://bjs.ojp.gov/content/pub/pdf/ppus20.pdf>; By comparison, as of late 2020 the jail and prison populations were estimated at about 1.8 million people.

²⁸ Alexi Jones, *Correctional Control 2018: Incarceration and supervision by state*, Prison Policy Initiative (Dec. 2018), <https://www.prisonpolicy.org/reports/correctionalcontrol2018.html>

²⁹ Pew Charitable Trusts, *Policy Reforms Can Strengthen Community Supervision* (Apr. 23, 2020), available at <https://www.pewtrusts.org/en/research-and-analysis/reports/2020/04/policy-reforms-can-strengthen-community-supervision>.

³⁰ Alison Lawrence, Probation and Parole Violations: State Responses, at National Conference of State Legislatures (Nov 2008), available at <https://www.ncsl.org/print/cj/violationsreport.pdf> (citing William J. Sabol and Heather Courture, Prison Inmates at Midyear 2007, at 5, Bureau of Justice Statistics (June 2008)).

Revocations can occur for violations of conditions, such as testing positive for drug use, missing check-ins with the parole or probation officer, a new arrest or police contact, failure to maintain housing and many others, including, as noted previously, failure to pay fines and fees. Imposition of too many requirements, particularly those that require travel, time off from work, and childcare to comply, can increase the likelihood that violations will occur and result in unnecessary reincarceration. Moreover, revocations disproportionately impact low-income, Black and brown probationers and parolees. For this reason, requirements should be no more extensive and onerous than necessary to further rehabilitation and protect public safety. As the Department of Justice has observed,

At a minimum, agencies should adjust levels of supervision based on risk; requiring more intensive supervision requirements for higher-risk individuals is necessary, but not sufficient. Research shows that more intensive supervision, absent risk-reduction interventions, can make outcomes worse, as closer surveillance uncovers more misconduct but programming to facilitate behavior change is absent. An agency should define separate supervision pathways that are appropriate for people with different risk and need profiles.³¹

One way to effectuate this is through legislation defining when probation or parole violations can result in reincarceration. In Vermont, for example, a statute generally limits revocation and reincarceration unless “confinement is necessary to protect the community from further criminal activity by the probationer.”³² Other states explicitly provide for sanctions short of incarceration that may be imposed for violations, such as additional treatment or community service.³³ When used in this manner, increased use of community supervision can reduce the number of incarcerated prisoners while fostering rehabilitation and protecting public safety.

PRINCIPLE 4: Eliminate incarceration for failure to pay fines/fees until after an ability-to-pay hearing and a finding of willfulness

Commentary:

In *Bearden v. Georgia*, the U.S. Supreme Court ruled that courts may not incarcerate an individual for nonpayment of a fine or restitution without first holding a hearing on the individual's ability to pay and making a finding that the failure to pay was “willful.”³⁴ Unfortunately, more than half a century later, people are still incarcerated because they

³¹ Bureau of Justice Assistance, Department of Justice, *Community Supervision: Public Safety Risk Assessment Clearinghouse*, available at <https://bja.ojp.gov/program/psrac/implementation/structured-decision-making/community-supervision>.

³² 28 V.S.A. §303 (2022), available at <https://legislature.vermont.gov/statutes/section/28/005/00303>.

³³ PEW, To safely cut incarceration, states rethink supervision violations (July 19, 2019), available at <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/07/to-safely-cut-incarceration-states-rethink-responses-to-supervision-violations> (noting that a South Carolina effort to utilize administrative sanctions for supervision noncompliance led to significant reduction in reincarceration).

³⁴ *Bearden v. Georgia*, 461 U.S. 660, 667-69 (1983).

cannot pay court fines and fees.³⁵ Many of these individuals simply lack the financial means to pay the fine or fee.³⁶

In 2018, the ABA House of Delegates adopted the *Ten Guidelines on Court Fines and Fees*.³⁷ These Guidelines make clear that incarceration for failure to pay must be strictly limited to those who are provided an ability-to-pay hearing, with counsel, and whose failure to pay is found to be willful.³⁸ Moreover, the ability-to-pay standard should be “clear and consistent” and “require considerations of at least the following factors: receipt of needs-based or means-tested public assistance; income relative to an identified percentage of the Federal Poverty Guidelines; homelessness; health or mental health issues, financial obligations and dependents; eligibility for a public defender or civil legal services; lack of access to transportation; current or recent incarceration; other fines and fees owed to courts; any special circumstances that bear on a person’s ability to pay; and whether payment would result in manifest hardship to the person or dependents.”³⁹

Principle 5: Repeal mandatory minimum sentencing provisions

Commentary:

Mandatory minimum sentences not only contribute to the mass incarceration problem in the United States, they are also inequitable and counterproductive. First, Black and Latinx defendants are more likely to receive mandatory minimum sentences than whites. Of federal prisoners subject to mandatory minimum sentences in 2015, 41.5 percent were Latinx, even though Latinx people make up only 17 percent of the overall U.S. population. Further, 28.9 percent of inmates subject to mandatory minimum sentences were Black, despite the fact that Black people represent only 13 percent of the U.S. population. Only 27.2 percent of those subject to mandatory minimum sentences were white.⁴⁰

Second, mandatory minimum sentences afford prosecutors disproportionate power to coerce a plea bargain. The prosecutor can threaten to charge a crime with a long mandatory sentence, whether warranted or not, to coerce the defendant to plead guilty. Such charges tie the hands of judges who wish to tailor the punishment to the individual defendant’s circumstances.⁴¹ Mandatory minimum sentences thus act “like a sledgehammer rather than a scalpel.”⁴²

³⁵ Tony Messenger, *Can't pay the court? Go to jail. Debtors' prison lives on.*, Washington Post (Jan. 7, 2022); Juliette Rihl, How not paying court fines and costs can mean jail time, PublicSource (Feb 27, 2020) (noting that in 2019, PA judges sent defendants to jail for not paying fines in roughly 3,600 cases); American Civil Liberties Union, *In For A Penny: The Rise Of America's New Debtors' Prisons* (2010), ACLU of Louisiana, *Louisiana Debtors' Prisons: An Appeal To Justice* (2015); ACLU of Washington and Columbia Legal Services, *Modern-Day Debtors' Prisons: The Ways Court-Imposed Debts Punish People For Being Poor* (2014).

³⁶ See *id.*

³⁷ 2018AM114.

³⁸ *Id.* at Guidelines 3, 4 and 8.

³⁹ *Id.* at Guideline 7.

⁴⁰ Leadership Conference, *Sentencing and Mandatory Minimums* (2018) at p. 2.

⁴¹ ABA policy urges against this practice. See

⁴² Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARVARD LAW REVIEW 2463, 2487 (2004); Alison Siegler, Brennan Center for Justice, *End Mandatory Minimums* (2021)

Third, mandatory minimum sentences, or the threat thereof, do not improve public safety. Incarceration is intrinsically criminogenic.⁴³ Not surprisingly, mandatory sentencing laws have not reduced recidivism. Indeed, in increasing the level of incarceration—at an average annual cost of more than \$37,000 per inmate—mandatory minimum sentencing diverts resources from other aspects of public safety and essential social services, including, for example, rehabilitative programs that can reduce recidivism.⁴⁴

The federal government has adopted partial reforms of mandatory sentencing. President Biden, during the 2020 campaign, called for the abolition of mandatory minimum sentences for nonviolent crimes, and, upon his election, the Justice Department promptly rescinded its policy of charging, in all cases, the offenses that would carry the most severe sentence.⁴⁵ The First Step Act of 2018 reduced mandatory minimum sentences for some drug traffickers with prior convictions, lowered the 20-year mandatory minimum to 15 years, and reduced the life-in-prison mandatory minimum to 25 years.⁴⁶ But long mandatory minimum sentences remain on the books.⁴⁷

Many states, too, have undertaken reforms of mandatory minimum sentences. For example, Maryland enacted a law repealing mandatory minimum sentences for nonviolent drug offenses.⁴⁸ New Jersey accomplished the same thing by administrative directive.⁴⁹ Iowa passed legislation that allowed the parole board to release nonviolent drug offenders who served at least half their sentences.⁵⁰ And Oklahoma gave judges more discretion in the sentencing of nonviolent offenders.⁵¹ As of 2014, more than 29 states had adopted reforms of mandatory minimum sentences.⁵² However, no jurisdiction has abolished mandatory minimum sentences across the board.

⁴³ Francis Cullen, Cheryl Lero Johnson, and Daniel S. Nagin, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91(3) *Prison Journal* 48S, 51S (2011).

⁴⁴ Pew Charitable Trust, *Low Return: Penalty increases enacted in 1980s and 1990s have not reduced drug use or recidivism* (2015).

⁴⁵ Ryan Reilly, DOJ pulls Trump administration's harsh charging and sentencing policy, *HuffPost* (Jan 29, 2021), available at https://www.huffpost.com/entry/doj-biden-sentencing-charging-policy_n_601441aac5b63b0fb2808ce7.

⁴⁶ Congressional Research Service, *The First Step Act of 2018: An Overview* (March 4, 2019), pp. 8-9.

⁴⁷ See U.S. Sentencing Commission, *Report at a Glance: Mandatory Minimum Penalties in the Federal System*, available at <https://www.ussc.gov/research/research-reports/report-glance-mandatory-minimum-penalties-federal-system>.

⁴⁸ Ovetta Wiggins, *How Maryland came to repeal mandatory minimums for drug offenders*, WASHINGTON POST (June 1, 2016).

⁴⁹ Gurbir S. Grewal, Attorney General of New Jersey, *Attorney General Law Enforcement Directive No. 2021-4* (April 19, 2021); Nicholas Katzban, NJ allows non-violent drug offenders to apply for new sentences, *NorthJersey.com* (May 19, 2021), available at <https://www.northjersey.com/story/news/new-jersey/2021/05/19/nj-allows-non-violent-drug-offenders-apply-new-sentences/5172441001/>.

⁵⁰ Kathy Bolten, Branstad signs bill allowing early release of hundreds of drug felons, *Des Moines Register* (May 12, 2016), available at <https://www.desmoinesregister.com/story/news/politics/2016/05/12/branstad-signs-bill-freeing-hundreds-drug-felons/84260820/>.

⁵¹ 22 OK Stat. §22-985 (2020).

⁵² Ram Subramanian and Ruth Delaney, *Playbook for Change? States Reconsider Mandatory Minimum Sentences*, at 8 Center on Sentencing and Corrections (Feb 2014).

Reforming mandatory fine requirements warrants equal attention. Some jurisdictions have mandatory minimum fines up to \$750,000.⁵³ Mandatory minimum fines for driving while intoxicated are common. Illinois, for example, imposes minimum fines up to \$5,000.⁵⁴ The ABA Ten Guidelines on Court Fines and Fees, adopted by the House of Delegates in 2018, urge jurisdictions to enable judges “to waive or reduce any fine” and note that “a full waiver of fines should be readily accessible to people for whom payment would cause substantial hardship.”⁵⁵

PRINCIPLE 6: Adopt “second look” policies, requiring regular review of sentences of incarceration to determine if they remain appropriate

Commentary:

Reducing mass incarceration requires taking a second look at long sentences. Although it is well documented that individuals “age out” of a propensity to commit criminal activity—known as the age-crime curve—large numbers of people remain in prison many years, even decades, past when there is any rational policy justification for keeping them behind bars.

“Over 200,000 people in U.S. prisons were serving life sentences in 2020—more people than were in prison with any sentence in 1970. Nearly half of the life-sentenced population is Black. Nearly one-third is age 55 or older.”⁵⁶ “Many people serving long sentences, including for a violent crime, no longer pose a public safety risk when they have aged out of crime. Long sentences are of limited deterrent value and are costly, because of the higher cost of imprisoning the elderly.”⁵⁷ At some point in the course of such sentences, the legitimate question arises whether they continue to serve the purpose for which they were imposed.

As sixty current and former prosecutors pointed out in a joint statement, “[a]lthough the role of incarceration is primarily to protect public safety, our criminal legal system currently has few mechanisms to ensure that only those who still pose a serious safety risk remain behind bars.”⁵⁸ Jurisdictions should adopt such mechanisms. Lengthy sentences should be automatically reviewed and, where appropriate, reduced after the passage of sufficient time. The Model Penal Code recommends judicial review after 15 years for adult crimes,

⁵³ Zach Ahmad, NYCLU, *How NY makes poor people pay to be prosecuted* 2021); Fines and Fees Justice Center, *The Price of Justice: Fines, Fees and the Criminalization of Poverty in the United States* (2020).

⁵⁴ Ill. Stat. Ann. § 11-501.

⁵⁵ Guideline 2, ABA Ten Guidelines on Court Fines and Fees, available at https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/aba-ten-guidelines_.pdf?logActivity=true.

⁵⁶ Nazgol Ghandnoosh, *A Second Look at Injustice* (May 12, 2021), available at <https://www.sentencingproject.org/publications/a-second-look-at-injustice/#:~:text=Legal%20experts%20recommend%20taking%20a,10%20years%20for%20youth%20crimes>.

⁵⁷ *Id.*

⁵⁸ *Joint Statement on Sentencing Second Chances and Addressing Past Extreme Sentences* (April 2021), available at <https://fairandjustprosecution.org/wp-content/uploads/2021/04/FJP-Extreme-Sentences-and-Second-Chances-Joint-Statement.pdf>

and 10 years for youth crimes.⁵⁹ Legislators in 25 states have introduced bills requiring prisoners to receive a second look after serving a certain period of time in prison. Consistent with that trend around the country, prisoners who have served more than 15 years of confinement should have the ability to have their sentence reviewed by a judge or panel of judges, who have the power to reduce that sentence after a “second look” at the incarcerated person, his or her record of rehabilitation, and any other relevant circumstances, including their age and health status.

PRINCIPLE 7: Expand use of early release mechanisms, including time credit and compassionate release programs

Commentary:

Most jurisdictions permit sentence reductions based on good behavior and/or completion of programming to reduce recidivism.⁶⁰ These programs not only encourage compliance and use of anti-recidivism programs in prisons but also help prepare prisoners for release. However, reductions available under such programs are severely restricted both in terms of who is eligible to pursue reductions and the total reductions available.

Most jurisdictions also offer some mechanism for seeking early release from incarceration based on age, infirmity, or other compelling circumstances.⁶¹ Often called compassionate release,⁶² these mechanisms typically require application through the prison system, rather than the courts. A number of these programs have been criticized for lacking clear standards and granting too few releases.⁶³

Early release mechanisms, when used appropriately, can help jurisdictions reduce incarceration by expediting the release of individuals who no longer present a significant

⁵⁹ A Second Look at Injustice, supra n. 56; Model Penal Code: Sentencing, § 305.6 Modification of Long-Term Prison Sentences (2017), available at https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/mpcs_proposed_final_draft.pdf.

⁶⁰ The National Conference of State Legislatures collected good time and earned time policies in December 2020, available at https://www.ncsl.org/Portals/1/Documents/cj/Final-Sentence_Credit_50-State_Chart_2020.pdf. As of that time, only Maine, Michigan, Minnesota, South Dakota and Wisconsin had no good time or earned time program.

⁶¹ A 2008 review of state department of correction policies by USA Today found that 36 states had “some program allowing for the early release of dying or infirm prisoners.” Marty Roney, *36 states release ill or dying inmates*, USA Today (Aug 13, 2008); see also Mary Price, *Everywhere and Nowhere: Compassionate Release in the States*, Families Against Mandatory Minimums (June 2018), available at <https://famm.org/wp-content/uploads/Exec-Summary-Report.pdf> (noting that “49 states and the District of Columbia provide some means for prisoners to secure early release when circumstances such as imminent death or significant illness lessen the need for, or morality of, their imprisonment.”).

⁶² The mechanism is also sometimes called humanitarian release, medical and geriatric parole, medical furlough, suspension or reduction of sentence or clemency on medical grounds.

⁶³ For example, a 2013 Report by the Inspector General for the U.S. Justice Department found that the Federal Bureau of Prisons’ compassionate release program lacked “clear standards on when compassionate release is warranted, resulting in ad hoc decision making.” U.S. Dept of Justice Office of Inspector General, Evaluation and Inspections Division, *The Federal Bureau of Prisons’ Compassionate Release Program* (April 2013), available at <https://oig.justice.gov/reports/2013/e1306.pdf>. The FAMM report on Compassionate Release in the States also noted that “despite the widespread existence of these programs, very few prisoners receive compassionate release.”).

risk of harm to the public, either because of their extraordinary rehabilitative record, advanced age, health condition, or other relevant circumstances. Jurisdictions should consider expanding the use of early release mechanisms by eliminating unnecessary barriers or exceptions to eligibility and broadening the criteria for release. Additionally, to be effective, these programs should be systematized – with an advertised, accessible process for application and clear criteria upon which an application will be evaluated.

PRINCIPLE 8: Encourage prosecutors to establish policies that reduce incarceration

Commentary:

Core to the effectuation of each of these Principles is the prosecutor. Prosecutors are the gatekeepers to the criminal legal system. They have the power to charge (or not), to divert people from incarceration (or not), to recommend community supervision (or not), to plea bargain (or not), and to recommend a sentence.

The ABA Criminal Justice Standards for the Prosecutorial Function urge each prosecutor's office "to develop general policies to guide the exercise of prosecutorial discretion."⁶⁴ Such policies should be aimed at "achiev[ing] fair, efficient, and effective enforcement of the criminal law within the prosecutor's jurisdiction."⁶⁵ To help reduce mass incarceration and reverse the harm that it has done to impacted communities, prosecutors should establish policies that promote alternatives to incarceration and seek to reduce the length of sentences.

Charging: Upon receipt of a case from law enforcement, the prosecutor must first decide whether or not to institute formal criminal charges against the individual. Appropriate screening of cases at this charging point can help avoid erroneous detention and prosecutions. Prosecutors' offices "should establish standards and procedures for evaluating complaints to determine whether formal criminal proceedings should be instituted."⁶⁶ Prosecutors should consider not only whether sufficient evidence exists to sustain charges, but also "the extent or absence of harm,"⁶⁷ "the impact of the prosecution or non-prosecution on public welfare,"⁶⁸ "characteristics of the offender,"⁶⁹ "whether the authorized or likely punishment or collateral consequences are disproportionate in relation to the particular offense or the offender,"⁷⁰ "the possible influence of any cultural, ethnic, socioeconomic or other improper biases,"⁷¹ and "potential collateral impact on third parties,"⁷² among other things.

⁶⁴ ABA Criminal Justice Standards for the Prosecution Function, at Standard 3-2.4(a).

⁶⁵ *Id.*

⁶⁶ ABA Criminal Justice Standards for the Prosecution Function, at Standard 3-4.2(b).

⁶⁷ *Id.* at Standard 3-4.4(a)(iii).

⁶⁸ *Id.* at Standard 3-4.4(a)(iv).

⁶⁹ *Id.* at Standard 3-4.4(a)(v).

⁷⁰ *Id.* at Standard 3-4.4(a)(vi).

⁷¹ *Id.* at Standard 3-4.4(a)(x).

⁷² *Id.* at Standard 3-4.4(a)(xii).

Pretrial Detention: In exercising discretion on whether to recommend pretrial detention, prosecutors should consider all relevant facts and circumstances and make a individualized recommendation to the court.⁷³ “The prosecutor should favor pretrial release of [people who have been charged], unless detention is *necessary* to protect individuals or the community or to ensure the return of the defendant for future proceedings.”⁷⁴ Moreover, “prosecutors should be open to reconsideration of pretrial detention . . . based on changed circumstances, including an unexpectedly lengthy period of detention.”⁷⁵

Plea: More than nine out of 10 cases are resolved by plea bargain.⁷⁶ In *Padilla v. Kentucky*, the Supreme Court observed, “plea bargaining . . . is not some adjunct to the criminal justice system; it *is* the criminal justice system.”⁷⁷ For this reason, the decision to offer a plea and what plea to offer may be the most important the prosecutor makes. In exercising discretion in plea bargaining, prosecutors should similarly consider not only what might be accepted by the defendant, but also what plea and recommended sentence best serves the interests of justice.⁷⁸ Prosecutors must consider equity in their plea bargaining practices, as well – which is to say “[s]imilarly situated defendants should be afforded equal plea agreement opportunities.”⁷⁹

Sentencing: “The severity of sentences imposed should not be used as a measure of prosecutor’s effectiveness.”⁸⁰ Prosecutors’ offices should develop “consistent policies for evaluating and making sentencing recommendations, and not leave complete discretion for sentencing policy to individual prosecutors.”⁸¹

Transparency: Because prosecutors exercise enormous discretion, transparency in decision-making is critical to accountability. Publication of data from critical stages of the prosecution “serves to improve the working of prosecution offices and further the public’s knowledge of how cases are prioritized, the extent to which disparities based on traits of

⁷³ *Id.* at Standard 3-5.2(b).

⁷⁴ *Id.* at Standard 3-5.2 (a).

⁷⁵ *Id.* at Standard 3-5.2 (d).

⁷⁶ PEW Research Center, *Trials are rare in the federal criminal justice system, and when they happen, most end in convictions* (June 10, 2019), available at https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/ft_19-06-11_trialsandguiltypleas-pie-2/ (noting that 90% of federal criminal cases resolved through a plea of guilty); see also Lindsey Devers, *Plea and Charge Bargaining: Research Summary*, Bureau of Justice Assistance (Jan 24, 2011), available at <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf> (While there are no exact estimates of the proportion of cases that are resolved through plea bargaining, scholars estimate that about 90 to 95 percent of both federal and state cases are resolved through this process.”)

⁷⁷ *Padilla v. Kentucky*, 559 U.S. 356 (2012).

⁷⁸ See ABA Criminal Justice Standards on Guilty Pleas, at Standard §14-1.1 (“As part of the plea process, appropriate consideration should be given to the views of the parties, the interests of the victims and the interest of the public in the effective administration of justice.”); ABA Criminal Justice Standards for the Prosecution Function, at Standard 3-5.6(e)-(g).

⁷⁹ ABA Criminal Justice Standards on Guilty Pleas, at Standard §14-3.1(d).

⁸⁰ ABA Criminal Justice Standards on the Prosecution Function, at Standard §3-7.2(a).

⁸¹ *Id.* at Standard § 3-7.2(d).

a defendant or respondent exist and can be eliminated, whether outcomes of cases meet the goals of public safety, and how the pursuit of justice functions within that office.”⁸² To that end, prosecutors should collect data on all key recommendations and action points, including charging, pretrial release, plea offers and sentencing recommendations.⁸³ Such data should include both the prosecutor’s recommendation and the court’s decision.⁸⁴ Further, prosecutors should collect data regarding defendants’ or respondents’ race and gender and be able to review that data to identify and disparate treatment or impact in their practice and take steps to rectify such practices.⁸⁵

PRINCIPLE 9: Identify, monitor, and eliminate racial disparities in all incarceration-related areas

Commentary:

One of the most tragic aspects of mass incarceration is its disproportionate and devastating impact on people and communities of color across the United States. Over the last 50 years, the ill-fated War on Drugs, heavy-handed law enforcement, and overly harsh sentencing regimes have combined to ravage Black and brown neighborhoods and significantly increase the chances that individual Black, Latinx, and Native people will be ensnared by the criminal legal system. This is in stark contrast to their white counterparts. For instance, one out of every three Black men born in 2001 can expect to be incarcerated at some point in their lives, compared to one out of every 17 white men.⁸⁶ Similar disparities exist among women: one out of every 18 Black women born in 2001 can expect to face incarceration, compared to one in 111 white women born in the same year.⁸⁷ Black men and Latinx men are also 6 times and 2.5 times more likely to be incarcerated than white men, respectively. Further, Black people are stopped and arrested by the police at disproportionate rates,⁸⁸ leading to a greater chance of prosecution and, ultimately, imprisonment.

Despite widespread recognition of these longstanding trends, the disparities remain.⁸⁹ But the precise nature and breadth of these disparities are less clear. Thus, a deliberate effort must be made to identify, monitor, and eliminate racial disparities in all

⁸² Report to ABA House of Delegates on 2021AM504, at 1, available at <https://www.americanbar.org/content/dam/aba/administrative/news/2021/08/annual-meeting-resolutions/504.pdf>.

⁸³ 2021AM504, available at <https://www.americanbar.org/content/dam/aba/administrative/news/2021/08/annual-meeting-resolutions/504.pdf> (urging all prosecutor offices to collect and publish all such data, subject to applicable confidentiality standards)

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Criminal Justice Facts, Sentencing Project, available at <https://www.sentencingproject.org/criminal-justice-facts/>.

⁸⁷ *Id.*

⁸⁸ Wendy Sawyer, Visualizing the Racial Disparities in Mass Incarceration, Prison Policy Initiative, available at <https://www.prisonpolicy.org/blog/2020/07/27/disparities>.

⁸⁹ Elizabeth Hinton, et. al., An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System, Vera Institute for Justice (May 2018), available at <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf>.

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incarceration-related areas, including (but not limited to) rates of pretrial detention, referrals to diversion programs, probation/community release, charging decisions, incarceration for failure to pay fines and fees, and early and/or compassionate release mechanisms. Among other things, this effort will require comprehensive and consistent data collection in jurisdictions across the country in order to monitor the extent to which racial disparities persist across all levels of the system, and ultimately, to inform solutions to this protracted and insidious problem.

REPORT

Introduction

Over the years, the ABA has adopted numerous policies aimed at reforming components of the criminal legal system in a manner that seeks to reduce reliance on incarceration.¹ These existing policies address numerous aspects of sentencing, as well as pretrial detention and court fines and fees.² Taken together, these policies implicitly acknowledge that mass incarceration damages individuals, families, communities, and society in myriad ways. But there has not been a concerted effort to place this collection of policies into the larger context of the need for system-wide reform since the Justice Kennedy Commission in 2004. And there has never been such an effort specifically designed to address the need to end mass incarceration.

The ABA Working Group on Building Public Trust in the Justice System has canvassed existing ABA policies, supplemented them and compiled the whole into a set of Nine Principles, which, if employed together and consistently over time, would set the United States on a path toward ending mass incarceration. These Principles articulate critical steps, which, in combination, would bring about the sustained, collective, and creative reform necessary to make our criminal legal system more equitable and effective.

Background: The United States' Failed Experiment in Mass Incarceration

"The United States has less than 5 percent of the world's population, yet nearly 25 percent of its prisoners. Mass incarceration has crushing consequences — racial, economic, social — and it doesn't make us safer."³ As the Brennan Center for Justice has explained,

The prison population began to grow in the 1970s, when politicians from both parties used fear and thinly veiled racial rhetoric to push increasingly punitive policies. [President Richard] Nixon started this trend, declaring a "war on drugs" and justifying it with speeches about being "tough on crime." But the prison population truly exploded during President Ronald Reagan's administration. When [President] Reagan took office in **1980, the total prison population was 329,000**, and when he left office eight years later, the prison population had essentially **doubled, to 627,000**. This staggering rise in incarceration hit communities of color hardest: They were disproportionately incarcerated then and remain so today.

Incarceration grew both at the federal and state level, but most of the growth was in the states, which house the vast majority of the nation's prisoners. The number of prisoners grew in every state — blue, red, urban, and rural. In Texas, for example, the state incarceration

¹ See, e.g., 2017A112C (urging jurisdictions to favor release of defendants pretrial); 2018A114 at Guideline 3 (urging jurisdictions to prohibit incarceration for failure to pay a fine or fee); 2004A121A (urging jurisdictions to repeal mandatory minimum sentences and ensure that sentencing systems provide appropriate punishment without over-reliance on incarceration as a criminal sanction).

² See *id.*

³ James Cullen, *The History of Mass Incarceration*, Brennan Center for Justice (July 20, 2018), available at <https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration>.

rate quadrupled: In 1978, the state incarcerated 182 people for every 100,000 residents. By 2003, that figure was 710.⁴

“Not only does the U.S. have the highest incarceration rate in the world; every single U.S. state incarcerates more people per capita than virtually any independent democracy on earth.”⁵ As of 2021, 664 of every 100,000 people in the United States was incarcerated.⁶ “For four decades, the U.S. has been engaged in a globally unprecedented experiment to make every part of its criminal justice system more expansive and more punitive. As a result, incarceration has become the nation’s default response to crime, with, for example, 70 percent of convictions resulting in confinement — far more than other developed nations with comparable crime rates.”⁷

If each U.S. state were a country, thirty-four states would be the countries with the highest incarceration rates in the world. The top 34 highest incarcerating countries per 100,000 in population would be Louisiana (1,094), Mississippi (1,031), Oklahoma (993), Georgia (968), Arkansas (942), Alabama (938), Kentucky (930), Arizona (868), Wyoming (850), Texas (840), Tennessee (838), South Dakota (824), Florida (795), Montana, (789), Indiana (765), Idaho (761), Virginia (749), Missouri (735), New Mexico (733), West Virginia (731), Alaska (718), Nevada (713), Kansas (698), South Carolina (678), Wisconsin (663), Pennsylvania (659), Ohio (659), Delaware (631), North Carolina (617), Colorado (614), Nebraska (601), Michigan (500), North Dakota (583), and Iowa (582). Notably, two states, Louisiana and Mississippi, incarcerated more than 1% of their populations. And combined, these 34 states confined more than 0.5% of their people.

Even Massachusetts, which has the lowest incarceration rate of all U.S. states, has an incarceration rate more than double that of other founding NATO countries: United Kingdom (129 persons incarcerated per 100,000), Portugal (111), Canada (104), France (93), Belgium

⁴ *Id.* As another example, from 1978 to 2016, Hawaii’s population increased by only 53%. During the same time period, however, Hawaii’s incarceration rate exploded by 670%, with the number of incarcerated people increasing from 727 to 5,602. HCR 85 Task Force, *Creating Better Outcomes, Safer Communities: Final Report of the House Concurrent Resolution 85 Task Force on Prison Reform to the Hawaii Legislature 2019 Regular Session*, at 1 (Dec. 2018), available at https://www.courts.state.hi.us/wp-content/uploads/2018/12/HCR-85_task_force_final_report.pdf.

⁵ See Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, Prison Policy Initiative (September 2021), available at <https://www.prisonpolicy.org/global/2021.html>.

⁶ The PPI numbers “include justice-involved youth held in juvenile residential facilities, people detained by the U.S. Marshals Service (many pre-trial), people detained for immigration offenses, sex offenders indefinitely detained or committed in “civil commitment centers” after completing a sentence, and those committed to psychiatric hospitals as a result of criminal charges or convictions.” *Id.* According to the authors, these categories of people “are not typically included in the official statistics that aggregate data about prison and jails for the simple reason that these facilities are largely separate from the state and local systems of adult prisons and jails. That definitional distinction is relevant to the people who run prisons and jails but is irrelevant to the advocates and policymakers who must confront the overuse of confinement by all of the various parts of the justice systems in the United States.” *Id.*

⁷ *History of Mass Incarceration*, *supra* n. 3.

(93), Italy (89), Luxembourg (86), Denmark (72), Netherlands (63), Norway (54), and Iceland (33).⁸

“The fiscal consequences of mass incarceration are immense. The United States spends about \$270 billion annually on our criminal justice system, with the vast majority of those costs borne by taxpayers. Building and running prisons is an astonishingly expensive enterprise. Many states spend tens of thousands of dollars per year to incarcerate a single person — rivaling what it would cost to send them to an elite, private university.”⁹

The societal damage of mass incarceration “extends far beyond the money spent by states and the federal government.”¹⁰ It “exacerbates poverty and inequality” not only through the direct effects of incarceration but also because “people who have interacted with the justice system — a disproportionate number of whom are racial and ethnic minorities — face discrimination in the hiring process, earn lower wages, have weaker social networks, and experience less upward economic mobility than those who are never incarcerated. And they aren’t the only ones to shoulder these burdens: their families and communities suffer as well, and the effect reverberates across generations.”¹¹

For all these reasons, the United States should immediately begin reversing the devastating trend of mass incarceration. Federal, state, local, territorial, and tribal governments should immediately begin reducing the number of people they incarcerate per capita, with a goal of, at minimum, reducing their per capita incarceration to those comparable to international norms of other developed nations. To do so, federal, state, local, territorial, and tribal governments should adopt policies consistent with the ABA Nine Principles on Ending Mass Incarceration. The following sets forth the rationale supporting each of the nine principles:

Strictly and uniformly limit use of pretrial detention:

The ABA has long advocated for strict limits on the use of pretrial detention. In February 2002, the House of Delegates approved the ABA Standards for Criminal Justice: Pretrial Release (the “Pretrial Release Standards”), with the accompanying commentary published in 2007.¹² The Pretrial Release Standards set forth principles for many facets of pretrial proceedings, from conditions of release to notice to victims.¹³ Standard 10-1.1 provided in part:

The law favors the release of defendants pending adjudication of charges. Deprivation of liberty pending trial is harsh and oppressive, subjects defendants to economic and psychological hardship, interferes with their ability

⁸ *Id.* Treating U.S. states as countries, El Salvador, with an incarceration rate of 562 out of 100,000 people, would be ranked thirty-fifth. Only sixteen other countries, including Turkmenistan (552), Rwanda (515), Cuba (510), Thailand (445), Panama (420), Costa Rica (374), Uruguay (372), Brazil (357), Belarus (345), Turkey (335), Nicaragua (332), Russia (329), Cape Verde (296), Namibia (295), Eswatini (277), Trinidad and Tobago (276), have higher incarceration rates than the state with the lowest incarceration rate, Massachusetts (275).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² ABA Standards for Criminal Justice: Pretrial Release (3d ed. 2007), available at https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.pdf

¹³ *Id.*

to defend themselves, and, in many instances, deprives their families of support. These Standards limit the circumstances under which pretrial detention may be authorized and provide procedural safeguards to govern pretrial detention proceedings.

Standard 10-1.2, entitled “Release under least restrictive conditions; diversion and other alternative release options,” set forth a recommended standard for determining whether an individual charged with a crime should be detained:

In deciding pretrial release, the judicial officer should assign the least restrictive condition(s) of release that will reasonably ensure a defendant's attendance at court proceedings and protect the community, victims, witnesses or any other person. Such conditions may include participation in drug treatment, diversion programs or other pre-adjudication alternatives. The court should have a wide array of programs or options available to promote pretrial release on conditions that ensure appearance and protect the safety of the community, victims and witnesses pending trial and should have the capacity to develop release options appropriate to the risks and special needs posed by defendants, if released to the community. When no conditions of release are sufficient to accomplish the aims of pretrial release, defendants may be detained through specific procedures.

These efforts dovetail with the ABA's bail reform efforts. In 2017, for example, Resolution 112C urged jurisdictions to “favor release of defendants upon their own recognizance or unsecured bond,” and to release defendants before trial unless a court determines “that release on cash bail or secured bond is necessary to assure the defendant's appearance and no other conditions will suffice for that purpose.”¹⁴ It further urged that courts be prohibited from “imposing a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant's inability to pay.”¹⁵

Adopting a principle urging limited use of pretrial detention is therefore consistent with past ABA policy and a critical step in reducing reliance on incarceration.

Increase use of diversion programs and other alternatives to criminal prosecution:

Prosecutors in a limited number of jurisdictions across the country are implementing alternatives to prosecution and incarceration – a.k.a. diversion programs - for many offenses. Diversion programs generally aim to address underlying causes of criminality and provide individuals with a means of avoiding criminal legal system involvement. For example, more than half the inmates in state prisons qualify as having a substance abuse problem, and one-third of heroin addicts pass through the corrections system each year.¹⁶ Imprisoning these

¹⁴ 2017A112C, available at <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2017/2017-am-112c.pdf>.

¹⁵ *Id.*

¹⁶ Fair and Just Prosecution, *Harm Reduction Responses to Drug Use*, available at https://www.fairandjustprosecution.org/staging/wp-content/uploads/2019/08/FJP_Brief_HarmReduction.pdf.

individuals is not solving the drug problem—for the individuals or society at large—and has only exacerbated the problem of mass incarceration. Diversion into treatment programs is frequently the superior approach.¹⁷ Successful completion of a diversion program generally results in no criminal prosecution.

Evidence shows that diversion programs can reduce recidivism and ease the burden on courts, correction systems, and prosecutors' offices.¹⁸ "In addition to affording individuals an opportunity to address the behaviors that brought them to the attention of the justice system without the burden of a criminal conviction, diversion reduces the costs associated with formal court proceedings, reduces the burden on correctional institutions, lowers community corrections caseloads and frees up limited justice system resources and services for high-risk offenders."¹⁹

There are multiple models for diversion, including but not limited to, treatment, restorative justice, and probation.²⁰ Drug courts are the most common type of adult and juvenile diversion.²¹ In addition, Law Enforcement Assisted Diversion (LEAD) "is a pre-booking diversion program that engages individuals who would otherwise be detained on low-level drug possession or sales charges, prostitution, or other charges related to behavioral health issues or extreme poverty."²² Such programs are active in Washington, New Mexico, New York, Maryland, North Carolina, Oregon, West Virginia, and Maine, among others.²³ An evaluation of LEAD participation in Seattle showed significant results: "60% lower odds of arrest during the six months subsequent to evaluation entry; and both a 58% lower odds of arrest and 39% lowers odds of being charged with a felony over the longer term."²⁴

A diversion program in Miami diverts individuals with serious mental disorders or concurrent mental and substance abuse problems.²⁵ Illinois has a diversion program for low-level drug-related offenses by individuals who do not have a prior felony or violent misdemeanor

¹⁷ See, e.g., Aleksandra E. Zgierska, et. al., Pre-arrest diversion to addiction treatment by law enforcement: protocol for the community-level policing initiative to reduce addiction-related harm, including crime, Health and Justice 9 (2021), available at <https://healthandjusticejournal.biomedcentral.com/articles/10.1186/s40352-021-00134-w>.

¹⁸ Leah Wong and Katie Rose Quandt, Building exits off the highway to mass incarceration: Diversion programs explained, Prison Policy Initiative (July 20, 2021), available at <https://www.prisonpolicy.org/reports/diversion.html> ("Anytime prosecutors can utilize diversion, they relieve the burden on the court system, correctional facilities, and probation offices in their jurisdiction, in addition to sparing individuals the collateral consequences of a criminal record).

¹⁹ District of Columbia Statistical Analysis Center, *Brief: Diversion and Deflection in the District of Columbia* (Fall 2017), available at https://cjcc.dc.gov/sites/default/files/dc/sites/cjcc/page_content/attachments/DIVERSION%20AND%20DEFLECTION%20IN%20THE%20DISTRICT%20OF%20COLUMBIA.pdf

²⁰ Fair and Just Prosecution, *Promising Practices in Prosecutor-Led Diversion*, available at <https://www.fairandjustprosecution.org/staging/wp-content/uploads/2017/09/FJPBrief.Diversion.9.26.pdf>.

²¹ *Brief: Diversion and Deflection in the District of Columbia*, supra n. 19.

²² *Harm Reduction Responses to Drug Use*, supra n. 16.

²³ LEAD National Support Bureau, available at <https://www.leadbureau.org/>.

²⁴ Susan Collins, et. al., Seattle's Law Enforcement Assisted Diversion (LEAD): Program effects on recidivism, 64 Evaluation and Planning Program 49 (2017), available at <https://www.sciencedirect.com/science/article/abs/pii/S014971891630266X?via%3Dihub>.

²⁵ *Harm Reduction Responses to Drug Use*, supra n. 16.

conviction. San Francisco uses neighborhood courts for certain nonviolent misdemeanor or felony cases.²⁶ This program uses restorative justice principles and voluntary adjudicators. “After reviewing the police report and hearing from the participant, adjudicators determine one or more ‘directives’ for the individual to complete to repair the harm caused. Directives can include community service, restitution, a letter of apology, or treatment, among other options.”²⁷ The program had a 97 percent appearance rate and a 90 per cent successful conclusion rate.²⁸

The ABA has long supported diversion. In 2004, acting on the recommendations of the Kennedy Commission on criminal justice reforms, the House urged jurisdictions to “[a]dopt diversion or deferred adjudication programs that, in appropriate cases, provide an offender with an opportunity to avoid a criminal conviction.”²⁹ The Criminal Justice Section of the ABA is currently preparing new standards related to diversion programs, which are consistent with support for the increased use of diversion programs and avoidance of incarceration whenever possible.

Increased use of diversion is consistent with past ABA policy and a critical step toward ending mass incarceration.

Maximize use of alternatives to incarceration such as probation and community release, with the fewest restrictions consistent with rehabilitation and public safety:

At the end of 2018, just under 4.4 million people were on probation or parole, more than twice the number incarcerated in state and federal prisons and local jails. That amounts to one in every 55 adults under justice system supervision.³⁰

“Historically, probation and parole were intended to provide a less punitive, more constructive alternative to incarceration, but a growing body of evidence suggests that a frequent emphasis on surveillance and monitoring of people under supervision rather than on promoting their success, along with the resource demands of ever-larger caseloads, has transformed community supervision into a primary driver of incarceration.”³¹ Forty-five percent of incarcerations nationwide are because of violations of probation or parole.³² Nearly one in four prisoners are incarcerated because of supervision violations, costing states more than \$9.3 billion each year, of which \$2.8 billion was for violations based on new

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ 2004A112A; see also Report of the ABA Justice Kennedy Commission to the House of Delegates (August 2004), available at <https://static.prisonpolicy.org/scans/aba/kennedycommreport.pdf>.

³⁰ National Conference of State Legislatures, *Community Supervision* (Oct. 22, 2021), available at <https://www.ncsl.org/research/civil-and-criminal-justice/community-supervision.aspx>.

³¹ Pew, *Policy Reforms Can Strengthen Community Supervision* (April 22, 2020), available at <https://www.pewtrusts.org/en/research-and-analysis/reports/2020/04/policy-reforms-can-strengthen-community-supervision>.

³² The Council of State Governments Justice Center, *Confined and Costly: How Supervision Violations are Filling Prisons and Burdening Budgets* (June 18, 2019), available at <https://csqjusticecenter.org/publications/confined-costly/>.

offenses and \$6.5 billion for technical supervision violations, such as missing a treatment appointment or failing to report to a probation officer on time, among other things.³³

Community supervision should be a path to reintegrate former inmates into society, not a bus stop on the way back to prison. Jurisdictions should favor alternatives to incarceration for technical violations of the conditions of community supervision.

Notably, the ABA has supported alternatives to incarceration for certain violations of community supervision. Indeed, as early as 1997, the House of Delegates urged implementation of such alternatives.³⁴ In 2007, the House urged the use of graduated sanctions for violations of parole or probation.³⁵

Increased use of tailored and supportive community supervision can dramatically improve rehabilitation, reduce recidivism and, therefore, help end mass incarceration.

Eliminate incarceration for failure to pay fines/fees until after an ability-to-pay hearing and a finding of willfulness:

Courts across the United States impose a variety of mandatory fines, fees, surcharges and assessments in connection with certain criminal and civil proceedings. Often these fees fund programs or services imposed when an individual is either released from custody pre-trial or sentenced in a criminal case.³⁶ These include fees for supervision, monitoring, drug testing, courses or required counseling or treatment, and even for expenses related to pretrial detention itself.³⁷ In many jurisdictions, when an individual cannot pay the fines and fees assessed, they can be incarcerated for failure to pay.³⁸

³³ *Id.*

³⁴ 1997M108 (urging jurisdictions to develop and implement alternatives to incarceration as sanctions for violations of probation and parole).

³⁵ 2007M103B (urging jurisdictions to “develop and implement meaningful graduated sanctions for violations of parole or probation as alternatives to incarceration”).

³⁶ For example, Michigan requires judges to impose on people convicted of traffic and misdemeanor offenses a minimum state assessment *in addition to* any fines and costs. Hon. Elizabeth Hines, *View from the Michigan Bench*, National Center for State Courts 36, available at <http://www.ncsc.org/~media/Microsites/Files/Trends%202017/View-from-Michigan-Bench-Trends-2017.ashx>. The minimum assessment in Michigan misdemeanor cases is \$125. *Id.*

³⁷ For an illustrative catalog of fees imposed in just a single case, see Alicia Bannon, Mitali Nagrecha & Rebekah Diller, *Criminal Justice Debt: A Barrier to Reentry*, The Brennan Center of Justice at New York University School of Law (2010), <https://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf> (“*Criminal Justice Debt*”), at 9 (snapshot of Case Financial Information sheet from a criminal case in the Court of Common Pleas of Cambria County, Pennsylvania. See also Human Rights Watch, *Profiting from Probation America’s “Offender-Funded” Probation Industry* (2014), <https://www.hrw.org/report/2014/02/05/profitting-probation/americas-offender-funded-probation-industry> (“*Profiting from Probation*”), at 27-31 (discussing “pay only” probation arrangements). Other fees assessed do not relate to services provided. For example, the vast majority of revenue collected from mandatory driver’s license reinstatement fees in Arkansas goes to the Arkansas State Police. Ark. Code Ann. § 27-16-808. In California, California, a \$4 fee is imposed for every criminal conviction, including traffic infractions, for Emergency Medical Air Transportation. Cal. Govt. Code § 76000.10(c)(1).

³⁸ The Brennan Center has identified the four most common “paths” to incarceration for failure to pay: (1) many courts may revoke or withhold probation or parole upon an individual’s failure to pay; (2) some states authorize incarceration as a penalty for failure to pay, such as through civil contempt; (3) some courts force

Nobody should be incarcerated due to poverty. For this reason, ABA policy has long opposed incarceration for failure to pay unless the individual is shown to have the financial means to pay.³⁹ In 2018, the ABA House of Delegates adopted the *Ten Guidelines on Court Fines and Fees*.⁴⁰ These Guidelines make clear that incarceration for failure to pay must be strictly limited to those who are provided an ability-to-pay hearing, with counsel, and whose failure to pay is found to be willful.⁴¹

Ensuring that no one is incarcerated simply for being poor will not only help solve mass incarceration, but also effectuate core principles of equal justice.

Repeal mandatory minimum sentencing provisions:

In 2017, nearly 22 percent of criminal convictions, representing 13,577 inmates, were for crimes with mandatory minimum sentences.⁴² Of those, fewer than 4 in 10 received a sentence reduction because of cooperation or a statutory safety valve, leaving 13.7 percent of inmates subject to mandatory minimum sentences.⁴³ More than two-thirds of those sentences were for drug offenses.⁴⁴ Mandatory minimum sentencing provisions are also common under state law for drug, pornography, and firearms offenses.

The ABA has opposed mandatory minimum sentences for nearly 50 years. At the Mid-Year Meeting in 1974, the House passed a resolution opposing legislatively or administratively imposed mandatory minimum sentences or parole, including sentences for drug offenders.⁴⁵ In 2004, in response to the findings of the Justice Kennedy Commission, the House of Delegates urged jurisdictions to repeal mandatory minimum sentence statutes.⁴⁶ In 2010, the ABA testified before the U.S. Sentencing Commission that “[s]entencing by mandatory minimums is the antithesis of rational sentencing policy.”⁴⁷ In 2017, the House urged jurisdictions to “repeal laws requiring minimum sentences” and “to refrain from enacting laws punishable by mandatory minimum sentences.”⁴⁸ And in 2018, the House urged that all

defendants to “choose” to serve prison time rather than paying a court-imposed debt; and (4) many states authorize law enforcement officials to arrest individuals for failure to pay and to hold them while they await an ability-to-pay hearing. See *Criminal Justice Debt*, *supra* n. 37, at 20-26.

³⁹ 2016A111B; 2017M112C (urging governments to “prohibit a judicial officer from imposing a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant’s inability to pay”).

⁴⁰ 2018A114.

⁴¹ *Id.* at Guidelines 3, 4 and 8.

⁴² United States Sentencing Commission, *Quick Facts* (2017) at 1; The Leadership Conference, *Fact Sheet on Sentencing and Mandatory Minimums* (2018).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Report to Resolution 2017A10B (citing Proceedings of the 1974 Midyear meeting of the ABA House of Delegates, Report No. 1 of the Section of Criminal Justice, at 443-44), available at https://www.americanbar.org/content/dam/aba/administrative/crsj/committee/opposing_minimum_sentence_ing_10b.authcheckdam.pdf.

⁴⁶ 2004A112A.

⁴⁷ Testimony of James E. Felman on behalf of the American Bar Association before the United States Sentencing Commission (June 2, 2010).

⁴⁸ 2017A10B (opposing the imposition of mandatory minimum sentences).

prosecuting authorities prohibit use of charges with mandatory minimums and recidivist enhancements to secure plea agreements.⁴⁹

Eliminating mandatory minimum sentences, consistent with long-standing ABA policy, will reduce over-reliance on incarceration.

Adopt “second look” policies, requiring regular review of sentences of incarceration to determine if they remain appropriate:

In recent years, federal and state governments have begun to institute reforms that lessen the term of imprisonment for many offenses and to focus more on rehabilitation as opposed to punishment and incapacitation. Most of these reforms, however, are not retroactive. Therefore, many inmates continue to serve exceptionally long sentences that no longer comport with our collective understanding of appropriate sentencing. As of May 2019, more than half of federal prisoners were 36 years old or older, past the ages with the highest risk of recidivism.⁵⁰ Further, 19.2% of federal prisoners were more than 50 years old, an age at which the risk of recidivism sharply declines.⁵¹ Yet there are few mechanisms by which these prisoners can reduce their sentences and achieve release.

“Second look” sentencing allows prisoners to petition the courts or administrative agencies for resentencing after a specified period of incarceration. The court could then make an individualized determination whether the original sentence was still appropriate and necessary to protect the public, based on the inmate’s rehabilitation and behavior. “If the progression of the individual is such that the original sentence would be a waste of resources, is unnecessary to protect the public, and unjust or harmful for the person, the court may resentence the individual to a shorter prison term or time served.”⁵²

The Model Penal Code recommends a second look at sentencing after 15 years of incarceration, with reconsideration every 10 years thereafter.⁵³ The National Association of Criminal Defense Lawyers has proposed model legislation allowing a prisoner to petition for resentencing after 10 years of incarceration.⁵⁴ Twenty-five states have considered or are consideration legislation to institute second look sentencing. The District of Columbia has enacted legislation allowing individuals sentenced for a crime committed when they were under 25 to petition the court for resentencing after they have served 15 years. The judge

⁴⁹ 2018M108C. The ABA also has opposed mandatory minimum fees. In ABA’s Ten Guidelines on Fines and Fees, adopted by the House of Delegates in 2018 (2018A114), Guideline 2 provided that: Fines used as a form of punishment for criminal offenses or civil infractions should not result in substantial and undue hardship to individuals or their families. No law or rule should limit or prohibit a judge’s ability to waive or reduce any fine, and a full waiver of fines should be readily accessible to people for whom payment would cause a substantial hardship.

⁵⁰ Bureau of Prisons, *Inmate Age* (2019), available at https://www.bop.gov/about/statistics/statistics_inmate_age.jsp

⁵¹ *Id.*

⁵² Families for Justice Reform, *A Second Chance Starts with a Second Look: The Case for Reconsideration of Lengthy Prison Sentences*, available at <https://famm.org/wp-content/uploads/Second-Look-White-Paper.pdf>.

⁵³ American Law Institute, *Model Penal Code* § 305.6 (2008).

⁵⁴ NACDL, *Model Second Look Legislation*, available at <https://www.nacdl.org/getattachment/4b6c1a49-f5e9-4db8-974b-a90110a6c429/nacdl-model-second-look-legislation.pdf>.

may reduce the sentence if the inmate does not pose a danger to public safety and the interests of justice warrant resentencing.⁵⁵

The ABA has supported second look sentencing in the past. The Criminal Justice Standards on Sentencing provide that “[t]he rules of procedure should authorize a sentencing court, at any time during the period that the court has retained jurisdiction over a sentenced offender, to modify the requirements or conditions of a sanction to fit the present circumstances of the offender.” In 2003, the House of Delegates urged jurisdictions to entertain prisoners’ requests for modification of their sentences.⁵⁶ And in 2004, the House adopted the Kennedy Commission recommendations to establish standards and a process for people in prison to request reduction of their sentences.⁵⁷

For all these reasons, every jurisdiction should have a process for the routine review and reconsideration of extended terms of incarceration, which, in turn, can help end mass incarceration.

Expand use of early release mechanisms such as good time credit and compassionate release programs:

Most jurisdictions permit sentence reductions based on good behavior and/or completion of programming to reduce recidivism.⁵⁸ These programs not only encourage compliance and program use in prisons but also can help to prepare prisoners for successful reentry. For example, New York offers time credit for “a significant programmatic accomplishment,” which includes obtaining an advanced degree, receiving a certification from the state department of labor, successfully completing an apprenticeship or significant job training program.⁵⁹

However, such programs vary greatly across jurisdictions and are often severely limited both in terms of who is eligible for good time credits and the total time that a sentence can be reduced. In addition, most jurisdictions do not allow individuals convicted of certain offenses to pursue good time credits. For example, the federal good time credit program expanded through the 2018 First Step Act is not accessible to individuals convicted of a number of

⁵⁵ Leah Sakala and Leigh Courtney, *The New DC Second Look Amendment Act Is a Step in the Right Direction, and Community Supports for Young Adults Can Build on This Progress*. Urban Institute (Dec. 17, 2020), available at <https://greaterdc.urban.org/blog/new-dc-second-look-amendment-act-step-right-direction-and-community-supports-young-adults-can>. DC had previously enacted a similar statute for offender who committed their crimes when under the age of 18. *Id.*

⁵⁶ 2003M103B (urging jurisdictions to “develop criteria relating to the consideration of prisoner requests for reduction or modification of sentence based on extraordinary and compelling circumstances arising after sentencing, to ensure their timely and effective operation”).

⁵⁷ 2004A112C (urging jurisdictions to “establish standards and provide an accessible process by which prisoners may request a reduction of sentence in exceptional circumstances, both medical and non-medical, arising after imposition of sentence, including but not limited to old age, disability, changes in the law, exigent family circumstances, heroic acts, or extraordinary suffering; and to ensure that there are procedures in place to assist prisoners who are unable to advocate for themselves.”).

⁵⁸ The National Conference of State Legislatures collected good time and earned time policies in December 2020, available at https://www.ncsl.org/Portals/1/Documents/cj/Final-Sentence_Credit_50-State_Chart_2020.pdf. As of that time, only Maine, Michigan, Minnesota, South Dakota and Wisconsin had no good time or earned time program.

⁵⁹ 43 NY Statutes 24, Section 803-B, available at <https://www.nysenate.gov/legislation/laws/COR/803-B>.

firearm, drug, or sex offenses, among many others. An independent review of the program concluded that “less than half of federal inmates are eligible” for the program and that current eligibility criteria is not connected to collective recidivism risk.⁶⁰

The total time reductions that can be accrued through good time credit programs similarly vary widely by state and often within states based on the offense of conviction.⁶¹ A 2018 analysis by Prison Fellowship calculated the maximum time reduction available under each state’s earned and good time policies.⁶² According to the study, in states with programs, the percentage reduction available varied from 8% in Ohio to 83% in California.⁶³

Similarly, most jurisdictions also offer some mechanism for seeking early release from incarceration based on age, infirmity, or other compelling circumstances.⁶⁴ Often called compassionate release,⁶⁵ these mechanisms typically require application through the prison system, rather than the courts. But like other early release programs, compassionate release programs are often criticized for lacking clear standards and granting too few releases.⁶⁶

The ABA has long supported programs for early release from incarceration, when appropriate. For example, the ABA has urged that jurisdictions establish mechanisms, with sufficient resources and clear procedures, criteria and timelines, for compassionate release for elderly and infirm prisoners, as well as early release based on extraordinary and

⁶⁰ Report of the Independent Review Committee Pursuant to the Requirements of Title I Section 107(g) of the First Step Act of 2018, at 2 (Dec 2020), available at <https://firststepact-irc.org/report-of-the-independent-review-committee-report-pursuant-to-the-requirements-of-title-i-section-107g-of-the-first-step-act-fsa-of-2018-p-l-115-391/>. Nevertheless, the Department of Justice has proposed expanding the offenses that would exclude individuals from participation in the ETC program. See The Attorney General’s First Step Act Section 3634 Annual Report, at 13-16 (Dec 2020), available at https://www.bop.gov/inmates/fsa/docs/20201221_fsa_section_3634_report.pdf.

⁶¹ National Conference of State Legislatures, *State good time and earned time laws* (Dec 2020), available at https://www.ncsl.org/Portals/1/Documents/cj/Final-Sentence_Credit_50-State_Chart_2020.pdf.

⁶² Prison Fellowship, *Earned and good time policies: Comparing maximum reductions* available (2018), available at https://www.prisonfellowship.org/wp-content/uploads/2018/04/GoodTimeChartUS_Apr27_v7.pdf.

⁶³ *Id.* Some states do not have good time credit programs, including Hawaii, Georgia, Utah and Minnesota.

⁶⁴ A 2008 review of state department of correction policies by USA Today found that 36 states had “some program allowing for the early release of dying or infirm prisoners.” Marty Roney, *36 states release ill or dying inmates*, USA Today (Aug 13, 2008); see also Mary Price, *Everywhere and Nowhere: Compassionate Release in the States*, Families Against Mandatory Minimums (June 2018), available at <https://famm.org/wp-content/uploads/Exec-Summary-Report.pdf> (noting that “49 states and the District of Columbia provide some means for prisoners to secure early release when circumstances such as imminent death or significant illness lessen the need for, or morality of, their imprisonment.”).

⁶⁵ The mechanism is also sometimes called humanitarian release, medical and geriatric parole, medical furlough, suspension or reduction of sentence or clemency on medical grounds.

⁶⁶ For example, a 2013 Report by the Inspector General for the U.S. Justice Department found that the Federal Bureau of Prisons’ compassionate release program found that the program lacked “clear standards on when compassionate release is warranted, resulting in ad hoc decision making.” U.S. Dept of Justice Office of Inspector General, Evaluation and Inspections Division, *The Federal Bureau of Prisons’ Compassionate Release Program* (April 2013), available at <https://oig.justice.gov/reports/2013/e1306.pdf>. The FAMM report on Compassionate Release in the States, *supra* n. 64, also noted that “despite the widespread existence of these programs, very few prisoners receive compassionate release.”).

compelling circumstances. At the 2003 Annual Meeting, for example, the House of Delegates urged jurisdictions to:

- (1) evaluate their existing laws, as well as their practices and procedures, relating to the consideration of prisoner requests for reduction or modification of sentence based on extraordinary and compelling circumstances arising after sentencing, to ensure their timely and effective operation;
- (2) develop criteria for reducing or modifying a term of imprisonment in extraordinary and compelling circumstances, provided that a prisoner does not present a substantial danger to the community. (Rehabilitation alone shall not be considered an extraordinary and compelling circumstance.); and
- (3) develop and implement procedures to assist prisoners who by reason of mental or physical disability are unable on their own to advocate for, or seek review of adverse decisions on, requests for sentence reduction.⁶⁷

At the 1996 Mid-year meeting, the House adopted a resolution urging each jurisdiction to review its procedures relating to medical release of terminally ill inmates to ensure that they are accessible, integrated into regular processes, and “provide for expedited handling of requests for medical release.”⁶⁸ And at the 1996 Annual Meeting, the House supported compassionate release for terminally ill prisoners.⁶⁹ And, in 2004, the House adopted the Kennedy Commission recommendations to establish a process for people in prison to request release for a variety of reasons “medical and non-medical, arising after imposition of sentence, including but not limited to old age, disability, changes in the law, exigent family circumstances, heroic acts, or extraordinary suffering.”⁷⁰

Early release mechanisms, when used appropriately, can help jurisdictions reduce incarceration by expediting the release of individuals who no longer present a significant risk of recidivism. All individuals expected to return to our communities deserve an opportunity to expedite that return if they can demonstrate such diminished risk. To this end, jurisdictions should consider expanding use of early release mechanisms by eliminating barriers or exceptions to eligibility and expanding program criteria.

Additionally, consistent with past ABA policy, early release programs should be systematized.⁷¹ Incarcerated individuals should be made aware of these programs and how

⁶⁷ 2003M103B.

⁶⁸ 1996M113B.

⁶⁹ 1996A109.

⁷⁰ 2004A112C.

⁷¹ For example, eligibility for the federal good time credit program could be expanded and simplified. See Emily Tiry and Julie Samuels, *Three ways to increase the impact of the First Step Act’s earned time credits*, Urban Wire (Apr 30, 2021), available at <https://www.urban.org/urban-wire/three-ways-increase-impact-first-step-acts-earned-time-credits>. See also, Families Against Mandatory Minimums, *Summary: First Step Act, S. 756* (115th Congress, 2018), available at <https://famm.org/wp-content/uploads/FAMM-FIRST-STEP-Act-Summary-Senate-version.pdf> (“Any person who will return to our communities from prison someday should time credit incentives for doing the hard work of rehabilitation.”).

they operate. Program materials should be accessible. Applications, where required, should be simple and easy to use. Any criteria for evaluation should be clear, easy to understand and applied in an equitable fashion. And the timeline for decision making should be defined and expeditious.

Encourage prosecutors to establish policies that reduce incarceration:

“Prosecutors are the most powerful officials in the criminal justice system. Their routine, everyday decisions control the direction and outcome of criminal cases and have greater impact and more serious consequences than those of any other criminal justice official.”⁷² The ABA Criminal Justice Standards on the Prosecution Function encourage prosecutors making these decisions to set standards and policies for their office that are designed to ensure fairness and equity in the criminal legal system:

- **Standard 3-1.2** indicates the primary duty of the prosecutor is to seek justice within the bounds of the law...to serve the public interest and act with integrity and balanced judgement to increase public safety by pursuing appropriate criminal charges and by exercising discretion to not pursue criminal charges in appropriate circumstances.⁷³
- **Standard 3-4.4** focuses directly on the exercise of discretion in filing, declining, maintaining and dismissing criminal charges, including considering unwarranted disparate treatment of similarly situated persons and the possible influence of any cultural, ethnic, socioeconomic or other improper biases.
- Additional Standards prohibit improper bias (**Standard 3-1.6**) and require evaluation of workload in exercising discretion and prioritizing cases (**Standard 3-1.8**).

In considering the interests of justice, prosecutors can and should take into account the impact of key decisions – from charging decisions to pretrial release recommendations, to plea offers, to sentencing recommendations - on incarceration rates and the overall goal of ending mass incarceration. ABA policy also provides that prosecutors should collect data on all critical decision points and release that data in the aggregate, consistent with confidentiality, to allow the public to accurately assess whether prosecutorial decisions are serving the interests of the community.⁷⁴ A number of jurisdictions, including Manhattan, already collect and publish this data.⁷⁵ Others, like Connecticut, have recently passed legislation requiring its collection and publication.⁷⁶

⁷² Angela Davis, *The American Prosecutor: Power, Discretion and Misconduct*, at 25 Criminal Justice Magazine (Spring 2008), available at https://digitalcommons.wcl.american.edu/facsch_lawrev/1396/.

⁷³ ABA Criminal Justice Standards on the Prosecution Function, Standard § 3-1.2

⁷⁴ 2021A504 (urging the creation and use of public prosecutorial dashboards).

⁷⁵ See Manhattan District Attorney's Data Dashboard, available at <https://data.manhattanda.org/#!/arrests>; see also Measures for Justice, *National Prosecutorial Dashboards: Lessons Learned, Themes and Categories for Consideration*, available at <https://measuresforjustice.org/services/national-prosecutorial-dashboards>.

⁷⁶ Connecticut Public Act 19-59: An Act Increasing Fairness and Transparency in the Criminal Justice System (2019), available at <https://legiscan.com/CT/text/SB00880/id/2037836/Connecticut-2019-SB00880-Chaptered.pdf>.

Given the critical role that prosecutors play in the criminal legal system, reducing incarceration rates is likely impossible without their support. By encouraging the consideration of reducing mass incarceration during the exercise of discretion in key prosecutorial decisions and recommendations, requiring transparency with regard to prosecutorial practices and policies, and taking steps to eliminate race and class inequities, prosecutors can and must play a key role in ensuring fairness and balance in the American criminal legal system.

Identify, monitor, and eliminate racial disparities in all incarceration-related areas:

Due to increased awareness about the dangerous implications of mass incarceration—both from a humanitarian perspective and as a matter of economic efficiency—there have been modestly successful bipartisan efforts in recent years to decrease the *number* of people in jails and prisons across the country.⁷⁷ Nevertheless, significant racial disparities continue to plague our criminal legal system generally and our incarceration practices in particular. As the Prison Policy Initiative points out, “Systemic racism is evident at every stage of the system, from policing to prosecutorial decisions, pretrial release processes, sentencing, correctional discipline, and even reentry. The racism inherent in mass incarceration affects children as well as adults, and is often especially punishing for people of color who are also marginalized along other lines, such as gender and class.”⁷⁸

Indeed, the ABA has already recognized the particularly devastating impact mass incarceration has had on Black communities in this country. Resolution 503 adopted by the House of Delegates in August 2021 urged Congress to create and appropriate funds for a subcommittee to “study and make findings relating to the present day social, political, and economic consequences of the criminal legal system and mass incarceration for African American persons living in the United States.”⁷⁹

While Resolution 503 follows earlier and ongoing efforts by the ABA to encourage racial equity measures more broadly, it correctly notes that “without a specific focus on the role that the criminal legal system has played in implementing the 13th Amendment’s exception from its prohibition of slavery for those convicted of a crime, a commission will be woefully incomplete and the reparations needed for the most destructive - lethal - of our structurally racist institutions will be inadequate.”

The ABA’s Justice Kennedy Commission on reforms of the criminal justice system made recommendations that were embodied in resolutions adopted by the House in 2004. The House urged the establishment of Criminal Justice Racial and Ethnic Task Forces in communities that would:

⁷⁷ Weihua Li, *et. al.*, *There are fewer people behind bars now than 10 years ago. Will it last?*, The Marshall Project (Sept. 20, 2021), available at <https://www.themarshallproject.org/2021/09/20/there-are-fewer-people-behind-bars-now-than-10-years-ago-will-it-last#:~:text=and%20Katie%20Park-.Nearly%20two%20million%20adults%20were%20incarcerated%20across%20the%20country%2C%20according,compared%20with%20the%202010%20Census>.

⁷⁸ Wendy Sawyer, *Visualizing Racial Disparities in Mass Incarceration*, Prison Policy Institute (July 27, 2020), available at <https://www.prisonpolicy.org/blog/2020/07/27/disparities/>

⁷⁹ 2021A503; HR40 proposes to establish a Commission to Study and Develop Reparation Proposals for African Americans.

“1) design and conduct studies to determine the extent to racial and ethnic disparity in the various stages of criminal investigation, prosecution, disposition, and sentencing; 2) make periodic public reports on the results of their studies; and 3) make specific recommendations intended to eliminate racial and ethnic discrimination and unjustified racial and ethnic disparities.”⁸⁰

Consistent with these proposals, the ABA should strongly encourage concerted efforts by local and state governments and agencies to collect all relevant demographic data regarding incarceration-related practices in their jurisdictions. This will allow those jurisdictions to better monitor demographic trends in their data and identify any ongoing racial disparities across the criminal legal system. Equipped with such data, jurisdictions will be better positioned to develop policies and practices designed to eliminate those disparities.

Addressing racial disparities in practices that lead to incarceration is a critical step to ending mass incarceration.

CONCLUSION

No criminal justice reform effort, standing alone, will be effective at reversing America's over-reliance on incarceration, which has resulted in far too many individuals spending far too much time behind bars. A unified approach is required. The ABA Nine Principles to Reduce Mass Incarceration brings together long-standing ABA policies to provide an easy-to-access roadmap toward sustainable, transformative change.

Respectfully submitted,

Robert Weiner, Chair
Working Group on Building Public Trust in the
American Justice System

August 2022

⁸⁰ 2004A112B.

GENERAL INFORMATION FORM

Submitting Entity: Working Group on Building Public Trust in the American Justice System

Submitted By: Robert Weiner, Chair

1. Summary of the Resolution(s).

The ABA Working Group on Building Public Trust in the Justice System has canvassed existing ABA policies, supplemented them and compiled the whole into a set of Nine Principles, which, if employed together and consistently over time, would set the United States on a path toward ending mass incarceration.

2. Indicate which of the ABA's Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

This Resolution Advances the Rule of Law (Goal 4) by setting the United States on a path toward ending mass incarceration. A unified approach is required if we hope to reverse the tragedy of mass incarceration in this country. These Principles articulate critical steps, which, in combination, would bring about the sustained, collective, and creative reform necessary to make our criminal legal system more equitable and effective.

3. Approval by Submitting Entity.

This Resolution was passed by the Working Group on Building Public Trust in the American Justice System on May 3, 2022.

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

No.

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

The relevant policies are referenced throughout the Report. Key policies relevant to this Resolution are:

ABA Standards for Criminal Justice: Pretrial Release
 ABA Ten Guidelines on Fines and Fees
 03A103B
 04A121C
 17A112C
 21A503

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

N/A

7. Status of Legislation. (If applicable)

There is no pending legislation, state or federal.

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

This policy will enable the ABA and relevant ABA committees to provide guidance to courts, legislatures, and advocates on the ground on the best means of ensuring the ending of mass incarceration.

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

It is not anticipated that this resolution will result in any direct or indirect costs to the Association.

10. Disclosure of Interest. (If applicable)

None

11. Referrals.

Criminal Justice Section
Section of Civil Rights and Social Justice
Young Lawyers Division
Judicial Division
Section of Litigation
Government & Public Sector Lawyers Division
Section of State and Local Government Law
Standing Committee on Legal Aid and Indigent Defense

12. 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.*

Jason Vail (Staff Counsel), Ph: 312-988-5755, Email: jason.vail@americanbar.org

13. 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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Robert Weiner (Chair), Ph: 202-431-0696, Email: robertnweiner@aol.com.

EXECUTIVE SUMMARY

1. Summary of the Resolution.

This Resolution adopts the ABA Nine Principles on Reducing Mass Incarceration and urges federal, state, local, territorial, and tribal legislative, and other governmental bodies to promulgate law and policy consistent with, and otherwise to adhere to, the Principles.

2. Summary of the issue that the resolution addresses.

The ABA Working Group on Building Public Trust in the Justice System has canvassed existing ABA policies, supplemented them and compiled the whole into a set of Nine Principles, which, if employed together and consistently over time, would set the United States on a path toward ending mass incarceration.

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

A unified approach is required if we hope to reverse the tragedy of mass incarceration in this country. These Principles articulate critical steps, which, in combination, would bring about the sustained, collective, and creative reform necessary to make our criminal legal system more equitable and effective.

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

To date, no minority views or opposition has been identified.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON LAWYER REFERRAL AND INFORMATION SERVICE
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association adopts the revised Model Rules
2 Governing Lawyer Referral and Information Services, dated August 2022, which
3 combines the Model Supreme Court Rules Governing Lawyer Referral and Information
4 Services and the Minimum Quality Standards for Lawyer Referral; and
- 5 FURTHER RESOLVED, That the American Bar Association encourages state, local,
6 territorial, and tribal supreme courts; state, local, territorial, tribal, and specialty bar
7 associations; and other state, local, territorial, and tribal legislative and/or regulatory
8 bodies to adopt these new Model Rules Governing Lawyer Referral and Information
9 Services.

AMERICAN BAR ASSOCIATIONSTANDING COMMITTEE ON LAWYER REFERRAL AND INFORMATION SERVICEMODEL RULES GOVERNING LAWYER REFERRAL AND INFORMATION SERVICESAugust 2022Preamble and Scope

Lawyer referral and information services, also called a variety of other names such as lawyer referral services, (collectively, “LRIS Programs”), have been in operation in this country for more than 50~~80~~ years, and were first established in response to requests by middle income ~~persons~~ people for assistance in obtaining appropriate legal counsel. ~~Lawyer Referral and Information Services are~~ LRIS Programs increasingly have played an important role in ensuring access to justice for the public at large, particularly for those of moderate means. The lawyer referral aspect of LRIS Programs is designed to assist ~~persons~~ those who are able to pay ~~normal attorney fees~~ — either at a full or a moderate rate — but whose ability to locate appropriate legal representation is frustrated by a lack of experience with the legal system, a lack of information about the type of service needed, or a fear of the potential costs of seeing a lawyer. ~~Lawyer referral programs~~ The information aspect of LRIS Programs is designed to help both those who can and those who cannot afford to pay for legal services.

LRIS Programs offer ~~two~~ three important services to the public. ~~First, they help the client~~ consumer determine if thea problem is truly of a legal nature by screening inquiries and referring the client to other service agencies when appropriate. ~~The second, and perhaps more important, function of a lawyer referral service is to~~ consumer appropriately. Second, LRIS Programs provide the ~~client~~ consumer with an unbiased referral to an ~~attorney~~ a lawyer who has proven experience in the area of law appropriate to the ~~client's~~ consumer's needs. Although many programs have panels of lawyers with limited experience, which have benefitted clients with moderate means, the primary referral pool consists of that lawyers who have substantial experience in the field in which they elect to receive referrals. Third, LRIS Programs also provide information about governmental and consumer agencies, pro bono programs, pro se resources, courthouse information, or other legal service providers that may assist the consumer. In a 2021 survey of LRIS Programs, it was reported that 45 percent of all callers were referred to someone other than panel members.¹ The public has come to equate the function of ~~lawyer referral programs~~ ~~with~~ LRIS Programs with consumer-oriented assistance, and ~~expects to expect~~ that the loyalty of the program will lie with the consumer, and only secondarily with the participating ~~attorney~~ lawyers.

¹ This survey was based on total calls during the 2020 fiscal year. These callers were referred to social or governmental services, legal aid programs, or other pro bono organizations. The ABA Standing Committee on Lawyer Referral and Information Service conducts a biennial census of LRIS Programs and presents its findings during the Committee's annual National Lawyer Referral Workshop.

In 1989, following a long review process by state and local bar association and lawyer referral experts from both Although the public and private sector, the American Bar Association adopted model Model Rules for the operation of public service lawyer referral programs. The overriding concern of the model Governing Lawyer Referral and Information Services (the “Rules is consumer protection.

The aspirational standards used previously at the state and local level were simply”) are not sufficientintended to ensure the public service orientation of some private, for profit services; strong and enforceable regulations were needed to achieve minimal standards for all lawyer referral services. However, whilebe read restrictively, the Rules must be strong toshould not be effective, we have been mindful of the need to allow legitimate public service oriented attorneys and providers to operate withoutinterpreted as allowing LRIS Programs to exercise undue interference. In draftinfluence over the model Rules, we have done our best to balance these considerations. Theselegal services provided by panel lawyers. The Rules are designed to provide a level playing field for all programs, whether private or bar-sponsored. Each state is urged to examine its rules, decisions and opinions in other to utilize the model Rules in a manner consistent with its own law. or private.

These model rules have also been drafted in legislative form, for states where lawyers are regulated by the Legislature.

COMMENTARY

The lawyer referral mechanism was originally created to help the public identify the best method, whether legal or non-legal, for resolving disputes and protecting important rights. Special programs provided much needed assistance specifically for the poor, and the wealthy had the means and ability to secure appropriate counsel. It was harder for middle income persons, fearful about the cost and quality of available legal services, to know where and how to find the most appropriate assistance for legal problems.

Public service lawyer referral programs helped to fill the information void in a responsible and unbiased manner, and at a reasonable cost. The public has come to rely on the objective nature of the assistance provided by lawyer referral programs. Recently, withWith the advent of private, for-profit referral services in some jurisdictions and lawyer advertising, the flow of information to the public has increased, but questions have been raised about whether this information continues to be objective and unbiased. In particular, concerns have been expressed about how the determination is made about which lawyers receive referrals, whether there are any consumer protections such as experience requirements, whether the lawyers receiving the referrals have malpractice coverage, is there a process for addressing consumer complaints about the service or the lawyers receiving the referral, and whether the legal services to which consumers are referred will be affordable. It is for this reason, as well as those reasons articulated elsewhere in these rules the Rules, that regulation is desirable of both non-profit lawyer referral and information services and for-profit services where they are permitted to

operate. These Rules are not meant to encourage or discourage jurisdictions to allow for-profit referral services to operate and whether lawyers may share fees with such services is the provenance of the Rules of Professional Conduct and not these Rules. We strongly urge legislatures or courts in each state and the District of Columbia to adopt the Rules and, where the Rules have not yet been adopted, we encourage LRIS Programs voluntarily to follow the Rules.

Terminology

- “Aggrieved person” refers to (a) a person or entity that has obtained a referral or information from a lawyer referral and information service and/or received legal services from a lawyer referred by the lawyer referral and information service and believes that he, she, or it has suffered an injury as a result of the lawyer referral and information service or panel lawyer not following the Rules or (b) a lawyer who has sought to be a member of a lawyer referral information service or is or was a member and believes that he or she has suffered an injury as a result of the lawyer referral or information service or a panel lawyer not following the Rules.
- The term “lawyer referral and information service” is meant to be read broadly to mean any service ~~shall~~that operates for the direct or indirect purpose of referring potential clients to particular lawyers, whether or not the term “referral service” is used to describe the service.
- “Moderate means” refers to people or entities that have the ability to pay for the legal services they seek, but have relatively limited resource from which to make those payments.
- “Panel” is a list of lawyers who are members of the lawyer referral and information service and are considered qualified to provide a certain type of legal services.

Rule 1: Who May Participate.

Rule 1 ————— Lawyers eligible to practice in this state may participate in a lawyer referral and information service that refers ~~them to~~ prospective clients to them, but only if the service conforms to these Rules (“a qualified service”).

Commentary

1 A lawyer need not have a physical presence in the geographical area from which the lawyer referral and information service receives client inquiries, but the lawyer referral and information service must consider whether the lawyer has the appropriate means to deliver services to such clients.

Rule 2: Public Interest Requirement.

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Rule II ——— A qualified ~~A~~ lawyer referral and information service must be operated in the public interest for the purpose of referring prospective clients to lawyers, pro bono and public service legal programs, and government, consumer, social service or other agencies ~~who~~that can provide the assistance the clients need in light of their financial circumstances, spoken language, any disability, geographical convenience, and the nature and complexity of their problems and providing the public with information regarding legal and social services.

COMMENTARY

Commentary

1 _____ The intent of this rule is to articulate the public service requirement ~~offor~~ lawyer referral programs and information services. While it ~~does~~is not intended to preclude private the operation of for-profit referral and information services ~~from operating~~, this statement does establish the primacy of a public service intent. Section 1.6 of the American Bar Association's (ABA) Statement of Standards and Practices for a Lawyer Referral and Information Service, approved February, 1984, by the ABA House of Delegates, states "The Service lawyer referral and information services should be operated for the benefit of the public. ~~It~~They should be readily accessible, and ~~its~~their existence should be made known to the public to the greatest extent possible-".

2 _____ The lawyer referral mechanism was originally created to help the public identify the best method, whether legal or non-legal, for resolving disputes and protecting important rights. The wealthy had the means and ability to secure appropriate counsel; however, it was harder for middle-income and low-income people to do the same. Lawyer referral and information services are public-service oriented programs that should be designed to fit those client needs.

3 _____ As vital as lawyer referral is, the information provided by programs —about, for example, lawyers, the legal system in -general, the availability of legal services, and the availability of consumer, governmental-, social service and other agencies that can address the client's problem—, is an equally important public service. —Services should provide both lawyer referrals and this type of information.

4 _____ Lawyer referral and information services that are operated in the public interest are designed to fill the legal information void in a responsible and unbiased manner. The public has come to rely on the objective nature of the assistance provided by lawyer referral and information services.

Rule III ——— **3: Operating as a Lawyer Referral and Information Service.**

Only a ~~qualified~~ service that conforms to these Rules may call itself a lawyer referral service and information service, lawyer referral service or the equivalent, or operate for a

direct or indirect purpose of referring potential clients to particular lawyers, whether or not the term "referral service" is used.

COMMENTARY

~~These definitions are similar to the California statute and New York proposed court rules. While California currently regulates use of the term "referral service," this~~ Commentary

1 This rule establishes more clearly that it encompasses any entity operating to make referrals to lawyers, regardless of whether the entity uses the term "referral service."

2 Before the rules on lawyer advertising were relaxed, lawyer referral and information services were operated primarily as a public service to provide informed access to the legal system. With the onset of widespread advertising, and the exemption of lawyer referral services from the ordinary prohibitions against splitting fees with attorneys, it has become it is important to develop that a broad definition of lawyer referral services and information service and lawyer referral service be used for regulatory purposes, although these rules are not meant to apply to certain types of services, as set forth in Rule 13, including services that are just advertising programs.

Rule IV 4: Eligibility to Participate.

A qualified lawyer referral and information service must be open to all lawyers licensed and eligible to practice in this state jurisdiction who maintain an office within have a physical presence in or substantial connection to the geographical area served, and who:
(4

- (a) meet reasonable, objectively determinable experience requirements established by the service; (2)
- (b) agree to pay reasonable registration and membership, consultation and referral fees not to exceed an amount those established by the (State Bar Standing Committee on Lawyer Referral and Information Services), hereinafter "the Committee", its lawyer referral and information service committee or other governing body to encourage widespread lawyer participation; and (3 and consistent with the rules of professional conduct; and
- (c) maintain in force a policy of errors and omissions insurance, or provide proof of financial responsibility, in an amount at least equal to the minimum established by the Committee its governing body.

COMMENTARY

194 Commentary

195 1 This rule is designed to limit panel membership to ~~attorneys~~lawyers who are
 196 licensed and in good standing with ~~the attorney~~their respective regulatory entity in a given
 197 state. It also notably requires that panel membership be open to all ~~attorneys~~lawyers
 198 who wish to join, provided that they are located in ~~the~~or have a substantial connection to
 199 the geographic area served and satisfy those requirements set forth therein. Requiring a
 200 presence in or connection to the geographical area is important for two reasons. First,
 201 most lawyer referral and information services are local, and staff can more easily verify
 202 experience requirements, obtain feedback, pursue dispute resolution procedures, and
 203 anticipate issues before they arise with lawyers who are based in or have a substantial
 204 connection to the area. Second, requiring such a presence or connection helps ensure
 205 accountability of the lawyers to the lawyer referral and information service and to their
 206 clients.

207 2 Under no circumstances should a service close a panel by selling or allocating
 208 designated geographical areas or areas of practice to a limited number of individuals
 209 based on their ability to pay a fee to the service. ~~However, where it can be demonstrated~~
 210 ~~to the Committee by objective criteria that unlimited panel membership undermines~~
 211 ~~legitimate consumer interests because of numbers of lawyers leaving a panel due to~~
 212 ~~historically limited referral potential, then a service may want to amend Rule IV by adding~~
 213 ~~language which protects the service but does not open the door to the abuses noted~~
 214 ~~above. Such language might read, "For good cause shown and within strict guidelines,~~
 215 ~~(the Committee) may approve a reasonable limitation on the number of lawyers to be~~
 216 ~~enrolled on a panel at a service, provided such limitation is in the public interest."~~

217 3 Where it can be demonstrated by objective criteria that unlimited panel
 218 membership undermines legitimate client interests due to historically limited referral
 219 potential, then a service may reasonably limit the number of lawyers enrolled on a panel,
 220 provided that such limitation is in the public interest and is not based in whole or in part
 221 upon the ability of the enrolled individuals to pay a fee to the lawyer referral and
 222 information service.

223 4 The purpose of subsection (4a) is to mandate that each service ~~require~~requires
 224 member lawyers who are referred cases in particular subject matter areas to have an
 225 appropriate level of experience in these areas. ~~The criteria to be used in determining~~
 226 ~~such requirements are more fully set forth in the Commentary to Rule X.—10.~~

227 ~~Subsection (2) should be used in those states which deem it appropriate.~~5 The fees
 228 charged and where it is paid mentioned in subsection (b) must be consistent with the rules
 229 of professional conduct and the statutory and decisional law of that jurisdiction.
 230

231 ABA Model. See a/s/o Rule of Professional Conduct 7.2 prohibits giving anything of value
 232 to one who recommends the lawyer's services except, among others, "the usual charges
 233 of a not for profit lawyer referral service...." Many states have interpreted this and other
 234 similar provisions in both court decisions and ethics opinions. Each state is urged to

examine these rules, decisions and opinions in order to utilize the model rule in a manner consistent with its own law. Note: Blanks ___ followed by parenthetical material () identify places where insertions should be made to tailor these rules to each individual state⁹.

6 ___ The intent of subsection (3c) is to ensure that, in the event errors are made by the participating attorney~~a panel lawyer~~, the client has redress through the attorney's policy of lawyer's insurance. The policy. This is a requirement is contained in the ABA's Minimum Quality Standards, even if the referral and information service operates in a locality that does not require malpractice insurance.

7 ___ Only by requiring such insurance, or a showing of financial responsibility, can a client's needs best be satisfied. -In states~~jurisdictions~~ where referral services are not immune from lawsuits for negligent referral, this requirement will help protect the service from such ~~suits~~lawsuits; in states where such immunity exists, it ensures that a client may find redress against the principal negligent party, *i.e.*, the attorney~~lawyer~~.

Rule V — 5: Total Charges.

The combined fees and expenses charged a prospective client by a qualified~~paid to a~~ service and a lawyer to whom the client is referred ~~shall~~must not exceed the total charges which~~that~~ the client would have incurred had no referral and information service been involved.

COMMENTARY

Commentary

1 ___ The intent of this rule is to ensure that the client ~~shall~~is not be economically disadvantaged in any respect because the client has decided to ~~utilize~~use a lawyer referral and information service. -A very similar provision is contained in the California Minimum Standards for a Lawyer Referral Service.

Simply put, clients should not have to pay more for services obtained through the lawyer referral and information service than they would if they obtained the services on their own. ABA Model Rule of Professional Conduct 7.2 states that a~~Under no circumstances may~~ a panel lawyer cannot pay more than the "usual charge of a not for profit lawyer the client for a consultation fee or referral service or other legal service organization" in exchange for a fee that the lawyer owes to the lawyer referral and information service.

Rule VI — 6: Ownership Interest.

No fee-generating referral may be made to any lawyer who has an ownership interest in, or who operates or is employed by, a qualified~~lawyer referral and information~~ service, or

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who is associated with a law firm ~~which that~~ has an ownership interest in, or operates, or is employed by, a qualified lawyer referral and information service.

COMMENTARY

Commentary

1 The intent of this rule is to prevent the temptation of using the referral and information service to refer ~~cases matters~~ to oneself, rather than to serve the ~~clients' client's~~ needs. ~~—The important goal of unbiased referrals (see ABA Minimum Quality Standards for Lawyer Referral Services, approved August 1989, by the ABA House of Delegates) is thus thereby maintained. See also the California statute, which sets self-referral levels.~~

~~Since~~2 Because the purpose of lawyer referral is to provide the client with the best option for a specific legal need, ~~the a~~ referral and information service ~~which that~~ makes referrals to its owners or operators is in constant danger of, intentionally or unintentionally, referring the most desirable ~~cases matters~~ in-house, without considering the client's needs first. ~~—This potential for a conflict of interest between the lawyer referral and information service and the client's needs must be avoided.—~~ The rule provides the most reliable method of maintaining unbiased referrals.

Membership3 Service on a Board or lawyer referral and information service committee of a sponsoring bar association should not, in and of itself, exclude a panel lawyer from accepting referrals, provided the referral and information service maintains adequate safeguards against preferential treatment of these lawyers, including ensuring that some portion of the Board or lawyer referral and information service committee is comprised of lawyers who do not receive referrals.

Rule VII — 7: Client Satisfaction.

A ~~qualified~~ lawyer referral and information service ~~shall must~~ periodically survey client satisfaction with its operations and ~~shall must~~ investigate and take appropriate action with respect to client complaints against ~~panelists~~ panel lawyer, the service, and its employees.

COMMENTARY

Commentary

1 The intent of this rule is to help ensure that the referral and information service is truly meeting the needs of the public by requiring direct feedback from the users of the lawyer referral and information service. ~~—A similar requirement is found in the ABA's Minimum Quality Standards.—~~ However, this rule does not mean that every client must be

included in a survey. ~~It is recognized that, in certain situations the direct mailing of a survey, surveying some clients may not be in the best interest of the clientclients, and that discretion should be used, for example, with domestic violence or health and substance abuse issues.~~

Rule VIII — 8: System of Review.

A ~~qualified~~ lawyer referral and information service ~~shall~~ must establish and publish a procedure for (a) admitting, suspending, or removing panel lawyers from its roll of ~~panelists~~, and (b) addressing client complaints about the lawyer referral and information service. Any member lawyer adversely affected by the decision of the lawyer referral and information service may appeal to ~~the Committee~~ its governing body.

COMMENTARY

Commentary

1 The intent of this rule is to require rules to ensure that, as a public service, providing qualified and quality representation must be a priority of any referral service. ~~These provisions are similar to both the ABA Minimum Quality Standards and the California Minimum Standards currently in force~~ lawyer referral and information service.

2 Without rigidly defining what the procedures must be, this provision acknowledges the need for each lawyer referral and information service to establish procedures for admission, suspension, and removal of panel attorneys. ~~lawyers as well as complaints about the lawyer referral and information service~~. These procedures must be clearly articulated to: assure the public that a mechanism exists for responding to client complaints about panel lawyers or the lawyer referral and information service and potential instances of misconduct by panel attorneys; ~~ensure due process for the parties~~ clients and lawyers involved; and protect the confidences ~~and secrets~~ of clients of those ~~attorneys~~ panel lawyers and the lawyer referral and information service. This includes a duty to investigate client complaints against participating attorneys ~~panel lawyers and the lawyer referral and information service~~.

3 It is appropriate to have a separate process for complaints about the lawyer referral and information service, which need not include an appeals procedure.

Rule IX — 9: Percentage Fees.

If a lawyer referral and information service ~~may~~ charges, in addition to ~~any referral set amounts as registration, membership, consultation fee, charge a and referral fees, a referral fee calculated as that is~~ a percentage of legal fees earned by any panel lawyer ~~panelist to whom the service has referred a matter. The, the~~ income from any such percentage fee ~~shall~~ must be used only to pay the reasonable operating expenses of the

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lawyer referral and information service and to fund public service activities of the service or its sponsoring organization, including the delivery of pro bono legal services.

COMMENTARY

~~This section should be used in those states which deem it appropriate, and where it is consistent with the rules of professional conduct and the statutory and decisional law of that jurisdiction.~~

Commentary

1 ~~The ABA policy has~~ Rules of Professional Conduct have long prohibited the division of fees for legal services. ~~See with non-lawyers. However, ABA Canons of Professional Ethics No. 34 (1928). The policy against sharing a legal fee with a non-lawyer is embodied in the ABA's Model Code of Professional Responsibility DR 3-102 and Model Rules of Professional Conduct Rule 5.4(a).~~

~~Two ABA ethics opinions have approved financing of bar association sponsored lawyer referral services by charging a reasonable percentage of fees. See Formal Opinion 204 (1956) and Informal Opinion 1076 (1968). Opinions in several states have adopted similar reasoning in permitting payment of percentage fees to either bar sponsored or general non-profit lawyer referral services.~~

~~ABA-Model Rule of Professional Conduct 7.2¹ prohibits giving anything of value to one who recommends the lawyer's services except, among others, "the usual charges of a not-for-profit lawyer referral service...." Many states have interpreted this and other similar provisions in both 5.4(a)(4) permits the sharing of court decisions and ethics opinions. Each state is urged to examine these rules, decisions and opinions in order to utilize the model statute in a manner consistent with its own law.~~

~~Each state is urged to examine its rules, decisions and opinions in order to utilize the model rule in a manner consistent with its own law. awarded legal fees in a matter with a nonprofit organization that referred the matter to the lawyer. Some states may believe that this restriction on lawyer fee sharing is adequate to address the public interest involved— and thus this provision is not necessary. In other jurisdictions, where it is perceived that there is a need not only to regulate the practice of lawyers but also to regulate the business practices of lawyer referral services, additional regulation may be necessary— and information services, it may be felt that additional regulation is necessary. This section should be used in those jurisdictions that deem it appropriate, and where it is consistent with the rules of professional conduct and the statutory and decisional law of that jurisdiction. See Rule 4(b).~~

2 Two ABA ethics opinions have approved financing of bar association sponsored lawyer referral and information services by charging a reasonable percentage of fees. See Formal Opinion 291 (1956) and Informal Opinion 1076 (1968).

Opinions in several states have adopted similar reasoning in permitting payment of percentage fees to either bar sponsored or general non-profit lawyer referral and information services.

Rule X ——— 10: Subject Matter Panels.

~~A qualified lawyer referral and information service shall~~must establish specific subject matter panels, ~~and eligibility for which must be determined on the basis of experience and other substantial objectively determinable criteria. A lawyer referral and information service may establish panels for clients with moderate and no fee panels, foreign language means, panels, of lawyers with limited experience, panels whose members charge no fees or reduced fees, panels of members who will handle limited scope representations, panels whose members handle alternative dispute resolution panels proceedings, and other special~~specific panels which that respond to the diverse referral needs of the consumer public, ~~eligibility for which shall be determined on the basis of experience and other substantial objectively determinable criteria.~~

COMMENTARY

~~This requirement is similar to one contained in the ABA's Minimum Quality Standards.~~

~~The California legislation required the establishment of specific panels "representing different areas of law and limited to attorneys who meet reasonable participation requirements ..." (see Minimum Standards for a Lawyer Referral Service in California, Rule 7.2). The New York State Bar Association's Proposed Minimum Standards are similar to the California legislation. (See Proposed Minimum Standards, Section 6.2, contained in "Report of the Special Committee on Lawyer Referral Services Regulations," New York State Bar Association, June 1990.)~~

Commentary

1 Panels must be organized by "subject matter." To serve on a subject matter panel, attorneys must meet the experience and other substantial and objective criteria established by the lawyer referral and information service.

2 The importance of establishing objective meaningful experiences~~subject matter~~ requirements cannot be underestimated. ~~It is inappropriate for a service to simply refer a caller to the next panel lawyer on the list without determining that the panel lawyer is qualified in the field of practice infor which legal services are needed. SinceBecause the public relies on services to provide qualified legal representation which improves on that is better than what the consumer can client could obtain by letguesswork, it is incumbent~~

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upon these services to ensure that their attorneys panel lawyers have substantially more qualifications than mere bar membership.

3 "Experience" is not intended to mean "expertise" or "specialization," ~~nor~~ and it should ~~not~~ be defined merely by length of time in practice. ~~See ABA Statement of Standards section 5.2, Comment. Rather, the goal is to ensure, in the words of this Comment, that both the subject matter panels and the qualification standards shall "meet the needs and reasonable expectations of the community served."~~ In meeting these needs, "consideration should also be given to the prospective panel member's lawyer's experience with particular kindstypes of eases," "matters, and to "requiring a certain amount of recent actual experience."

Rule XI — 4 Lawyer referral and information services should recruit and, when possible, admit panel members that reflect the diversity of the public being served.

5 Panels that serve clients with moderate means enable those that do not qualify for legal aid to afford a lawyer when they are unable to pay full market price for legal services. Limited experience panels include member lawyers without significant experience in a particular subject matter. In some instances, limited experience panels may also provide legal services at a reduced cost or they may be included on a modest means panel. However, the eligibility parameters for participation in these panels – whether modest means, limited experience, or a combination of the two – must be plainly defined and communicated to clients receiving referrals from those panels.

6 ABA Model Rule of Professional Conduct 1.2(c) specifically allows limited scope representation if the limitation is reasonable and the client gives informed consent. Consistent with this Rule, a lawyer referral and information service may have limited scope panels.

7 To the extent that a lawyer referral and information service uses an algorithm to decide to which panel members to refer work, the service should disclose to the public in general terms how the algorithm works. In addition, the algorithm may not be based on how much the attorneys have agreed to pay or have paid the service for referrals or how long the attorneys have been panel members.

Rule 11: Oversight.

The operation of these Rules and compliance with their provisions ~~shall~~must be supervised by a _____ (Standing Committee on Lawyer Referral and Information Services) to be appointed by the _____ (State Bar). The _____ (Committee) shall the lawyer referral and information service's governing entity and/or regulatory body. The lawyer referral and information service's governing entity must develop and promulgate rules, regulations, procedures, and forms to discharge its obligations not inconsistent with these Rules and subject to approval by the _____ (State Bar Board of Governors). The _____ (Committee) may submit to the _____ (State Bar Board of Governors) recommendations for changes in these Rules for transmission to the Court jurisdiction's regulatory body.

COMMENTARY

Commentary

1 ____ The intent of this rule is to establish the regulatory ~~entity which is~~ entities that are charged with overseeing qualified lawyer referral and information services, and to allow ~~this~~ these regulatory entity/entities to adopt ~~its~~ their own rules and regulations for oversight purposes. ~~This is similar to~~ Not all lawyer referral and information services may be operated by a bar association and thus may not be overseen by a "committee." Therefore, we use the legislative mandate which required more inclusive term "governing body," which may include a bar association's committee on lawyer referral, or the State Bar board of California to adopt extensive Minimum Standards a for-profit or not-for-profit organization as allowed by the jurisdiction.

2 ____ Each ~~state~~ jurisdiction will determine, based on its legislative, judicial, or state bar regulatory authority over the practice of law, the composition of the regulatory entity ~~which that~~ will oversee lawyer referral and information services.

Rule XII — 12: Reporting Requirements.

A qualified lawyer referral and information service shall ~~(1) register with the (Committee) and must:~~

- (a) demonstrate its compliance with these Rules before commencing to
operate; (2) operation;
- (b) update the materials filed with the ____ (Committee) its governing body
and/or regulatory agency within 30 days of any material change; and (3)
(annually)
- (c) Annually file with the ____ (Committee) its governing body and/or regulatory
agency a report of its operations and finances during the previous ____ (fiscal
year); demonstrating its continued compliance with these Rules.

Rule XIII — 13: Exemptions.

These Rules do not apply to ~~(1);~~

- (a) a group or prepaid legal plan, whether operated by a union, trust, mutual benefit or aid association, corporation, or other entity or person, which (a) that (i) provides unlimited or a specified amount of telephone advice or personal communication at no charge to the members or beneficiaries, other than a periodic membership or beneficiary fee, and (b) ii) furnishes or pays for legal services to its members or beneficiaries; (2) a plan of prepaid legal services insurance authorized to operate in the state; (3) individual

lawyer to lawyer referrals; (4) lawyers jointly advertising their own services in a manner which discloses that such advertising is solely to solicit clients for themselves; or (5) any pro bono legal assistance program which does not accept fees from lawyers or clients for referrals.

COMMENTARY

- (b) a plan of prepaid legal services insurance authorized to operate in the jurisdiction;
- (c) individual lawyer-to-lawyer referrals;
- (d) lawyers jointly advertising their own services in a manner that discloses that such advertising is solely to solicit clients for themselves; or
- (e) any pro bono legal assistance program that does not accept fees from lawyers or clients for referrals.

Commentary

1 _____ These exclusions, other than (c) and (d), are all for services which that are, like lawyer referral and information services, designed to promote the accessibility of legal services to the public.

2 _____ Individual referrals from one lawyer to another are part of the everyday practice of law. Many of these "referrals" are informal and involve no fee.- If a referral fee is involved, the state's relevant rules of professional conduct should be applied. See ABA Model Rule of Professional Conduct 1.5(e).

3 _____ ABA Model Rule ~~XIV~~ _____ of Professional Conduct 7.2 prohibits giving anything of value to one who recommends the lawyer's services except, among others, "the usual charges of a not-for-profit lawyer referral service" Many jurisdictions have interpreted this and other similar provisions in both court decisions and ethics opinions. These rules, decisions and opinions should be reviewed when interpreting this rule.

Rule 14: Confidentiality.

A disclosure of information to a lawyer referral and information service for the purpose of seeking legal assistance ~~shall be deemed~~ must be kept confidential by the lawyer referral and information service and should be protected as a privileged lawyer-client communication.

COMMENTARY

Since Commentary

1 Because a client discloses confidential information to a lawyer referral and information service for the sole purpose of seeking the assistance of a lawyer, the client's communication for that purpose should be protected by lawyer-client privilege maintained as confidential by the lawyer referral and information service (see ABA Model Rule of Professional Conduct 1.6).

2 Communications between a lawyer referral and information service and client of that service should also be protected from disclosure by the attorney-client privilege. See ABA House of Delegates Resolution 106 (2016), which calls for the adoption of rules or enactment of legislation to establish an evidentiary privilege for lawyer referral and information services and their clients for confidential communications between a client of the service and the lawyer referral and information service when a client consults the service for the purpose of retaining a lawyer or obtaining legal advice from a lawyer.

Rule XV — 15: Enforcement.

The (Committee) regulatory agency or any aggrieved person may seek an injunction in the Circuit Court to enjoin violations of these Rules. –In the event the injunction is granted, the petitioner shall be entitled to reasonable costs and attorney's fees.

COMMENTARY

Commentary

1 The intent of this rule is to provide that anyone aggrieved, not merely the regulatory entity agency, may move to enjoin unlawful operations of an LRS. This intent is similar to that in the California law. The current provision is strengthened over present California law by providing specific authority for recovery of litigation costs and attorneys fees a lawyer referral and information service.

2 It is important to note that, while "any aggrieved person" may move to enjoin illegal activity, typically the responsibility for enforcement should fall primarily on the shoulders of the regulatory entity.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON LAWYER REFERRAL AND INFORMATION SERVICE

MODEL RULES GOVERNING LAWYER REFERRAL AND INFORMATION
SERVICES

August 2022

Preamble and Scope

Lawyer referral and information services, also called a variety of other names such as lawyer referral services, (collectively, “LRIS Programs”), have been in operation in this country for more than 80 years, and were first established in response to requests by middle income people for assistance in obtaining appropriate legal counsel. LRIS Programs increasingly have played an important role in ensuring access to justice for the public at large, particularly for those of moderate means. The lawyer referral aspect of LRIS Programs is designed to assist those who are able to pay – either at a full or a moderate rate – but whose ability to locate appropriate legal representation is frustrated by a lack of experience with the legal system, a lack of information about the type of service needed, or a fear of the potential costs of seeing a lawyer. The information aspect of LRIS Programs is designed to help both those who can and those who cannot afford to pay for legal services.

LRIS Programs offer three important services to the public. First, they help the consumer determine if a problem is truly of a legal nature by screening inquiries and referring the consumer appropriately. Second, LRIS Programs provide the consumer with an unbiased referral to a lawyer who has proven experience in the area of law appropriate to the consumer's needs. Although many programs have panels of lawyers with limited experience, which have benefitted clients with moderate means, the primary referral pool consists of that lawyers who have substantial experience in the field in which they elect to receive referrals. Third, LRIS Programs also provide information about governmental and consumer agencies, pro bono programs, pro se resources, courthouse information, or other legal service providers that may assist the consumer. In a 2021 survey of LRIS Programs, it was reported that 45 percent of all callers were referred to someone other than panel members.² The public has come to equate the function of LRIS Programs with consumer-oriented assistance, and to expect that the loyalty of the program will lie with the consumer, and only secondarily with the participating lawyers.

Although the Model Rules Governing Lawyer Referral and Information Services (the “Rules”) are not intended to be read restrictively, the Rules should not be interpreted as allowing LRIS Programs to exercise undue influence over the legal services provided by

² This survey was based on total calls during the 2020 fiscal year. These callers were referred to social or governmental services, legal aid programs, or other pro bono organizations. The ABA Standing Committee on Lawyer Referral and Information Service conducts a biennial census of LRIS Programs and presents its findings during the Committee's annual National Lawyer Referral Workshop.

panel lawyers. The Rules are designed to provide a level playing field for all programs, whether bar-sponsored or private.

With the advent of for-profit referral services in some jurisdictions and lawyer advertising, the flow of information to the public has increased, but questions have been raised about whether this information continues to be objective and unbiased. In particular, concerns have been expressed about how the determination is made about which lawyers receive referrals, whether there are any consumer protections such as experience requirements, whether the lawyers receiving the referrals have malpractice coverage, is there a process for addressing consumer complaints about the service or the lawyers receiving the referral, and whether the legal services to which consumers are referred will be affordable. It is for this reason, as well as those reasons articulated elsewhere in the Rules, that regulation is desirable of both non-profit lawyer referral and information services and for-profit services where they are permitted to operate. These Rules are not meant to encourage or discourage jurisdictions to allow for-profit referral services to operate and whether lawyers may share fees with such services is the provenance of the Rules of Professional Conduct and not these Rules. We strongly urge legislatures or courts in each state and the District of Columbia to adopt the Rules and, where the Rules have not yet been adopted, we encourage LRIS Programs voluntarily to follow the Rules.

Terminology

- “Aggrieved person” refers to (a) a person or entity that has obtained a referral or information from a lawyer referral and information service and/or received legal services from a lawyer referred by the lawyer referral and information service and believes that he, she, or it has suffered an injury as a result of the lawyer referral and information service or panel lawyer not following the Rules or (b) a lawyer who has sought to be a member of a lawyer referral information service or is or was a member and believes that he or she has suffered an injury as a result of the lawyer referral or information service or a panel lawyer not following the Rules.
- The term “lawyer referral and information service” is meant to be read broadly to mean any service that operates for the direct or indirect purpose of referring potential clients to particular lawyers, whether or not the term “referral service” is used to describe the service.
- “Moderate means” refers to people or entities that have the ability to pay for the legal services they seek, but have relatively limited resource from which to make those payments.
- “Panel” is a list of lawyers who are members of the lawyer referral and information service and are considered qualified to provide a certain type of legal services.

Rule 1: Who May Participate.

Lawyers eligible to practice in this state may participate in a lawyer referral and information service that refers prospective clients to them, but only if the service conforms to these Rules.

Commentary

1 A lawyer need not have a physical presence in the geographical area from which the lawyer referral and information service receives client inquiries, but the lawyer referral and information service must consider whether the lawyer has the appropriate means to deliver services to such clients.

Rule 2: Public Interest Requirement.

A lawyer referral and information service must be operated in the public interest for the purpose of referring clients to lawyers, pro bono and public service legal programs, and government, consumer, social service or other agencies that can provide the assistance the clients need in light of their financial circumstances, spoken language, any disability, geographical convenience, and the nature and complexity of their problems and providing the public with information regarding legal and social services.

Commentary

1 The intent of this rule is to articulate the public service requirement for lawyer referral and information services. While it is not intended to preclude the operation of for-profit referral and information services, this statement does establish the primacy of a public service intent. Lawyer referral and information services should be operated for the benefit of the public. They should be readily accessible, and their existence should be made known to the public to the greatest extent possible.

2 The lawyer referral mechanism was originally created to help the public identify the best method, whether legal or non-legal, for resolving disputes and protecting important rights. The wealthy had the means and ability to secure appropriate counsel; however, it was harder for middle-income and low-income people to do the same. Lawyer referral and information services are public-service oriented programs that should be designed to fit those client needs.

3 As vital as lawyer referral is, the information provided by programs about, for example, lawyers, the legal system in general, the availability of legal services, and the availability of consumer, governmental, social service and other agencies that can address the client's problem, is an equally important public service. Services should provide both lawyer referrals and this type of information.

4 Lawyer referral and information services that are operated in the public interest are designed to fill the legal information void in a responsible and unbiased manner. The

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106 public has come to rely on the objective nature of the assistance provided by lawyer
107 referral and information services.

108 **Rule 3: Operating as a Lawyer Referral and Information Service.**

109 Only a service that conforms to these Rules may call itself a lawyer referral and
110 information service, lawyer referral service or the equivalent, or operate for a direct or
111 indirect purpose of referring potential clients to particular lawyers, whether or not the term
112 “referral service” is used.

113 Commentary

114 1 This rule establishes more clearly that it encompasses any entity operating to
115 make referrals to lawyers, regardless of whether the entity uses the term “referral service.”

116 2 Before the rules on lawyer advertising were relaxed, lawyer referral and
117 information services were operated primarily as a public service to provide informed
118 access to the legal system. It is important that a broad definition of lawyer referral and
119 information service and lawyer referral service be used for regulatory purposes, although
120 these rules are not meant to apply to certain types of services, as set forth in Rule 13,
121 including services that are just advertising programs.

122 **Rule 4: Eligibility to Participate.**

123 A lawyer referral and information service must be open to all lawyers licensed and eligible
124 to practice in this jurisdiction who have a physical presence in or substantial connection
125 to the geographical area served, and who:

- 126 (a) meet reasonable, objectively determinable experience requirements
127 established by the service;
- 128 (b) agree to pay reasonable registration, membership, consultation and referral
129 fees not to exceed those established by its lawyer referral and information
130 service committee or other governing body to encourage widespread lawyer
131 participation and consistent with the rules of professional conduct; and
- 132 (c) maintain in force a policy of errors and omissions insurance in an amount at
133 least equal to the minimum established by its governing body.

134 Commentary

135 1 This rule is designed to limit panel membership to lawyers who are licensed and
136 in good standing with their respective regulatory entity. It also notably requires that panel
137 membership be open to all lawyers who wish to join, provided that they are located in or
138 have a substantial connection to the geographic area served and satisfy those
139 requirements set forth therein. Requiring a presence in or connection to the geographical
140 area is important for two reasons. First, most lawyer referral and information services are
141 local, and staff can more easily verify experience requirements, obtain feedback, pursue
142 dispute resolution procedures, and anticipate issues before they arise with lawyers who

are based in or have a substantial connection to the area. Second, requiring such a presence or connection helps ensure accountability of the lawyers to the lawyer referral and information service and to their clients.

2 Under no circumstances should a service close a panel by selling or allocating designated geographical areas or areas of practice to a limited number of individuals based on their ability to pay a fee to the service.

3 Where it can be demonstrated by objective criteria that unlimited panel membership undermines legitimate client interests due to historically limited referral potential, then a service may reasonably limit the number of lawyers enrolled on a panel, provided that such limitation is in the public interest and is not based in whole or in part upon the ability of the enrolled individuals to pay a fee to the lawyer referral and information service.

4 The purpose of subsection (a) is to mandate that each service requires member lawyers who are referred cases in particular subject matter areas to have an appropriate level of experience in these areas. The criteria to be used in determining such requirements are more fully set forth in the Commentary to Rule 10.

5 The fees charged and paid mentioned in subsection (b) must be consistent with the rules of professional conduct and the statutory and decisional law of that jurisdiction. See *also* Rule 9.

6 The intent of subsection (c) is to ensure that, in the event errors are made by a panel lawyer, the client has redress through the lawyer's insurance policy. This is a requirement even if the referral and information service operates in a locality that does not require malpractice insurance.

7 Only by requiring such insurance can a client's needs best be satisfied. In jurisdictions where referral services are not immune from lawsuits for negligent referral, this requirement will help protect the service from such lawsuits; in states where such immunity exists, it ensures that a client may find redress against the principal negligent party, *i.e.*, the lawyer.

Rule 5: Total Charges.

The combined fees and expenses paid to a service and a lawyer to whom the client is referred must not exceed the total charges that the client would have incurred had no referral and information service been involved.

Commentary

1 The intent of this rule is to ensure that the client is not economically disadvantaged in any respect because the client has decided to use a lawyer referral and information service. Simply put, clients should not have to pay more for services obtained through the

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lawyer referral and information service than they would if they obtained the services on their own. Under no circumstances may a panel lawyer charge the client for a consultation fee or referral fee that the lawyer owes to the lawyer referral and information service.

Rule 6: Ownership Interest.

No fee-generating referral may be made to any lawyer who has an ownership interest in, or who operates or is employed by, a lawyer referral and information service, or who is associated with a law firm that has an ownership interest in, operates, or is employed by, a lawyer referral and information service.

Commentary

1 The intent of this rule is to prevent the temptation of using the referral and information service to refer matters to oneself, rather than to serve the client's needs. The important goal of unbiased referrals is thereby maintained.

2 Because the purpose of lawyer referral is to provide the client with the best option for a specific legal need, a referral and information service that makes referrals to its owners or operators is in constant danger of, intentionally or unintentionally, referring the most desirable matters in-house, without considering the client's needs first. This potential for a conflict of interest between the lawyer referral and information service and the client's needs must be avoided. The rule provides the most reliable method of maintaining unbiased referrals.

3 Service on a Board or lawyer referral and information service committee of a sponsoring bar association should not, in and of itself, exclude a panel lawyer from accepting referrals, provided the referral and information service maintains adequate safeguards against preferential treatment of these lawyers, including ensuring that some portion of the Board or lawyer referral and information service committee is comprised of lawyers who do not receive referrals.

Rule 7: Client Satisfaction.

A lawyer referral and information service must periodically survey client satisfaction with its operations and must investigate and take appropriate action with respect to client complaints against panel lawyer, the service, and its employees.

Commentary

1 The intent of this rule is to help ensure that the referral and information service is truly meeting the needs of the public by requiring direct feedback from the users of the lawyer referral and information service. However, this rule does not mean that every client must be included in a survey. It is recognized that, in certain situations, surveying some clients may not be in the best interest of the clients, and that discretion should be used, for example, with domestic violence or health and substance abuse issues.

215 **Rule 8: System of Review.**

216 A lawyer referral and information service must establish and publish a procedure for (a)
 217 admitting, suspending, or removing panel lawyers from its roll of panelists, and (b)
 218 addressing client complaints about the lawyer referral and information service. Any
 219 member lawyer adversely affected by the decision of the lawyer referral and information
 220 service may appeal to its governing body.

221 Commentary

222 1 The intent of this rule is to require rules to ensure that, as a public service, providing
 223 qualified and quality representation must be a priority of any lawyer referral and
 224 information service.

225 2 Without rigidly defining what the procedures must be, this provision acknowledges
 226 the need for each lawyer referral and information service to establish procedures for
 227 admission, suspension, and removal of panel lawyers as well as complaints about the
 228 lawyer referral and information service. These procedures must be clearly articulated to
 229 assure the public that a mechanism exists for responding to client complaints about panel
 230 lawyers or the lawyer referral and information service and potential instances of
 231 misconduct by panel lawyers; ensure due process for the clients and lawyers involved;
 232 and protect the confidences of clients of those panel lawyers and the lawyer referral and
 233 information service. This includes a duty to investigate client complaints against panel
 234 lawyers and the lawyer referral and information service.

235 3 It is appropriate to have a separate process for complaints about the lawyer referral
 236 and information service, which need not include an appeals procedure.

237 **Rule 9: Percentage Fees.**

238 If a lawyer referral and information service charges, in addition to set amounts as
 239 registration, membership, consultation fee and referral fees, a referral fee that is a
 240 percentage of legal fees earned by any panel lawyer to whom the service has referred a
 241 matter, the income from any such percentage fee must be used only to pay the
 242 reasonable operating expenses of the lawyer referral and information service and to fund
 243 public service activities of the service or its sponsoring organization, including the delivery
 244 of pro bono legal services.

245 Commentary

246 1 The ABA Rules of Professional Conduct have long prohibited the division of fees
 247 for legal services with non-lawyers. However, ABA Model Rule of Professional Conduct
 248 5.4(a)(4) permits the sharing of court-awarded legal fees in a matter with a nonprofit
 249 organization that referred the matter to the lawyer. Some states may believe that this
 250 restriction on lawyer fee sharing is adequate to address the public interest involved and
 251 thus this provision is not necessary. In other jurisdictions, where it is perceived that there

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is a need not only to regulate the practice of lawyers but also to regulate the business practices of lawyer referral and information services, it may be felt that additional regulation is necessary. This section should be used in those jurisdictions that deem it appropriate, and where it is consistent with the rules of professional conduct and the statutory and decisional law of that jurisdiction. See Rule 4(b).

2 Two ABA ethics opinions have approved financing of bar association sponsored lawyer referral and information services by charging a reasonable percentage of fees. See Formal Opinion 291 (1956) and Informal Opinion 1076 (1968). Opinions in several states have adopted similar reasoning in permitting payment of percentage fees to either bar sponsored or general non-profit lawyer referral and information services.

Rule 10: Subject Matter Panels.

A lawyer referral and information service must establish specific subject matter panels, eligibility for which must be determined on the basis of experience and other substantial objectively determinable criteria. A lawyer referral and information service may establish panels for clients with moderate means, panels of lawyers with limited experience, panels whose members charge no fees or reduced fees, panels of members who will handle limited scope representations, panels whose members handle alternative dispute resolution proceedings, and other specific panels that respond to the diverse referral needs of the consumer public.

Commentary

1 Panels must be organized by "subject matter." To serve on a subject matter panel, attorneys must meet the experience and other substantial and objective criteria established by the lawyer referral and information service.

2 The importance of establishing objective meaningful subject matter requirements cannot be underestimated. It is inappropriate for a service to simply refer a caller to the next panel lawyer on the list without determining that the panel lawyer is qualified in the field of practice for which legal services are needed. Because the public relies on services to provide qualified legal representation that is better than what the client could obtain by guesswork, it is incumbent upon these services to ensure that their panel lawyers have substantially more qualifications than mere bar membership.

3 "Experience" is not intended to mean "expertise" or "specialization," and it should not be defined merely by length of time in practice. Rather, the goal is to ensure that both the subject matter panels and the qualification standards meet the needs and reasonable expectations of the community served. In meeting these needs, consideration should also be given to the prospective panel lawyer's experience with particular types of matters, and to requiring a certain amount of recent actual experience.

4 Lawyer referral and information services should recruit and, when possible, admit panel members that reflect the diversity of the public being served.

5 Panels that serve clients with moderate means enable those that do not qualify for legal aid to afford a lawyer when they are unable to pay full market price for legal services. Limited experience panels include member lawyers without significant experience in a particular subject matter. In some instances, limited experience panels may also provide legal services at a reduced cost or they may be included on a modest means panel. However, the eligibility parameters for participation in these panels – whether modest means, limited experience, or a combination of the two – must be plainly defined and communicated to clients receiving referrals from those panels.

6 ABA Model Rule of Professional Conduct 1.2(c) specifically allows limited scope representation if the limitation is reasonable and the client gives informed consent. Consistent with this Rule, a lawyer referral and information service may have limited scope panels.

7 To the extent that a lawyer referral and information service uses an algorithm to decide to which panel members to refer work, the service should disclose to the public in general terms how the algorithm works. In addition, the algorithm may not be based on how much the attorneys have agreed to pay or have paid the service for referrals or how long the attorneys have been panel members.

Rule 11: Oversight.

The operation of these Rules and compliance with their provisions must be supervised by the lawyer referral and information service's governing entity and/or regulatory body. The lawyer referral and information service's governing entity must develop and promulgate rules, regulations, procedures, and forms to discharge its obligations not inconsistent with these Rules and subject to approval by the jurisdiction's regulatory body.

Commentary

1 The intent of this rule is to establish the regulatory entities that are charged with overseeing lawyer referral and information services, and to allow these regulatory entities to adopt their own rules and regulations for oversight purposes. Not all lawyer referral and information services may be operated by a bar association and thus may not be overseen by a "committee." Therefore, we use the more inclusive term "governing body," which may include a bar association's committee on lawyer referral, or the board of a for-profit or not-for-profit organization as allowed by the jurisdiction.

2 Each jurisdiction will determine, based on its legislative, judicial, or state bar regulatory authority over the practice of law, the composition of the regulatory entity that will oversee lawyer referral and information services.

Rule 12: Reporting Requirements.

A lawyer referral and information service must:

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- 326 (a) demonstrate its compliance with these Rules before commencing
327 operation;
- 328 (b) update the materials filed with its governing body and/or regulatory agency
329 within 30 days of any material change; and
- 330 (c) Annually file with its governing body and/or regulatory agency a report of its
331 operations and finances during the previous fiscal year, demonstrating its
332 continued compliance with these Rules.

333 **Rule 13: Exemptions.**

334 These Rules do not apply to:

- 335 (a) a group or prepaid legal plan, whether operated by a union, trust, mutual
336 benefit or aid association, corporation, or other entity or person, that (i)
337 provides unlimited or a specified amount of telephone advice or personal
338 communication at no charge to the members or beneficiaries, other than a
339 periodic membership or beneficiary fee, and (ii) furnishes or pays for legal
340 services to its members or beneficiaries;
- 341 (b) a plan of prepaid legal services insurance authorized to operate in the
342 jurisdiction;
- 343 (c) individual lawyer-to-lawyer referrals;
- 344 (d) lawyers jointly advertising their own services in a manner that discloses that
345 such advertising is solely to solicit clients for themselves; or
- 346 (e) any pro bono legal assistance program that does not accept fees from
347 lawyers or clients for referrals.

348 Commentary

349 1 These exclusions, other than (c) and (d), are all for services that are, like lawyer
350 referral and information services, designed to promote the accessibility of legal services
351 to the public.

352 2 Individual referrals from one lawyer to another are part of the everyday practice of
353 law. Many of these "referrals" are informal and involve no fee. If a referral fee is involved,
354 the state's relevant rules of professional conduct should be applied. See ABA Model Rule
355 of Professional Conduct 1.5(e).

356 3 ABA Model Rule of Professional Conduct 7.2 prohibits giving anything of value to
357 one who recommends the lawyer's services except, among others, "the usual charges of
358 a not-for-profit lawyer referral service" Many jurisdictions have interpreted this and
359 other similar provisions in both court decisions and ethics opinions. These rules, decisions
360 and opinions should be reviewed when interpreting this rule.

361 **Rule 14: Confidentiality.**

362 A disclosure of information to a lawyer referral and information service for the purpose of
 363 seeking legal assistance must be kept confidential by the lawyer referral and information
 364 service and should be protected as a privileged communication.

365 Commentary

366 1 Because a client discloses confidential information to a lawyer referral and
 367 information service for the sole purpose of seeking the assistance of a lawyer, the client's
 368 communication for that purpose should be maintained as confidential by the lawyer
 369 referral and information service (see ABA Model Rule of Professional Conduct 1.6).

370 2 Communications between a lawyer referral and information service and client of
 371 that service should also be protected from disclosure by the attorney-client privilege. See
 372 ABA House of Delegates Resolution 106 (2016), which calls for the adoption of rules or
 373 enactment of legislation to establish an evidentiary privilege for lawyer referral and
 374 information services and their clients for confidential communications between a client of
 375 the service and the lawyer referral and information service when a client consults the
 376 service for the purpose of retaining a lawyer or obtaining legal advice from a lawyer.

377 **Rule 15: Enforcement.**

378 The regulatory agency or any aggrieved person may seek an injunction to enjoin
 379 violations of these Rules. In the event the injunction is granted, the petitioner is entitled
 380 to reasonable costs and attorney's fees.

381 Commentary

382 1 The intent of this rule is to provide that anyone aggrieved, not merely the regulatory
 383 agency, may move to enjoin unlawful operations of a lawyer referral and information
 384 service.

385 2 It is important to note that, while "any aggrieved person" may move to enjoin illegal
 386 activity, typically the responsibility for enforcement should fall primarily on the shoulders
 387 of the regulatory entity.

REPORT

In furtherance of the Association's stated goals of advocacy for the profession and the enhancement of diversity, the Standing Committee on Lawyer Referral and Information Service has submitted a resolution consolidating the Minimum Quality Standards for Lawyer Referral and the Model Rules for Operating a Lawyer Referral Service into one comprehensive policy statement called the "Model Rules Governing Lawyer Referral and Information Services" (the "Model Rules"). These Model Rules are intended to update the guidance on lawyer referrals consistent with the current practice of law, while allowing for increased access to justice.

I. Introduction and Executive Summary

Lawyer referral and information services, also sometimes called lawyer referral services, (collectively, "LRIS Programs"),¹ have been in operation in this country for more than 80 years, and were first established in response to requests by middle income people for assistance in obtaining appropriate legal counsel. As such, lawyer referrals made by LRIS Programs are designed to assist those who are able to pay – either at a full or a moderate rate - but whose ability to locate appropriate legal representation is frustrated by a lack of experience with the legal system, a lack of information about the type of service needed, or a fear of the potential costs of seeing a lawyer. The information aspect of the LRIS Programs is designed to help both those who can and those who cannot afford to pay for legal services. LRIS Programs offer three important services to the public.

First, they help clients determine if problems are truly of a legal nature by screening inquiries and referring the clients appropriately. In addition to referrals to lawyers, many referrals are also made to resources that do not involve lawyers or other legal service providers, such as social service programs or governmental agencies.²

Second, LRIS Programs provide clients with unbiased referrals to lawyers who have proven experience in the area of law appropriate to the clients' needs. Although many programs have limited experience panels, which have benefitted clients with moderate means, to be on most panels, lawyers must exhibit substantial experience in the field in which they elect to receive referrals.

Third, LRIS Programs act as an access to justice portal, providing legal information about governmental and consumer agencies, pro bono programs, pro se resources, courthouse information, or other legal service providers that may assist clients. As a whole, LRIS Programs are known for providing consumer-oriented assistance, and it is expected that

¹ LRIS Programs are commonly referred to by a variety of other names as well, such as attorney referral services, attorney referral and information services, legal referral services, legal referral and information services, and intermediary services, just to name a few. This definition is not intended to exclude any such entity because of its name.

² During the course of our 2021 census of known LRIS Programs, it was reported that 45 percent of all callers were actually referred to someone other than a panel member. This survey was based on total calls during the 2020 fiscal year.

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the loyalty of the program will lie primarily with clients, and only secondarily with the participating lawyers.

Given the increased attention to LRIS Programs as access to justice portals, as well as the ongoing lack of access to justice for those of moderate means, the Committee has consolidated and amended the existing rules and standards to keep pace with modern day realities. Further, while LRIS Program rules enacted by legislatures or adopted by the courts must be strong enough to ensure that the needs of a diverse public are met, the Committee is mindful of the need to allow panel lawyers to operate without undue interference. In consolidating and amending the Model Rules and Minimum Quality Standards for Lawyer Referral, the Committee has done its best to balance these considerations. As such, these Model Rules are designed to provide a level playing field for all programs, whether bar-sponsored or private.

In the course of its outreach, the Committee realized that many are unfamiliar with LRIS Programs, the services they provide, and the constituents that they serve. As such, these Model Rules begin with a new preamble and scope section, as well as a terminology section. As the Model Rules will likely be read separately from this report, the Committee found it appropriate to make clear the types of programs about which it was speaking. LRIS Programs, for example, are differentiated from lawyer directories or simple matching services and these Model Rules are not intended to apply to lists of lawyers provided by courthouses or legal aid programs.

Like the current model lawyer referral rules, these proposed Model Rules make no distinction between for-profit and not-for-profit LRIS Programs. All LRIS Programs must be public-service oriented under both the current and proposed Model Rules. While many jurisdictions do not allow for-profit lawyer referral services, there are currently several jurisdictions that do allow for them. Of course, lawyers accepting referrals from for-profit lawyer referral services must comply with applicable Model Rules of Professional Conduct. Aside from the restrictions that are contained in the rules of professional conduct, with which these proposed Model Rules are intended to be consistent, the Committee found no compelling reason to add different rules for for-profit LRIS Programs.

During the past three years, the legal landscape has changed, and the practice of law is not limited to a specific geographic area. Whether that will lead to changes in the Model Rules of Professional Conduct as it pertains to multijurisdictional practice is beyond the scope of these Model Rules. However, these Model Rules eliminate the need to have a physical office in the location served by a local LRIS Program. This is consistent with Formal Ethics Opinion 495 issued by the ABA Standing Committee on Ethics and Professional Responsibility, which clearly stated that “[l]awyers may remotely practice the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted” pursuant to local rules and regulations.³ Instead of a strict,

³ ABA Formal Opinion 495, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-495.pdf. December 16, 2020.

physical presence requirement, these rules allow for either a physical presence or substantial contacts with the geographic area.

The proposed Model Rules also embrace diversity efforts. While the proposed rules do not implement quotas or minimum numbers, they do require that LRIS Programs recruit and retain diverse panel members. These diversity efforts should not be limited to race and gender, but also physical disability and other classes or individuals protected by federal law. In so doing, the LRIS Programs will better reflect their communities and encourage the public to seek them out to obtain legal representation.

For LRIS Programs operating in jurisdictions that are not regulated, the Committee encourages those programs to voluntarily operate in accordance with these Model Rules to the extent that they align with the local rules and applicable laws, decisions and opinions. In so doing, those LRIS Programs would be eligible to participate in the Committee's program listing LRIS Programs that meet minimum standards for lawyer referral. For those jurisdictions considering regulations for lawyer referral, the Committee strongly encourages adoption of these Model Rules and commentary in a manner consistent with local regulations and laws.

II. Historical Background

In 1989, following a long review process by state and local bar association and lawyer referral experts from both the public and private sector, the American Bar Association adopted Minimum Quality Standards for Lawyer Referral and Information Services.⁴ In 1993, the Association went on to adopt the Model Supreme Court Rules Governing Lawyer Referral Services.⁵ Both the aspirational Standards and the more detailed Model Supreme Court Rules provided a substantive framework within which LRIS Programs could operate. Nevertheless, while the core function of the Minimum Quality Standards and the Model Supreme Court Rules has remained the same, much has changed in the interim. Not only have private matching services entered into this space, but LRIS Programs themselves have evolved beyond simply matching services and now focus on access to justice – a one-stop-shop for many clients to find relevant information and guidance. In many instances, the LRIS Program is the most significant access to justice program being offered by a bar association, with more public touches than any other bar program. Not surprisingly, jurisdictions are taking notice. As of the time of this writing, more and more jurisdictions are examining how regulation of LRIS Programs and lawyer matching services might impact access to justice. This focus on access to justice includes various state reports recognizing the importance of encouraging diversity, ensuring privileged lawyer referral-client communications and, in some instances, eliminating rules that limit fee sharing. In this environment, the overriding concern of the Minimum Quality Standards and the Model Rules – client protection – is all the more important and continues to be a central focus of the Model Rules.

⁴ 89A123.

⁵ 93A10D.

In August 2016, the House of Delegates adopted a resolution by the Philadelphia Bar Association, requesting that the Association reaffirm its support of lawyer referral services and that it encourage them to adopt the Model Supreme Court Rules.⁶ At the same meeting, the House of Delegates adopted Resolution 106, encouraging jurisdictions to adopt a confidentiality privilege for communications between an LRIS Program and clients contacting the program for assistance.⁷ It is against this backdrop of existing ABA policies that these rules consolidate existing statements regarding lawyer referral into one, comprehensive, amended policy, the Model Rules.

III. Brief Summary of Amendments

In the 33 years since the initial adoption of the minimum standards, there have been no changes, although the services provided by these programs have changed a great deal. Based upon 3 years of study and comment from existing programs and various ABA constituencies, this Resolution seeks to update the Model Rules Governing Lawyer Referral and Information Services to emphasize inclusion and diversity, to recognize the use of technology and growth of remote work, and to facilitate access to justice. In addition, we have found that most of the existing rules are still applicable and should remain. The following chart provides a visual analysis of what the proposed amendments would change and what would be retained.

What Are The Changes?	Things That Will Remain:
<ul style="list-style-type: none">• Format change so resembles the Model Rules of Professional Conduct: addition of definitions (Terminology), addition of preamble stressing LRISs’ role in providing information to those who cannot afford or do not need a lawyer, access to justice and service to the public (Preamble), comments changes to explain rules (Comments), and elimination of minimum standards.• Relaxing physical presence requirements. (Rule 1, Comment 1; Rule 4)	<ul style="list-style-type: none">• Requirement that LRIS Programs operate in the public interest. (Rule 2)• LRIS Programs must provide information about legal, consumer, and government services, not just make referrals to panel members. (Rule 2)• Rules apply to <u>any</u> service that provides referrals. (Rule 3)• Participation in an LRIS must be open to all lawyers and LRIS Programs may not close a panel by selling memberships. (Rule 4)

⁶ 16A10A.

⁷ 16A106.

What Are The Changes?	Things That Will Remain:
<ul style="list-style-type: none"> • Requirement that the LRIS be accessible to people with disabilities. (Rule 2, Comment 1) • Removal of requirement of minimum number of panelists to help smaller services. (Rule 4, Comments 2 and 3) • Legal malpractice insurance required for all participating lawyers. (Rule 4(c)) • Client satisfaction survey may be conducted electronically instead of by mail. (Rule 7, Comment 1) • The inclusion of diversity goals. (Rule 10, Comment 4) • The inclusion of a confidentiality privilege for communications between an LRIS Program and the person seeking assistance. (Rule 14) • Emphasizes that the fees charged and paid must be consistent with the Rules of Professional Conduct. (Rules 4 and 9) • Urge disclosure of algorithms, if any. (Rule 10) • Assure consistency and clarity of the language used in the Rules. 	<ul style="list-style-type: none"> • Requirement that LRIS Programs assure panel lawyers are qualified. (Rule 4) • LRIS Programs must survey clients about satisfaction and have a system to review panel members. (Rules 7 and 8) • <u>Model Rules of Professional Conduct 5.4 or 7.2, which are outside the scope of these rules, will still preclude sharing of fees with for-profit services.</u> (Rule 9, Comment 1) • Not-for-profit services may charge percentage fees in accordance with ABA Ethics Op. 1076 (1968). (Rule 9) • Services must have subject matter panels based on objective criteria. (Rule 10) • Encouraging establishment of modest means panels/panels for lawyers with limited experience. (Rule 10) • Specific types of referrals are exempted. (Rule 13)

IV. Detailed Analysis

A. Combining the Model Supreme Court Rules and Minimum Quality Standards for Lawyer Referral. The current version of the Model Supreme Court Rules was adopted in 1993, yet few states (California, Florida, Missouri, North Carolina, Ohio, Tennessee, Texas, and Wyoming) actively regulate LRIS Programs.⁸ On the other hand, a large

⁸ North Carolina and Tennessee regulate “intermediary organizations,” which include lawyer referral services.

percentage of LRIS Programs and their governing bodies have voluntarily elected to operate in accordance with the Minimum Quality Standard adopted in 1989. While an obvious goal of this proposal is to provide a framework of rules for those jurisdictions that elect to implement regulations for LRIS Programs operating within their borders, updating the Minimum Quality Standards and combining them with the Model Supreme Court Rules is equally important for those LRIS Programs that have voluntarily chosen to comply with the American Bar Association's guidance on lawyer referral.

B. Diversity Goals. As of January 1, 2020, there were 1,328,692 active lawyers reported within the United States.⁹ Thirty-seven percent of those lawyers were women,¹⁰ while 14.1% were men and women of color.¹¹ No reliable statistics exist for percentages of the profession that identify as LGBTQ or for those that identify as disabled. Understandably, it is difficult to build diversity when drawing from a pool where little diversity exists. However, one of the primary goals of the American Bar Association is the elimination of bias and enhancement of diversity and inclusion throughout the Association, legal profession, and justice system. As a bedrock principle, it is incumbent upon these Model Rules to reflect the diversity goals of the Association as a whole. Therefore, these rules urge LRIS Programs to take steps to recruit and retain lawyers that are as diverse as the public that is served by their programs.

C. Confidentiality Privilege. In 2016, the House of Delegates adopted Resolution 106,¹² which urged regulatory agencies to recognize privileged communications between an LRIS Program and the individual contacting such program for assistance. To date, only California, Utah and New York have adopted such a privilege. Wisconsin has also adopted the privilege, but only as it applies to the Wisconsin State Bar Association lawyer referral program, not other programs that exist within the state. Other jurisdictions have either issued reports recommending implementation of such a privilege, or are studying the possibility, but have yet to do so. These rules move this stand-alone policy into the Model Rules in order to have all of the rules centrally located within one comprehensive lawyer referral policy.

D. Relaxing Physical Presence Requirements. As a result of the COVID-19 pandemic, 2020 was the year that brought remote working to the forefront for millions of Americans. However, even prior to 2020, there were an untold number of lawyers that were licensed in more than one jurisdiction. Many of which, under MRPC 5.5, were prohibited from practicing law in another jurisdiction if they were not licensed in the jurisdiction from which they were practicing. More aptly put, if a lawyer were licensed in Tennessee, but lived in Mississippi, she could potentially be subject to sanctions for

⁹ ABA Profile of the Legal Profession 2020, <https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf> at p. 31.

¹⁰ ABA Profile of the Legal Profession 2020, <https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf> at p.32.

¹¹ ABA Profile of the Legal Profession 2020, <https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf> at p. 33.

¹² 16A106.

practicing Tennessee law from a remote location in Mississippi.¹³ As such, the current version of the rule only allows the participation of licensed lawyers “in” the geographical area served by the lawyer referral program. However, what of the lawyer licensed in Illinois but living in Indiana that wants to join the Chicago Bar Association lawyer referral service? What of the thousands of lawyers that live in Connecticut and New Jersey that would like to join the New York City Bar Association legal referral service? Based on the number of individuals engaging in the multijurisdictional practice of law and given that that situation is not likely to end upon the conclusion of the COVID-19 pandemic, it is appropriate to allow not only lawyers physical present within the jurisdictional reach of LRIS Programs, but also to allow lawyers with “substantial connections” to the geographical area serviced by LRIS Programs to join those programs.

E. Removal of Minimum Numbers. The existing minimum quality standards require a minimum number of participating panel lawyers. This provision was added to ensure that referrals were fair, and that a lawyer was not benefitting from receiving excessive referrals. However, as was noted previously, LRIS Programs are first for the benefit of the public, and then for the benefit of lawyers. Where an LRIS Program has discerned a need for a particular panel, it is in the public interest to launch that panel to provide increased access to justice whether there is one member lawyer or legal paraprofessional or there are one hundred. As an example, many LRIS Programs have recognized a need for a moderate means panel. However, in recruiting for the panel, there may have been only one or two lawyers willing to participate. The public should not be denied the access to justice that could have been provided by those programs simply because recruitment efforts had yet to reach a required result.

F. Mandatory Legal Malpractice Insurance. Currently, only Oregon and Idaho require lawyers to carry legal malpractice insurance. However, as of the writing of this report, approximately 23 additional states require that lawyers report whether they have coverage and/or take some sort of training to lower the risk of malfeasance to potential clients. While not all jurisdictions have a malpractice requirement, 100% of LRIS Programs that participated in the Committee’s 2021 Lawyer Referral Census reported that such insurance is already required of their participants.¹⁴ In order to be consistent with the LRIS Programs’ existing public protection efforts, these rules include a malpractice insurance requirement. As this is already common to most if not all LRIS Programs, this requirement should not be unduly burdensome, but instead reflects a universal practice.

V. Conclusion

The age of the existing rules on lawyer referral, current lawyer referral practices, regulatory reform efforts impacting the practice of law as a whole, and the current remote working environment all demonstrate that the ABA policies on lawyer referral need to be

¹³ This example is based on the premise that the two states border each other. It should not be assumed that this would, in fact, be a violation.

¹⁴ Approximately 30% of known LRIS Programs participated in the Committee’s 2021 Lawyer Referral Census, which was based on information from 2020.

updated and consolidated into one, comprehensive set of rules that will not only provide an appropriate governance structure but will allow for innovation and growth of LRIS Programs. The core functions of the policy statement still remain – assuring that LRIS Programs provide public service and access to justice while, among other things, offering non-biased access to experienced, insured lawyers. However, these revisions also will allow for growth in the use of technology and innovation to continue to ensure that LRIS Programs fulfill their missions as access to justice portals. Many of these policies already exist but are in disparate policies. We respectfully request that the House of Delegates accept these Model Rules, which are the consolidation and amendment of the LRIS Model Supreme Court Rules and Minimum Quality Standards.

Respectfully submitted,

David G. Keyko, Chair,
Standing Committee on Lawyer Referral and Information Service

August 2022

GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Lawyer Referral & Information Service

Submitted By: David G. Keyko

1. Summary of the Resolution(s). This resolution consolidates the Minimum Quality Standards for Lawyer Referral and the Model Rules for Operating a Lawyer Referral Service into one comprehensive policy statement and amends that guidance to be consistent with the current operation of lawyer referral and information services.
2. Indicate which of the ABA's Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

This resolution advances Goal 2 - Improving our Profession, Goal 3 - Eliminate Bias and Enhance Diversity, and Goal 4 - Advance the Rule of Law, in that it provides clear, comprehensive guidance to lawyer referral and information services that partner with participating lawyers; it enhances diversity by urging the recruitment and participation of panel lawyers that reflect the diversity of the community; and it advances the rule of law by defining the role of lawyer referral and information services in not only providing legal services, but in creating community access points to increase access to justice.

3. Approval by Submitting Entity. Approved by the membership of the Standing Committee on Lawyer Referral & Information Service on May 3, 2022.
4. Has this or a similar resolution been submitted to the House or Board previously? Yes. A similar resolution was submitted for consideration at the 2022 Midyear Meeting. However, that resolution was withdrawn due to concerns expressed by various sections and delegations.
5. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?
 - The Minimum Quality Standards for Lawyer Referral adopted in 1989 (89A123) – This resolution includes the premises of Minimum Quality Standards for Lawyer Referral and would update the standards consistent with current operations.
 - The Model Supreme Court Rules Governing Lawyer Referral and Information Services adopted in 1993 (93A10D) – This policy includes much of the language of the Model Supreme Court Rules Governing Lawyer Referral and Information Services and would update the rules

consistent with current operations.

- The Privacy Privilege adopted in 2016 (16A106) – This policy includes the privacy privilege and encourages more jurisdictions to adopt it.
- Rededication Resolution 10A (16A10A) – This resolution incorporates the Association’s dedication to lawyer referral as declared in Resolution 16A10A.
- Model Rule of Professional Conduct 5.4 – No change. If this resolution is adopted, it will not affect Model Rule of Professional Conduct 5.4 nor will it allow the unauthorized sharing of fees.
- Model Rule of Professional Conduct 7.2 – No change. If this resolution is adopted, it will not affect Model Rule of Professional Conduct 7.2.

- 6. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A
- 7. Status of Legislation. (If applicable) N/A
- 8. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. The Committee will reach out to state, local, territorial and tribal courts and/or regulatory agencies, as well as the lawyer referral services themselves, to encourage adoption of these rules.
- 9. Cost to the Association. (Both direct and indirect costs) The Committee does not anticipate any costs outside of the normal employment costs of staff counsel.
- 10. Disclosure of Interest. (If applicable) N/A
- 11. Referrals.

ABA Center for Innovation
ABA Coalition on Racial and Ethnic Justice
ABA Commission on Disability Rights
ABA Diversity and Inclusion Advisory Council
Association of Professional Responsibility Lawyers
National Conference of Bar Presidents
New York City Bar Association
Philadelphia Bar Association
Section of Business Law
Section of Civil Rights and Social Justice
Section of Litigation
Solo, Small Firm, and General Practice Division
Standing Committee on Bar Activities and Services
Standing Committee on Delivery of Legal Services

Standing Committee on Ethics and Professional Responsibility
 Standing Committee on Legal Aid and Indigent Defense
 Standing Committee on Pro Bono
 Standing Committee on Professional Regulation
 State Bar of California
 State Bar of Colorado
 State Bar of Wisconsin
 Young Lawyers Division

12. 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.*)

David G. Keyko
 Chair, Standing Committee on Lawyer Referral & Information Service
David.Keyko@pillsburylaw.com
 (212) 858-1604

13. 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.*

David G. Keyko
 Chair, Standing Committee on Lawyer Referral & Information Service
David.Keyko@pillsburylaw.com
 (212) 858-1604

EXECUTIVE SUMMARY

1. Summary of the Resolution.

This resolution consolidates the Minimum Quality Standards for Lawyer Referral and the Model Rules for Operating a Lawyer Referral Service into one comprehensive policy statement, and amends that guidance to be consistent with the current operation of lawyer referral and information services.

2. Summary of the issue that the resolution addresses.

Currently, there is no comprehensive guidance that informs how lawyer referral and information service programs operate. In addition, what guidance exists is largely outdated.

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

This resolution aims to consolidate all guidance into one, easily accessible document. Further, it provides up-to-date guidance for those programs that voluntarily model their governance documents on the currently existing rules.

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

A previous version of this resolution was submitted for consideration at the 2022 Midyear Meeting and received considerable opposition. After that time, the Committee worked with various groups and was ultimately able to address many of their concerns. As of the time of submission, there is no identified opposition – internal or external – to this resolution.

AMERICAN BAR ASSOCIATION
COMMISSION ON YOUTH AT RISK
SECTION OF LITIGATION
COALITION ON RACIAL AND ETHNIC JUSTICE
CRIMINAL JUSTICE SECTION
JUDICIAL DIVISION
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
SOLO, SMALL FIRM AND GENERAL PRACTICE DIVISION
COMMISSION ON DISABILITY RIGHTS
COMMISSION ON DOMESTIC & SEXUAL VIOLENCE
COMMISSION ON LAW AND AGING

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association urges all federal state, local, territorial,
2 and tribal Bar Associations to educate attorneys and other legal professionals about anti-
3 Black systemic racism within the child welfare system, stemming from the history of
4 slavery in the United States and perpetuated by over-surveillance of and under-
5 investment in Black families in America, which is pervasive, ongoing, and a root cause of
6 the disproportionate involvement of Black parents and children within the system; and
7

8 FURTHER RESOLVED, That the American Bar Association urges federal, state, local,
9 territorial, and tribal governments and courts, as well as attorneys, judges, legislatures,
10 governmental agencies, and policymakers to:
11

- 12 (1) Recognize implicit and explicit bias and acknowledge collective responsibility for
13 challenging laws, policies, and practices that devalue Black families and normalize
14 systemic racism and family separation;
15
16 (2) Ensure all legal decisions, policies, and practices regarding children's wellbeing
17 respect the value of Black children and families' racial, cultural, and ethnic
18 identities and the connections, needs, and strengths that arise from those
19 identities; and
20
21 (3) Consult, listen to, and be led by Black parents, children, and kin with lived
22 experience in child welfare to learn how to support constructive steps to end the
23 legacy of Black family separation under the law.

REPORT

I. Introduction

Examining and acknowledging America's history of anti-Black racism and how it has impacted families since times of slavery and into the modern-day child welfare field is necessary. This historical recognition does not suggest that every child removal from the home is wrong. And it is not designed to support a full repeal of all child welfare laws. With this call to reflect on and recognize the connection between our collective history of under-investment in Black families and over-surveilling Black communities, however, the ABA can contribute to an important national conversation about what child welfare means for Black children and parents to ensure any system designed to meet family needs is grounded in understanding those needs directly.

In June 2020, the murder of George Floyd by a police officer spurred national outrage and a renewed call to action to stand up to systemic racism committed under authority of law against Black Americans. The ABA called on the legal community to recognize the special responsibility lawyers have to address these injustices and work to end systemic racism.¹ This Resolution follows that call by focusing on the responsibilities legal professionals have to challenge anti-Black racism in the child welfare system, one of the most complex and wide-reaching legal systems in our country today.

Racial disparity occurs at every decision point along the child welfare continuum.²

- Black families are overrepresented in reports of suspected maltreatment and experience child protective services (CPS) investigations at higher rates.³ These reports are so common that more than half of all Black children in America will experience a child welfare investigation by age 18.⁴
- Black children are at greater risk than white children of being separated from their families following an investigation, even when alleged maltreatment is the same.⁵

¹ *ABA President Martinez decries violence against George Floyd, Black community. Pledges action*, (June 5, 2020), <https://www.americanbar.org/news/abanews/aba-news-archives/2020/06/aba-president-martinez-decries-violence-against-george-floyd--bl/>.

² This inequitable treatment is compounded at the intersection of race and disability. See Loe et al., *Disproportionate Representation of Children of Color and Parents with Disabilities in the Child Welfare System: The Intersection of Race/Ethnicity, Immigration Status, and Disability*, 42(6) J DEVELOPMENT & BEHAVIORAL PEDIATRICS 512-514 (Aug. 2021), <https://pubmed.ncbi.nlm.nih.gov/34232145/>.

³ See K.S. Krase, Differences in racially disproportionate reporting of child maltreatment across report sources. 7 JOURNAL OF PUBLIC CHILD WELFARE 351–369 (2013) <https://doi.org/10.1080/15548732.2013.79876>; Hyunil Kim et al., *Lifetime Prevalence of Investigating Child Maltreatment Among US Children*, 107 AM. J. PUB. HEALTH 274, 274-280 (2017), <https://doi.org/10.2105/AJPH.2016.303545>.

⁴ See Kim, et al., *supra* note 3, at 274-280.

⁵ See Youngmin Yi et al., *Cumulative prevalence of confirmed maltreatment and foster care placements for US children by race/ethnicity, 2011-2016*. 110 AMERICAN JOURNAL OF PUBLIC HEALTH 704–709 (2020), <https://www.doi.org/10.2105/AJPH.2019.305554>.

- Once in CPS custody, Black children have longer placements in foster care, receive fewer services, and are less likely to reunify with families.⁶
- Finally, Black children are 2.4 times more likely than white children in foster care to experience parental loss through a court-ordered termination of parental rights.⁷

This Resolution seeks to ground these numbers in an understanding of how we arrived here. Specifically, this Resolution begins by calling on Bar Associations throughout the country to educate attorneys and other legal professionals on how the experience of separating Black children from their parents in the child welfare system is intimately linked to the history of slavery in our country.⁸ With an understanding of this history, the Resolution also urges judges, attorneys, legislators, and other legal professionals to challenge present-day laws that have devalued Black families and resulted in the separation of Black parents from their children through the child welfare system. Further, the Resolution urges the legal profession to recognize the inherent strength of Black families, to value Black cultural and ethnic identity tied to race, and to follow the lead of Black parents, children, and kin with lived experience in child welfare in taking constructive steps to end the legacy of family separation and design a public approach to family support that best meets children and parents' needs in the future.

In addition to calling on other Bar Associations to provide this education, the ABA also has a responsibility to recognize its own role contributing to racism in the legal field. For example, the ABA's refusal to permit Black attorneys as members until 1943 is a part of our organizational decision-making and structure that was consistent with other exclusions toward Black Americans that existed and harmed families for decades.⁹ Within the child welfare legal field in particular, the ABA has also traditionally supported and helped design pieces of legislation that have disproportionately affected and caused harm to Black children, parents, and families.¹⁰ Recognizing the discriminatory effect of these laws requires that the legal profession stand up and do something to change them. Even if those results arose from well-intended laws, no profession should turn a blind eye once the consequences are clear. More importantly, the ABA can support and implement a vision for child welfare emerging from the most important leaders in this space – Black children, parents, and family members whose lives have been affected by child welfare.

II. Prior ABA Policy

⁶ Children's Bureau Bulletin, *Child Welfare Practice to Address Racial Disproportionality and Disparity* (April 2021), https://www.childwelfare.gov/pubpdfs/racial_disproportionality.pdf.

⁷ Christopher Wildeman et al., *The Cumulative Prevalence of Termination of Parental Rights for U.S. Children, 2000-2016*; 25(1) CHILD MALTREAT. 32–42 (Feb. 2020).

⁸ See e.g., New York State Bar Association House of Delegates, Report and Recommendations of Committee on Families and the Law RESOLUTION ADDRESSING SYSTEMIC RACISM IN THE CHILD WELFARE SYSTEM OF THE STATE OF NEW YORK, April 2, 2022, <https://nysba.org/app/uploads/2022/03/Committee-on-Families-and-the-Law-April-2022-approved.pdf> (the NYSBA passed a resolution with an accompanying report finding the Child Welfare System “replete with systemic racism” and calling for reform).

⁹ American Bar Association, *ABA Timeline*, https://www.americanbar.org/about_the_aba/timeline/.

¹⁰ See, e.g., Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare* (2001), (Referencing the ABA's project Termination Barriers and active support for provisions in the Adoption and Safe Families Act that facilitated parental and child termination of family rights).

In 2008, the ABA passed Resolution 107, which urged Congress to review and collect data on the disproportionate representation of racial and ethnic minority children in the child welfare system.¹¹ Resolution 107 also called on judges, attorneys, and other legal professionals to help racial and ethnic minority families access services to prevent child removal into foster care and provide greater supports for kin caregivers. Finally, Resolution 107 encouraged legal professionals to seek bias training to improve cultural competence when working with racial and ethnic minority families. The ABA has passed several additional policies focused on bias training for all legal professionals, including judges, lawyers and law students in the ensuing years.¹²

Resolution 107 was an important starting point in recognizing and researching the issue of disproportionality for racial and ethnic minorities in the child welfare system. But it did not address the roots of that disproportionality, including longstanding systemic oppression perpetrated on Black families since before the nation's founding. Nor did it address the intersection of poverty and race that contribute to inequities Black families have often experienced when resources and public services are unevenly distributed.

This resolution goes beyond Resolution 107's examination of disproportionality in foster care to focus on understanding how the history of government surveillance of and deliberate underinvestment in Black families has led to and continues to impact decisions to separate Black children from their parents. Additionally, in contrast with Resolution 107, which focused broadly on "racial and ethnic minorities," this Resolution focuses solely on Black families. The history and impact of anti-Black racism in America is unique and must be honored as such. This does not imply that other areas of child welfare disproportionality and family separation are not also important areas of focus for the Association, including those that affect Native American children, LGBTQ children, and Latino and immigrant children and youth. The ABA has recent policies that focus on rights for each of those groups.¹³ Like those resolutions, this resolution focuses on calling for change in the treatment of one particular group – Black families.

III. Education on the Roots of Anti-Black Systemic Racism in Child Welfare

To understand how child welfare laws, policies, and practices have perpetuated and normalized anti-Black racism and Black family separation in America, it is important to look at the context in which those laws developed. This report examines two categories of legal history: (1) laws that have facilitated surveillance and separation of Black children and parents; and (2) laws that have facilitated underinvestment in Black families and incentivized caring for children apart from their parents. Both categories have shaped current child welfare laws and practices. The Commission on Youth at Risk will be

¹¹ ABA RESOLUTION 08A107 (2008).

¹² ABA RESOLUTION 21A102 (2021); ABA RESOLUTION 20A117 (2020); ABA RESOLUTION 20A116G (2020); ABA RESOLUTION 91A10D (1991).

¹³ See *generally*, ABA RESOLUTION 21M103A (2021) (Non-citizen Children Policy); ABA RESOLUTION 15A112 (2015), (Conversion Therapy Policy); ABA RESOLUTION 07A104B (2007), (LGBT Youth in Foster Care Policy); ABA RESOLUTION 18A119 (2018), (Rights of Immigrant Children); ABA RESOLUTION 19A115C (2019), (Constitutionality of the Indian Child Welfare Act Policy); ABA RESOLUTION 11A103D (2011), (Protection of Unaccompanied and Undocumented Immigrant Children).

producing a more complete historical White Paper on these categories as an additional resource. The history provided below is abbreviated for the Report structure.

A. Laws that Facilitated Surveillance and Separation of Black Children and Parents

“But the child was torn from the arms of its mother amid the most heart-rending shrieks from the mother and child on the one hand, and the bitter oaths and cruel lashes from the tyrants on the other.”¹⁴

For the more than 200 years when slavery was permitted by law in this country, the dehumanizing and violent act of taking children from their families was intentional and served enslavers’ economic interests.¹⁵ For example, the threat of family separation was used as a tool to keep enslaved mothers, fathers, and children compliant – no threat was more horrifying than the fear of being sold away from one’s family. As archival recordings from formerly enslaved people make clear, parents and “[c]hildren, even from a young age, were well aware that their sale could occur at any moment.”¹⁶ Family separation was also often a form of business development because children born to enslaved mothers were automatically deemed to be property of the enslaver and as such could be sold. While some supporters of slavery sought to normalize these breaks in family bonds by suggesting that Black parents and children did not experience personal emotions and family attachment in the same way as a white family member would, the majority recognized the cruelty involved.¹⁷ In fact, the known cruelty of taking children from their parents became a key focus of abolitionists who highlighted the pain of family separation to shame the system out of existence.

After the Civil War, Black leaders and their allies fought to secure a constitutional right to family integrity in recognition of the widespread destruction Black families had

¹⁴ DeNeen L. Brown, *‘Barbaric’: America’s cruel history of separating children from their parents*, WASH. POST, May 31, 2018, <https://www.washingtonpost.com/news/retropolis/wp/2018/05/31/barbaric-americas-cruel-history-of-separating-children-from-their-parents/> (quote taken from a 1849 narrative, Henry Bibb, a former enslaved person in an exhibit at the Smithsonian’s Museum of African American History and Culture, which documents the history of enslaved children being separated from their enslaved parents).

¹⁵ Michael A. Robinson, *Black Bodies on the Ground: Policing Disparities in the African American Community—An Analysis of Newsprint From January 1, 1915, Through December 31, 1915*, University of Georgia School of Social Work, (April 7, 2017) <https://doi.org/10.1177/0021934717702134>; As Frederick Douglass noted “[i]t is a common custom, in the part of Maryland from which I ran away, to part children from their mothers at a very early age.” *Narrative of the Life of Frederick Douglass*.

¹⁶ See Vanessa M. Holden, *Slavery and America’s Legacy of Family Separation*, AAIHS (July 25, 2018) <https://www.aaihs.org/slavery-and-americas-legacy-of-family-separation/>; Brown, *supra* note 14; Elizabeth Ofosu Johnson, *The disturbing history of enslaved mothers forced to breastfeed white babies in the 1600s*, FACE2FACE IN AFRICA (Aug. 20, 2018), <https://face2faceafrica.com/article/the-disturbing-history-of-enslaved-mothers-forced-to-breastfeed-white-babies-in-the-1600s>.

¹⁷ Thomas R.R. Cobb, a proponent of slavery was quoted in 1858 as proclaiming that the Black family “suffers little by separation”. See Nicholas Kristof, *Trump Wasn’t First to Separate Families, but Policy Was Still Evil*, NEW YORK TIMES (June 20, 2018), <https://www.nytimes.com/2018/06/20/opinion/trump-family-separation-executive-order.html>.

experienced during slavery.¹⁸ Despite these efforts, family separations between Black children and parents continued with frequency under the color of new laws. For example, vagrancy laws criminalized unemployment, and often led to Black family separation when parents were imprisoned and forced to perform labor through chain gangs or in direct service to former enslavers on plantations. Another legal basis for separation arose from “apprenticeship” laws, through which Black children were “hired out” to former enslavers through an agreement, often certified by a court, where unpaid labor was exchanged for a promise of “training.”¹⁹ In some cases, children were considered orphans when apprenticed. In others, children were required to enter labor agreements when their parents had been arrested or found to be destitute.²⁰ Courts and landowners rationalized the agreements with rhetoric that it served the “child’s best interests” to be apprenticed because their families could not support them financially.²¹

Though slavery, vagrancy laws, and forced apprenticeships no longer provide legal contexts for separating Black children from their parents and other kin, aspects of these laws influence practices today. For example, poverty and parental arrest continue to serve as two of the most prominent causes of child removal into foster care.²²

B. Laws that Facilitated Underinvestment in Black Families and Incentivized Caring for Children Apart from Their Parents

America has a long history of excluding Black parents from public support. For example, during the Depression, when mothers’ pensions were provided to help women care for children in their own homes after losing a male breadwinner to death, abandonment, or poor health, restrictions limited these supports to only white children of widows, and excluded children of Black mothers.²³ Likewise, in 1935 when the federal government established Aid to Dependent Children (ADC), Congress permitted state and local officials to set eligibility criteria and many states took steps to exclude Black parents.²⁴

¹⁸ Brief for Law Professors as *Amici Curiae* in Support of Plaintiffs’ Opposition to the Motion to Dismiss, *D.J.C.V. v. U.S.*, Civil Action No. 1:20-CV-05747-PAE (S.D.N.Y. Dec. 22, 2020).

¹⁹ See *The History of Slave Patrols, Black Codes, and Vagrancy Laws*, available at <https://www.facinghistory.org/educator-resources/current-events/policing-legacy-racial-injustice/history-slave-patrols-black-codes-vagrancy-laws>.

²⁰ At the same time, state laws severely limited Black property ownership as well as participation in certain businesses and skilled trades. See *Black Codes*, (June 1, 2010), available at <https://www.history.com/topics/black-history/black-codes>.

²¹ Constitutional Rights Foundation, *The Southern “Black Codes” of 1865-66*, <https://www.crf-usa.org/brown-v-board-50th-anniversary/southern-black-codes.html>.

²² National data released by the U.S. Department of Health and Human Services for FY20 indicates parental incarceration and neglect comprised 70% of all foster care entries that year. See U.S. DEP’T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES, CHILD. BUREAU, *The AFCARS Report: Preliminary FY 2020 Estimates as of October 04, 2021*, No.28 <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport28.pdf>.

²³ Ife Floyd et al., *TANF Policies Reflect Racist Legacy of Cash Assistance: Reimagined Program Should Center Black Mothers*, CENTER ON BUDGET AND POLICY PRIORITIES (Aug. 4, 2021), <https://www.cbpp.org/research/family-income-support/tanf-policies-reflect-racist-legacy-of-cash-assistance>.

²⁴ See, e.g., Taryn Lindhorst & Leslie Leighninger, “Ending Welfare as We Know It” in 1960: Louisiana’s

i. Unsuitability Provisions

In the second half of the 20th Century, underinvestment in Black families became especially intertwined with concepts of parental fitness and “unsuitability” that continue to have implications in the child welfare system today. Specifically, in the 1950s, as court-ordered public school desegregation processes began throughout the country, states passed new laws to exclude “unsuitable homes” from public aid eligibility based on parental fitness determinations. As one state legislator openly acknowledged, these exclusions were not based on actual fitness determinations, but were instead designed to push Black families out of the community to limit their children’s school enrollment.²⁵

The impact was extraordinary. In the span of just a few years, tens of thousands of children were cut from public aid, almost all of them Black, for being “illegitimate” or because their parents were “unfit.”²⁶ Laws in Florida and Tennessee went a step further. These states not only denied public benefits, they also encouraged caseworkers to ask mothers “unfit” for receiving aid to voluntarily release their children to a relative or risk referral to juvenile court for “child neglect.”²⁷

ii. The Flemming Rule – A Faulty Foundation for Child Welfare Law

Following significant domestic and international pressure, the federal government challenged these state suitability laws in 1961, when Arthur Flemming, the Secretary of Health, Education and Welfare, issued an administrative ruling prohibiting states from excluding children from ADC eligibility based on parental “suitability.”²⁸

*“A State plan . . . may not impose an eligibility condition that would deny assistance with respect to a needy child on the basis that the home conditions in which the child lives are unsuitable, while the child continues to reside in the home. Assistance will therefore be continued during the time efforts are being made either to improve the home conditions or to make arrangements for the child elsewhere.”*²⁹

As a result of the carveout language in the rule, however, although states could no longer deny aid to children based on parental unsuitability, they could continue to deny public

Suitable Home Law, SOCIAL SERVICE REVIEW, (December 2003) (Congress explicitly excluded “farm workers and domestic workers” from coverage, two areas of employment for Black women at the time).

²⁵ See LAURA BRIGGS, *TAKING CHILDREN: A HISTORY OF AMERICAN TERROR* 36 (2021) (quoting a Mississippi state legislator who declared “when the cutting starts, [Negroes will] head for Chicago”). See also Kelly Condit-Shrestha, *Racialized Borders within the United States: A History of Foster Care, Adoption, and Child Removal in African American Communities*, US HISTORY SCENE, <https://ushistoryscene.com/article/racializedborders> (last visited April 26, 2022).

²⁶ BRIGGS, at 39.

²⁷ *Id.* at 38.

²⁸ State Letter No. 452, Bureau of Public Assistance, Social Security Administration, Department of Health, Education, and Welfare; *The Federal Role in the Federal System: The Dynamics of Growth ...*, Volumes 1-4, United States. Advisory Commission on Intergovernmental Relations page 48.

²⁹ In 1968, the Supreme Court reaffirmed the message of the Flemming Rule when it held that a parent’s welfare application could justify taking children from their families. *King v. Smith*, 392 U.S. 309 (1968).

support if the child resided elsewhere.³⁰ Using this exception, and building on examples from Tennessee and Florida, states began removing children from Black parents seeking public aid and placing them in foster care, another “arrangement,” at rapid rates. Congress unintentionally incentivized this approach when it adopted the Flemming Rule into law, and simultaneously made Social Security Act funds available to support children in foster care away from their families.³¹ Before then, foster care had not received federal funding, had been largely used as a temporary support for families seeking voluntary help, and had excluded many non-white children. After 1961, the racial identity of children in foster care transformed. Tens of thousands of Black parents lost their children and Black children lost their parents, kin and communities. The total number of children in foster care nationally increased by 67% in a year, from 163,000 in 1961 to 272,000 by 1962.³²

Organizations, such as the Child Welfare League of America pushed for judicial oversight as a safeguard to “ensure that rogue caseworkers would not remove children from their homes simply to punish poor mothers for applying for [ADC benefits] in the first place.”³³ In response, Congress amended the Social Security Act in 1962 to provide that states are permitted to remove a child from a home that is *judicially determined* to be so unsuitable as to “be contrary to the welfare of such child.”³⁴ Unfortunately, judicial oversight did not provide the sought check on the system and often led to higher levels of public authority approving child removals into foster care.³⁵ Parents and children lacked counsel to challenge such decisions, and after court review it became even harder for Black parents and children to reunify. Today, sixty-one years later, the federal child welfare architecture established in 1961 remains largely unchanged.

IV. Recognize Bias and Acknowledge Collective Responsibility for Challenging Laws that Devalue Black Families

Although many laws passed since 1961 do not have the same explicitly discriminatory underpinnings, they cannot be understood in isolation from the centuries of foundation upon which they were developed. Looking forward, legal professionals have a responsibility to untangle the child welfare field from this foundation rooted in racism by challenging laws, policies and practices that have the impact of devaluing Black parent

³⁰ See CATHERINE RYMPH, *RAISING GOVERNMENT CHILDREN: A HISTORY OF FOSTER CARE AND THE AMERICAN WELFARE STATE* 168 (2017).

³¹ 42 U.S.C. § 604(b) (1961).

³² See C. Lawrence-Webb, *African American Children in the Modern Child Welfare System: A Legacy of the Flemming Rule*, 76(1) *CHILD WELFARE* (Jan-Feb 1997) 9-30 (referred to as the “Browning of child welfare in America”). See also W. Robert Johnston, *Historical statistics on adoption in the United States, plus statistics on child population and welfare* (Aug. 5, 2017) <https://www.johnstonsarchive.net/policy/adoptionstats.html>.

³³ RYMPH, *supra* note 29, at 168.

³⁴ 42 U.S.C. § 608(a)(1); see also 42 U.S.C. § 604(b); S.Rep. No. 1589, 87th Cong., 2d Sess., 14 (1962). Under the 1962 amendments, Congress also clarified that states can terminate AFDC assistance to a child living in an unsuitable home if they provide other adequate care and assistance for the child.

³⁵ See generally, Edward V. Sparer, *AFDC Eligibility Requirements Unrelated to Need: The Impact of King v. Smith*, 1219 U. PENN L. REV. (1970), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9425&context=penn_law_review.

and child bonds. Areas where historical impact should be addressed in future discussions about legislative change, include:

- Linking Foster Care Funding with Aid Eligibility;
- Definitions of Abuse and Neglect;
- Mandatory Reporting;
- Child Removals Based on Parental Incarceration;
- Prioritizing Cultural Identity;
- Terminations of Parental Rights

Each of these areas of law are complex and require careful consideration when proposing changes. Each area also requires an understanding of the historical underpinnings, outcomes produced, and calls for change from Black children, parents, and communities. With this Resolution, the ABA calls for all consideration of changes in these areas to be grounded in those core tenets.

i. Linking Foster Care Funding with Aid Eligibility

Federal maintenance payments, which cover partial costs of children's placement in foster care, continue to be linked to AFDC eligibility criteria. Building on the Flemming Rule, maintenance payments support only children who have been "voluntarily" placed in foster care or for whom a judge has found it is "contrary to welfare" to remain at home and "efforts" have been made to support the family.³⁶ These problematic thresholds for removing a child from their family require re-examination in light of the original intentions surrounding their creation as an alternative to supporting families through public aid.

ii. Definitions of Abuse and Neglect

In 1974, Congress passed the Child Abuse Prevention and Treatment Act (CAPTA) – as "a campaign against the national problem of child abuse."³⁷ Although CAPTA was non-discriminatory on its face, its passage, just thirteen years after the unsuitability rules were prohibited and federal funding became available for child removals, reinforced discriminatory impact for Black families. For example, several CAPTA provisions revived themes of saving children from poor families based on expansive definitions of abuse and neglect that continued to invite subjective assessments about parental fitness much like the suitability laws.³⁸ In some states, definitions of neglect included basic concepts of poverty, such as a lack of adequate clothing, housing, or food. These laws did not address a parent's ability to afford such things or provide guidance on what "adequate" means.

³⁶ 42 U.S.C. § 672.

³⁷ See Kathy Barbell & Madelyn Freundlich, *Foster Care Today*, CASEY FAMILY PROGRAMS NATIONAL CENTER FOR RESOURCE FAMILY SUPPORT (2001), http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/policy-issues/foster_care_today.pdf.

³⁸ CAPTA, P.L. 93-247 defined those categories broadly as "any recent act or failure to act on the part of a parent or caretaker which results in death, serious physical or emotional harm, sexual abuse or exploitation...or [a]n act or failure to act which presents an imminent risk of serious harm."

iii. Mandatory Reporting

As passed in 1974, CAPTA also triggered an expansion of the number of professionals mandated to report abuse and neglect.³⁹ Again the outcomes have not been even. Black children are more likely to be reported for suspected maltreatment than white children, particularly by mandated reporters in the education and medical fields.⁴⁰ The data demonstrate a false assumption among reporters that Black children are at a higher risk of abuse at home than white children.⁴¹ For reports related to neglect, this may also suggest an ongoing correlation with poverty rates that are addressed through child removal rather than support to the family.⁴² Black women are also more likely than white women to be screened for drug use during pregnancy and to face legal consequences for prenatal substance exposure, including incarceration and child removal.⁴³ Under CAPTA, courts also saw an increase in allegations of “failure to protect” against mothers who experienced domestic violence.⁴⁴

iv. Parental Incarceration

In a recurrent theme from the past, parental incarceration also led to increased foster care entry in the 1970s, 80s and 90s. CAPTA called for active communication between child welfare caseworkers and local law enforcement authorities conducting criminal investigations. This call for collaboration coincided with the national launch of the “war on drugs” in the late 1970s and early 1980s, when rates of incarceration for Black men and women increased disproportionately despite evidence of no difference in the use or distribution of drugs when compared with white people in America.⁴⁵ Rates of female

³⁹ After CAPTA, reports of child maltreatment increased from 60,000 in 1974 to one million in 1980 and 2 million in 1990. Recent estimates indicate that this figure has since doubled to roughly 4.4 million annual reports. JOHN E. B. MYERS, A SHORT HISTORY OF CHILD PROTECTION IN AMERICA, 456; *Child Maltreatment 2019*, U.S. DEP’T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES, CHILD. BUREAU (2021), at 7.

⁴⁰ Alan J. Detlaff & Reiko Boyd, *Racial Disproportionality and Disparities in the Child Welfare System: Why Do They Exist, and What Can Be Done to Address Them?*, 692 THE ANNALS OF THE AM. ACAD. 253, 254 (2020) (citing Emily Putnam-Hornstein et al., *Racial and Ethnic Disparities: Population-Based Examination of Risk Factors for Involvement with Child Protective Services*, 37 CHILD ABUSE & NEGLECT 33 (2013)).

⁴¹ Elizabeth Hlavinka, *Racial Disparity Seen in Child Abuse Reporting*, MEDPAGE TODAY (2020).

⁴² See New York State Bar Association House of Delegates, Report and Recommendations of Committee on Families and the Law, RESOLUTION ADDRESSING SYSTEMIC RACISM IN THE CHILD WELFARE SYSTEM OF THE STATE OF NEW YORK, at 11 (April 2, 2022), <https://nysba.org/app/uploads/2022/03/Committee-on-Families-and-the-Law-April-2022-approved.pdf> (CAPTA’s inclusion of neglect encapsulates poverty and has perpetuated surveillance and separation of Black families based on ability to provide basic needs).

⁴³ Kathi L H Harp and Amanda M Bunting, *The Racialized Nature of Child Welfare Policies and the Social Control of Black Bodies*, 27 (2) SOC. POLIT. 258–281 (Jun. 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7372952/>

⁴⁴ See generally, Debra Whitcomb, *Children and Domestic Violence: The Prosecutor’s Response*, (2004), <https://www.ojp.gov/pdffiles1/nij/199721.pdf>; Debra Whitcomb, *Prosecutors, Kids, and Domestic Violence Cases*, 248 NATIONAL INSTITUTE OF JUSTICE JOURNAL 2-9 (March 2002). See also Dorothy Roberts, *How the Child Welfare System Polices Black Mothers*, 15 BARNARD CENTER FOR RESEARCH ON WOMEN 3, (2019) <https://sfonline.barnard.edu/unraveling-criminalizing-webs-building-police-free-futures/how-the-child-welfare-system-polices-black-mothers/>.

⁴⁵ See The Sentencing Project: *Criminal Justice Facts*, <https://www.sentencingproject.org/criminal-justice-facts/> (last visited April 16, 2022) (During the first 15 years of the war on drugs the U.S. prison population

incarceration in particular tripled during the 1980s, and 80% of all Black women who were incarcerated during that time had children living with them at the time of their arrest.⁴⁶ Although some children were able to live with their fathers or other kin, many were referred to child welfare and entered foster care when their mothers were arrested. Law enforcement referrals to child welfare remain a leading cause of foster care entry today, accounting for nearly 20% of all referrals to child protection services.⁴⁷

v. Racial Identity

Throughout the early history of federally funded foster care, social workers often prioritized children's placements in the communities where they had roots. This could include family roots, cultural roots, and ethnic or racial identities. In 1994, Congress changed this landscape in the Multi-Ethnic Placement Act (MEPA), which allows foster and adoptive parents to retain rights to express a preference for children based on race while prohibiting racial preferences on behalf of the child or birth parents in finding a foster care placement for their child. Proponents of the law advocated for it as a "color blind" approach to child placements that would prioritize timeliness of a child's placement over cultural and racial heritage considerations. In juxtaposing those two interests as an either/or, without reconciling both as important, MEPA diminished the importance of the Black child's identity and the families' rights to family integrity.⁴⁸

Overrepresentation of Black children in foster care awaiting adoption remains and MEPA's focus on diminishing the importance of racial and cultural identity in placements has led to a gap in recognizing the unique identity that Black children have or respecting their need for community and culture that is connected to their identity.⁴⁹ This contradicts well-established best practice standards for adoption.⁵⁰

tripled from 200,000 to 600,000). See also Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility* (Sept. 30, 2014) <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility/> (Although white people have been statistically found to be more likely than Black people to sell drugs, and equally likely to consume them, Black people are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possession).

⁴⁶ Roberts, *supra* note 44.

⁴⁷ Dana Weiner et al., *Chapin Hall Issue Brief: COVID-19 and Child Welfare: Using Data to Understand Trends in Maltreatment*, CHAPIN HALL AT UNIVERSITY OF CHICAGO, <https://www.chapinhall.org/wp-content/uploads/Covid-and-Child-Welfare-brief.pdf>.

⁴⁸ Specifically, the law prohibits states from making placement decisions on the basis of race, color, or national origin, and mandates the "diligent recruitment" of racially and ethnically diverse pools of prospective foster and adoptive families.

⁴⁹ See Lorelei B. Mitchell et al., *Child Welfare Reform in the United States: Findings from a Local Agency Survey*, 84 CHILD WELFARE 5, 15 (2005) (only 8% of the 97 agencies included in the 1999-2000 Local Agency Survey created new recruitment efforts following the passage of MEPA); Evan B. Donaldson *Finding Families for African American Children: The Role of Race & Law in Adoption from Foster Care*, ADOPTION INST. (2008), at 35-36, 40; *Child and Family Services Reviews Aggregate Report, Round 3: Fiscal Years 2015-2018*, ADMIN. FOR CHILD. & FAMILIES, CHILD. BUREAU (June 5, 2020), at 46, (reporting that only seventeen states received a 'strength' rating for diligently recruiting diverse foster and adoptive families).

⁵⁰ *A Stronger Foundation for America's Families: Transition 2021*, CHILD WELFARE LEAGUE OF AM. (Dec. 2020), at 61, <https://www.cwla.org/wp-content/uploads/2021/01/Transition-2021-Final.pdf> ("All children deserve to be raised in a family that respects their cultural heritage.").

In 2022, the ABA adopted Resolution M22613, establishing a presumption of child presence in all dependency proceedings.⁵¹ Hearing from court-involved children informs legal decisions and practices that respect and value a child's unique identity, including their racial, cultural, and ethnic, linguistic, disability, sexual orientation, and gender identities. Consistent with federal law, efforts should always be made to place children with kinship relatives as the first placement option. When that is not an option, priority placements with foster parents who provide a nurturing home where a child's identity can be affirmed are critical to supporting children's well-being.

vi. Terminations of Parental Rights

Welfare reform in the 1990s further cut assistance to Black families and contributed to increased use of foster care. By 1999, just a few years after welfare reform, the number of children in foster care in the United States reached an all-time high at 567,000 – an increase of more than 570% since 1950. Child welfare professionals who believed many children were already lingering in foster care for too long, instead of achieving permanency, raised concerns about the impact of welfare reform early on. Congress responded by accelerating the timeline for terminating parental rights through the Adoption and Safe Families Act of 1997 (“ASFA”). Rather than incentivize supports for families staying together or reunifying, Congress funded adoption incentives only.

Since 1997, the number of parental terminations has exceeded the number of adoptions annually, resulting in a new legal concept known as the “legal orphan” who lacks legal birth parents and adoptive parents.⁵² A majority of these “legal orphans” are Black children. The number of children who experience a termination of parental rights, many of whom are not adopted, has exploded nationally. Researchers at the National Institutes of Health recently found 1 of every 100 children living in the U.S. is likely to experience a TPR by age 18.⁵³ The rate of TPR is closer to 2 of every 100 Black children.

Many people with lived experience in foster care note that even in situations where they could not remain with their birth parents, a termination of parental rights carries greater consequences than the law recognizes. A TPR not only ends the relationship with birth parents, but often results in cutting connections to other family members, grandparents, cousins, aunts, uncles, even siblings. The premise that not all families should be kept together, and the racially disparate outcomes of the law itself reflect an undermining of

⁵¹ ABA RESOLUTION 22M613 (2022), https://www.americanbar.org/content/dam/aba/administrative/child_law/aba-resolution-613.pdf (Presumption of Youth Presence in Court).

⁵² ASFA, “*Aging Out*” and the Growth in Legal Orphans, NAT’L COALITION FOR CHILD PROTECTION REFORM (Sept. 9, 2020), at 2, available at <https://drive.google.com/file/d/1X3X9a4H6LFfKWRnSDoIDxuZb6Dm4yUdA/view>; See also *Information Memorandum Log No: ACYF-CB-IM-20-09*, U.S. DEP’T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES (Jan. 5, 2021), at 9, <http://www.cwla.org/wp-content/uploads/2021/01/ACYF-CB-IM-20-09.pdf> (“[c]hildren who enter care and have their parents’ parental rights terminated more frequently fail to discharge and stay in care longer than children whose parent’s parental rights are not terminated . . .”).

⁵³ See Wildeman, *supra* note 7.

the constitutionally protected right to family integrity for Black families that continues to reverberate throughout all the communities where TPR has grown so common.

V. Valuing Race, Culture and Identity as Part of Child and Parent Rights to Family Integrity

Addressing anti-Black systemic racism in the child welfare system, just as slavery abolitionist and Black leaders called for 150 years ago, also involves renewing our nation's commitment to upholding the integrity of Black families. Today family integrity is a well-established fundamental liberty interest under the Fourteenth Amendment. It protects the interests of parents in directing the upbringing of their children and maintaining their families free from unwarranted government intrusion.⁵⁴ The Supreme Court has referred to parental rights to family integrity as “perhaps the oldest of the fundamental liberty interests recognized.”⁵⁵ As acknowledged in ABA Resolution 19A118, rights to family integrity also extends to children.⁵⁶

The Supreme Court's framing of the right to family integrity underscores the contours of the basic rights guaranteed to all families under the Constitution. In *Meyer v. Nebraska*, the Court explained that the Fourteenth Amendment protects the right to “establish a home and bring up children,” upholding the right of parents to control the education of their children.⁵⁷ The Court later reaffirmed the “fundamental liberty interest of natural parents in the care, custody, and management of their child” in *Santosky v. Kramer*.⁵⁸ Specifically, the *Santosky* Court held that “[e]ven when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.”⁵⁹ Recent immigration cases in lower courts have expounded on family integrity as

⁵⁴ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (“Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to . . . establish a home and bring up children . . .”); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (“The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment.”); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (reaffirming the “Court’s historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment.”); *Troxel v. Granville*, 530 U.S. 57, 77 (2000) (“We have long recognized that a parent’s interests in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment.”).

⁵⁵ *Troxel* 530 U.S. at 77. While the *Troxel* Court recognized family integrity as a fundamental liberty interest, it did not clearly articulate the level of scrutiny it applied in rendering its decision. Lower courts have applied varying levels of scrutiny. For example, the Ninth Circuit has applied both strict scrutiny and rational basis review in cases asserting a family integrity claim, and the Seventh Circuit has applied the Fourth Amendment’s “reasonableness test,” in recognition that some heightened level of scrutiny is warranted.

⁵⁶ ABA RESOLUTION 19A118 (2019).

⁵⁷ *Meyer*, 262 U.S. at 399. See also *Pierce v. Soc’y of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534 (1925) (holding that laws compelling children to attend public school unreasonably interfered with the liberty interests of parents in directing their children’s education).

⁵⁸ *Santosky*, 455 U.S. at 745.

⁵⁹ *Id.* at 753.

an independent liberty interest of children, holding that forced separations at the border “deprived the children of their family integrity.”⁶⁰

Despite our highest Court recognizing this fundamental right, it remains illusory in the face of laws and policies that perpetuate systemic injustice towards Black families. Whether by design or from disparate outcomes, child welfare legislation has regularly failed to uphold the constitutional right to family integrity for Black families. Allowing the status quo to persist without such a challenge ignores the role of existing laws in the destruction and devaluation of the Black family within the child welfare system. System impacted people emphasize that the right to family integrity implicates more than the immediate nuclear family. Indeed, entire bloodlines have been impacted by this system. For example, termination of parental rights, cuts a child off from more than just their biological parents. Frequently, their connection to grandparents, aunts, uncles, cousins, and even siblings is also terminated. Too often generations of families are negatively impacted by this system. A former system-impacted youth shared that, now as a parent, she grieves her own daughter’s loss of great-grandparents, aunts, and uncles.

To address anti-Black systemic racism in child welfare, policymakers must evaluate where laws run afoul of the right to maintain one’s family and, where necessary, revise or repeal legislation with a discriminatory impact. This call has been accepted in one state already – in April 2022, the New York State Bar Association (NYSBA) passed a resolution with accompanying report recognizing systemic racism resulting from the history of slavery exists within the state’s child welfare system, impacting Black families disparately, and acknowledging the collective responsibility of “legislators, policymakers, judges and attorneys for creating, promulgating, maintaining, implementing and/or enforcing laws, policies, rulings and practices that have not adequately valued Black families and have often resulted in their unnecessary investigation and separation of families.”⁶¹

VI. Following the Lead of Black Parents, Children and Kin

No one understands the impact of the child welfare system better than those who have lived experience within this system. Accordingly, to confront the legacy of anti-Black systemic racism in child welfare, we must ground our goals by following the lead of Black families—children, parents, and kin—directly impacted by this system.⁶² We cannot expect to have meaningful changes surrounding the child welfare system without stepping aside and allowing those closest to the problem—and therefore closest to the solution—to lead in implementing change. Despite the disparate impact child welfare laws have had on Black families, Black families with lived expertise historically have not been invited to

⁶⁰ *S.R. by and through J.S.G. v. Sessions*, 330 F. Supp. 3d 731 (D. Conn. 2018); *See also W.S.R. v. Sessions*, 318 F. Supp. 3d 1116 (N.D. Ill., 2018) (stating that the constitutional interest at issue was the “child’s right to remain in the custody of his parent”).

⁶¹ New York State Bar, *supra* note 8.

⁶² *See* ABA RESOLUTION 20A115 (calling for all legal system reform efforts that affect children and youth to be led by or conducted in partnership with individuals who had experienced those systems as children and youth). *See also* Zoe Livengood, *Strategies for Engaging Youth and Families with Lived Experiences*, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES (2020), https://www.ncjfcj.org/wp-content/uploads/2020/09/NCJFCJ_Strategies_for_Engaging_PWLE_Final.pdf

the table where decisions are being made. Black families with lived experience should be encouraged and supported in taking a leading role in drafting, creating, and implementing federal child welfare legislation. This change is necessary for Black families to truly experience their right to family integrity.⁶³

Black leaders with lived experience as parents, children, and kin around the country have already established organizations to facilitate this leadership. Organizations such as Rise,⁶⁴ Movement for Family Power,⁶⁵ and Think of Us⁶⁶ are excellent examples. Each focus on the concept “nothing about us without us.” Individuals with lived experience have a wide range of perspectives and include not only parents and children, but also Black kin, foster parents, and adoptive parents. It is important to acknowledge there are conflicting perspectives on the continued viability of the child welfare system. Many people, both those with lived experience and those who work within the system, are asking, “Should we advocate for reforms or tear the child welfare system down?” Listening to the voices of those with lived experience will reaffirm that change is needed. Opinions vary as to what that change looks like, with some advocating for the elimination of all forms of foster care, and others seeking to make improvements to the system rather than dismantle it.⁶⁷

Judges and attorneys who are obligated to represent, defend, and decide the outcome for a family, no matter how egalitarian their belief system, bring bias to the courtroom. Here too, legal professionals must follow the lead of Black leaders in the child welfare system, to achieve better outcomes for children. Resources on bias correction are available, but to truly address anti-Black systemic racism, listening to and following the lead of Black leaders, is essential. An analysis of discrimination and bias in the child welfare system requires acknowledging the correlation of poverty and child welfare that is frequently discussed by Black leaders. Diversity of the bench and the legal profession

⁶³ This call for Black family leadership is not new. In 1972, two scholars released a book on racism in child welfare that concluded by calling explicitly for Black family leadership as the key to addressing disproportionality. See ANDREW BILLINGSLEY AND JEANNE M. GIOVANNONI, *CHILDREN OF THE STORM: BLACK CHILDREN AND AMERICAN CHILD WELFARE* (1972).

⁶⁴ *About Rise*, <https://www.risemagazine.org/about/>, (last visited April 26, 2022).

⁶⁵ *Movement for Family Power*, <https://www.movementforfamilypower.org/> (last visited April 26, 2022).

⁶⁶ *Think of Us*, <https://www.thinkof-us.org/>

⁶⁷ *Compare Center for the Study of Social Policy, What Does it Mean to Abolish the Child Welfare System as We Know It?* (Jun. 29, 2020) available at <https://cssp.org/2020/06/what-does-it-mean-to-abolish-the-child-welfare-system-as-we-know-it/> (Upend the system) vs AJ Ortiz, *Abolishing the Child Welfare System Would Harm Victims of Child Abuse*, CHILD USA (Jun 21, 2021) available at <https://childusa.org/abolishing-the-child-welfare-system-would-harm-victims-of-child-abuse/>. See also, Alan Dettlaff et al., *What It Means to Abolish Child Welfare as We Know it*, IMPRINT NEWS (OCT. 14, 2020) <https://imprintnews.org/race/what-means-abolish-child-welfare/48257>; Michael Fitzgerald, *Rising Voices For ‘Family Power’ Seek to Abolish the Child Welfare System*, IMPRINT NEWS (JUL. 8, 2020), <https://imprintnews.org/child-welfare-2/family-power-seeks-abolish-cps-child-welfare/45141>; Molly Schwartz, *Do We Need to Abolish Child Protective Services? Inside one parent’s five-year battle with the ‘family destruction system,’* MOTHER JONES (Dec. 10, 2020), <https://www.motherjones.com/politics/2020/12/do-we-need-to-abolish-child-protective-services/>; Kendra Hurley, *How the Pandemic Became an Unplanned Experiment in Abolishing the Child Welfare System*, THE NEWS REPUBLIC (Aug. 18, 2021), <https://newrepublic.com/article/163281/pandemic-became-unplanned-experiment-abolishing-child-welfare-system>.

is also an important tool in reducing anti-black systemic racism as it helps to incorporate a variety of approaches and experiences when interpreting and applying the law.^{68, 69}

So much of the history of denying real needs stems from public narratives that distinguish Black families from the parenting ideal embodied in the white, middle-class model traditionally supported by state and federal law.⁷⁰ By following the lead of Black families with lived experience, judges, attorneys, policy makers, and other professionals in the child welfare system can learn to help change the narrative and view the strengths of the Black family, community, and support system for what they have always been.

VII. Conclusion

Like other legal systems, child welfare has a long history of over-surveillance of and underinvestment in the lives of Black families. This Resolution urges the ABA and the legal profession to examine that history, acknowledge our role in shaping it, and begin to untangle it by following the lead of Black children, parents, and kin who have experienced child welfare and know both the potential for harm and the importance of investing in the strength of Black families as foundational to our country.

Respectfully submitted,

Ernestine Gray, Chair
Commission on Youth at Risk - August 2022

⁶⁸ *Addressing Bias in Delinquency and Child Welfare Systems*, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, (2018) <https://www.ncjfcj.org/publications/addressing-bias-in-delinquency-and-child-welfare-systems>; *ENHANCING JUSTICE: REDUCING BIAS*, (Sarah E Redfield, ed., American Bar Association Judicial Division 2017); *JUDGES' JOURNAL: BLUEPRINT FOR DIVERSITY* (American Bar Association 2016); MARY-MARGARET ANDERSON, *UNDERSTANDING IMPLICIT BIAS: AN ATTAINABLE GOAL* (2015). https://www.americanbar.org/groups/judicial/publications/judges_journal/2015/fall/understanding_implicit_bias_an_attainable_goal/

⁷⁰ Dorothy Roberts, *Race and Class in the Child Welfare System*, FRONTLINE, <https://www.pbs.org/wgbh/pages/frontline/shows/fostercare/caseworker/roberts.html>.

GENERAL INFORMATION FORM

Submitting Entity: COMMISSION ON YOUTH AT RISK
 SECTION OF LITIGATION
 COALITION ON RACIAL AND ETHNIC JUSTICE
 CRIMINAL JUSTICE SECTION
 JUDICIAL DIVISION
 SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
 SOLO, SMALL FIRM AND GENERAL PRACTICE DIVISION
 COMMISSION ON DISABILITY RIGHTS
 COMMISSION ON DOMESTIC & SEXUAL VIOLENCE
 COMMISSION ON LAW AND AGING

Submitted By: Ernestine Gray, Chair, Commission on Youth at Risk

1. Summary of the Resolution(s).

This resolution calls on Bar Associations throughout the country to educate attorneys and other legal professionals on how the experience of separating Black children from their parents in the child welfare system is intimately linked to the history of slavery in our country as well as subsequent approaches to over-surveillance of and underinvestment in Black families.⁷¹ With an understanding of this history, the Resolution also urges judges, attorneys, legislators, and other legal professionals to challenge present-day laws that have devalued Black families and resulted in the separation of Black parents from their children. Further, the Resolution urges the legal profession to recognize the inherent strength of Black families, to value Black cultural and ethnic identity tied to race, and to follow the lead of Black parents, children, and kin with lived experience in taking constructive steps to end the legacy of family separation and design a public approach to family support that best meets children and parents' needs in the future.

This policy is the natural evolution of the ABA's larger call for the legal profession to address issues of racism in our civil and criminal justice systems in America.

2. Indicate which of the ABA's Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

This resolution seeks to improve our profession (Goal 2) by encouraging attorneys and judges to recognize ongoing anti-Black systemic racism in the child welfare

⁷¹ See e.g., New York State Bar Association House of Delegates, Report and Recommendations of Committee on Families and the Law RESOLUTION ADDRESSING SYSTEMIC RACISM IN THE CHILD WELFARE SYSTEM OF THE STATE OF NEW YORK, April 2, 2022, <https://nysba.org/app/uploads/2022/03/Committee-on-Families-and-the-Law-April-2022-approved.pdf> (the NYSBA passed a resolution with an accompanying report finding the Child Welfare System "replete with systemic racism" and calling for reform).

system and ensure all legal decisions, policies, and practices, regarding child well-being are not informed by racist goals or assumptions. The resolution also seeks to eliminate bias (Goal 3) by urging courts, attorneys, judges, legislators, governmental agencies, and other policy makers to recognize Black children, parents, and kin as unique individuals with unique racial, cultural, and ethnic identities that have important strengths and needs that should be valued rather than devalued in the child welfare system.

3. Approval by Submitting Entity.

Commission on Youth at Risk – April 25, 2022
 Commission on Disability Rights – May 3, 2022
 Commission on Domestic & Sexual Violence – April 28, 2022
 Commission on Law and Aging – May 3, 2022
 Criminal Justice Section – May 2, 2022
 Section of Civil Rights and Social Justice – May 4, 2022
 Section of Litigation – May 7, 2022
 Solo, Small Firm and General Practice Division – May 17, 2022

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

Yes. We submitted a prior version of this resolution on November 16, 2021. We withdrew the prior version from consideration at Midyear upon learning it would not be calendared. Since that date, we have made extensive changes based on feedback from the Drafting Team, Rules and Calendar, and other ABA entities. We have also cut the length of the accompanying Report as requested. Following those changes, we attach the revised Resolution and Report with a request that it be calendared at Annual.

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

This Resolution builds on the existing policies and standards identified below. Existing policies examine the disproportionate representation of racial and ethnic minority children in the child welfare system, addressing bias to improve cultural competence, engaging youth in legal system reform, preserving a right to family integrity, and supporting immigrant and other minority groups. This policy focuses solely on Black families, thus goes beyond existing policies or expands upon them. This Resolution does not contradict or undermine any existing ABA policies.

See:

- ABA RESOLUTION 08A107 (2008) (Racial and Ethnic Disproportionality in Child Welfare);
- ABA RESOLUTION 03A101B (2003) (Disparate Treatment by Race and Ethnicity);
- ABA RESOLUTION 21M103A (2021) (Non-citizen Children Policy);

- ABA RESOLUTION 18A119 (2018) (Rights of Immigrant Children and Standards for Custody, Placement and Care);
- ABA RESOLUTION 11A103D (2011) (Protection of Unaccompanied and Undocumented Immigrant Children);
- ABA RESOLUTION 19A115C (2019) (Constitutionality of the Indian Child Welfare Act);
- ABA RESOLUTION 22M613 (2022) (Presumption of Youth Presence in Court);
- ABA RESOLUTION 20A115 (2020) (Engagement in Youth Legal System Reform);
- ABA RESOLUTION 19A118 (2019) (Family Integrity and Family Unity);
- ABA RESOLUTION 07A104B (2007) (LGBT Youth in Foster Care Policy);
- ABA RESOLUTION 15A112 (2015), (Conversion Therapy Policy);
- ABA RESOLUTION 21A102 (2021) (Bias Training for Legal Professionals);
- ABA RESOLUTION 20A117 (2020) (Guidelines on Remote Technology in Proceedings);
- ABA RESOLUTION 20A116G (2020) (Training on Implicit Bias);
- ABA RESOLUTION 91A10D (1991) (Examining Bias in Federal Judicial System).

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

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

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

If adopted, this ABA Resolution with Report will be shared with federal, state, local, territorial, and tribal Bar Associations and courts, as well as attorneys, judges, legislators, governmental agencies, and policymakers with connection to or involved in the child welfare system to support and engage in eliminating anti-Black systemic racism that continues to impact Black families who come into contact with the system. We will encourage courts and judges to use this policy when helping to create relevant court rules, policies and procedures.

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

Adoption of this proposed resolution would result in only minor indirect costs associated with Commission staff time devoted to the policy subject matter as part of the staff members' overall substantive responsibilities.

10. Disclosure of Interest. (If applicable) None

11. Referrals. By copy of this form, the Report with Recommendation will be referred to the following entities:

- Center for Human Rights
- Coalition on Racial and Ethnic Justice

- Commission on Disability Rights
- Commission on Domestic and Sexual Violence
- Commission on Hispanic Legal Rights and Responsibilities
- Commission on Homelessness and Poverty
- Commission on Immigration
- Commission on Race and Ethnicity in the Profession
- Commission on Sexual Orientation and Gender Identity
- Commission on Women in the Profession
- Council for Diversity in the Educational Pipeline
- Criminal Justice Section
- Division for Legal Services
- Family Law Section
- Health Law Section
- Judicial Division
- Litigation Section
- Section of Civil Rights and Social Justice
- Section of Science and Technology
- Solo, Small Firm and General Practice Division
- Special Committee on Hispanic Legal Rights and Responsibilities
- Standing Committee on Legal Aid and Indigent Defense
- Standing Committee on Gun Violence
- Young Lawyers Division

12. 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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13. 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.

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Be aware that this information will be available to anyone who views the House of Delegates agenda online.

Ernestine Gray
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EXECUTIVE SUMMARY

1. Summary of the Resolution.

This Resolution calls on Bar Associations throughout the country to educate attorneys and other legal professionals on how the experience of separating Black children from their parents in the child welfare system is intimately linked to the history of slavery in our country as well as subsequent approaches to over-surveillance of and underinvestment in Black families.⁷² With an understanding of this history, the Resolution also urges judges, attorneys, legislators, and other legal professionals to challenge present-day laws that have devalued Black families and resulted in the separation of Black parents from their children. Further, the Resolution urges the legal profession to recognize the inherent strength of Black families, to value Black cultural and ethnic identity tied to race, and to follow the lead of Black parents, children, and kin with lived experience in taking constructive steps to end the legacy of family separation and design a public approach to family support that best meets children and parents' needs in the future. This policy is the natural evolution of the ABA's larger call for the legal profession to address issues of racism in our civil and criminal justice systems in America.

2. Summary of the issue that the resolution addresses.

As described above this Resolution builds on existing ABA law policies that examine disproportionality in the child welfare system, with a directed focus on recognizing how anti-Black systemic racism has resulted in the disparate treatment and involvement of Black parents, children, and kin in the system. More specifically, the Resolution calls for recognition that the history of governmental control, surveillance, under-investment, and interference in the lives of Black families since times of slavery, has led to and continues to impact decisions to separate Black children from their families as well as decisions about what happens once a child has been removed. Without that greater context it is impossible to avoid reinforcing the same structures. Instead of focusing broadly on "racial and ethnic minorities," this Resolution focuses solely on Black families. The history and impact of anti-Black racism in America is unique and must be honored as such. Additionally, the Resolution articulates specific guidance for Bar Associations, courts, attorneys, judges, legislators, governmental agencies, and policy makers to consult, listen to, and be led by Black parents, children, and kin with lived experience to end the legacy of Black family separation that has been embedded in the child welfare system.

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

⁷² See e.g., New York State Bar Association House of Delegates, Report and Recommendations of Committee on Families and the Law RESOLUTION ADDRESSING SYSTEMIC RACISM IN THE CHILD WELFARE SYSTEM OF THE STATE OF NEW YORK, April 2, 2022, <https://nysba.org/app/uploads/2022/03/Committee-on-Families-and-the-Law-April-2022-approved.pdf> (the NYSBA passed a resolution with an accompanying report finding the Child Welfare System "replete with systemic racism" and calling for reform).

This Resolution identifies actions needed to acknowledge and take constructive steps to correct for anti-Black systemic racism. By recognizing how specific laws and policies have devalued Black families and normalized systemic racism, we can begin to actively re-evaluate and assess laws that have been informed by racist goals or assumptions, undermining Black family integrity. We can also learn from Black people with lived experience to support constructive steps to end Black family separation, which implicates the constitutional rights of parents and children to family integrity.

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

None have been identified.

AMERICAN BAR ASSOCIATION

**COMMISSION ON DOMESTIC & SEXUAL VIOLENCE
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
COMMISSION ON WOMEN IN THE PROFESSION
COMMISSION ON HOMELESSNESS AND POVERTY
NATIONAL ASSOCIATION OF WOMEN LAWYERS**

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association urges federal, state, local, territorial,
2 and tribal governments to enact laws and adopt policies designed to prevent gender-
3 based violence; and
4
- 5 FURTHER RESOLVED, That the American Bar Association urges federal, state, local,
6 territorial, and tribal governments to adopt and adequately fund evidence-based
7 strategies to promote healthy, respectful, nonviolent relationships for all and to
8 emphasize the importance of affirmative, knowing, and competent consent.

REPORT

I. Introduction

Seventy-one percent of low-income households have experienced a civil legal problem in the past year, but for households with survivors of domestic violence or sexual assault, the rate is 97%.¹ One in four low-income households has experienced six or more civil legal problems in the past year, but when domestic or sexual violence is present, that number jumps to 67%.² Nationally, one-third of state court felony defendants are charged with domestic violence or intimate partner sexual assault.³ More than half of the problems receiving legal case services from LSC-funded legal aid programs involve family and housing issues.⁴ In nearly every jurisdiction, our legal systems are operating beyond capacity to address the harms caused by gender-based violence (“GBV”).

On top of an already stressed system response, COVID-19 deeply affected access to justice and intervention in both civil and criminal courts. Courthouse closures, scheduling delays, limited services and even hearings, compounded by technical challenges and lack of access to virtual proceedings, prevented survivors from quickly obtaining legal recourse for GBV, and created a backlog that survivors will face for years to come.

Legal systems are principally designed to mitigate harm, but mitigation alone is both costly and insufficient to the task. By making modest investments in evidence-based prevention strategies, with an aim toward eliminating violence before it starts, legislatures can work to limit the flow of GBV-related social harms.

Globally, GBV is condemned as a pervasive and enduring public health and public safety concern, in addition to being a violation of fundamental human and civil rights.⁵ Victims of GBV are at higher risk for long-term health problems, including anxiety, depression, post-traumatic stress disorder, substance abuse, personality disorders, sleep disorders, and suicidal ideation.⁶ Children who are exposed to domestic violence may suffer mental

¹ Legal Services Corporation. 2017. *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans*. Prepared by NORC at the University of Chicago for Legal Services Corporation. Washington, DC, available at <https://lsc.gov/our-impact/publications/other-publications-and-reports/justice-gap-report>.

² *Id.*

³ Erica L. Smith, Matthew R. Durose & Patrick A. Langan, *State Court Processing of Domestic Violence Cases*, Bureau of Justice Statistics Special Report, February 2008, NCJ 214993, available at <https://bjs.ojp.gov/content/pub/pdf/scpdvc.pdf>.

⁴ Legal Services Corporation, *supra* note 1.

⁵ See, e.g., Phumzile Mlambo-Ngcuka, Executive Director, UN Women, Statement on Violence Against Women and Girls: The Shadow Pandemic (Apr. 6, 2020), available at <https://www.unwomen.org/en/news/stories/2020/4/statement-ed-phumzile-violence-against-women-during-pandemic>; World Health Organization, *Violence Against Women* (Mar. 9, 2021), available at <https://www.who.int/news-room/fact-sheets/detail/violence-against-women>.

⁶ Kavita Alejo, *Long-Term Physical and Mental Health Effects of Domestic Violence*, 2 THEMIS: RESEARCH J. OF JUST. STUDIES & FORENSIC SCIENCE 82, 84 (2014), available at <https://scholarworks.sjsu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1016&context=themis>.

health problems, may exhibit violence themselves, and have a higher risk of both mental and physical health problems in adulthood.⁷ The annual economic cost of GBV is approximately \$1.5 trillion, a figure that has likely increased due to a surge in domestic violence worldwide amid the COVID-19 pandemic.⁸

Given the significant physical, emotional, and economic toll GBV exacts on society, prevention is crucial. Primary prevention efforts can reduce GBV by promoting healthy, respectful, nonviolent relationships; dispelling myths about GBV; and shifting attitudes and behaviors that perpetuate violence. In the United States, more than 15 million children have been exposed to domestic violence in the home at least one time.⁹ Studies have shown that exposure to violence during childhood is highly predictive that an adult will experience violence by an intimate partner or become abusers themselves.¹⁰ The intergenerational transmission of violence underscores the importance of investing in programs that aim to promote healthy relationships and interrupt the cycle of violence. Many of these programs seek to prevent GBV from occurring in the first place and view adolescence as a critical stage for implementing those early prevention efforts.

These programs and others were assessed by the CDC's Division of Violence Prevention, resulting in *STOP SV: A Technical Package to Prevent Sexual Violence*¹¹, and *Preventing Intimate Partner Violence Across the Lifespan: A Technical Package of Programs*,

⁷ Adhia A, Drolette LM, Vander Stoep A, Valencia EJ, Kernic MA. The impact of exposure to parental intimate partner violence on adolescent precocious transitions to adulthood. *J Adolesc.* 2019 Dec;77:179-187. doi:10.1016/j.adolescence.2019.11.001. Epub 2019 Nov 21. PMID: 31760205; PMCID: PMC6914254; Kernic MA, Wolf ME, Holt VL, McKnight B, Huebner CE, Rivara FP. Behavioral problems among children whose mothers are abused by an intimate partner. *Child Abuse Negl.* 2003 Nov;27(11):1231-46. doi: 10.1016/j.chiabu.2002.12.001. PMID: 14637299; Kernic MA, Holt VL, Wolf ME, McKnight B, Huebner CE, Rivara FP. Academic and school health issues among children exposed to maternal intimate partner abuse. *Arch Pediatr Adolesc Med.* 2002 Jun;156(6):549-55. doi:10.1001/archpedi.156.6.549. PMID: 12038886. Futures Without Violence, *Children, Youth & Teens*, available at <https://www.futureswithoutviolence.org/children-youth-teens/> (last visited Nov. 16, 2021); Olivia Harrison, *The Long-Term Effects of Domestic Violence on Children*, 41 *CHILD. LEGAL RTS. J.* 63, 63 (2021), available at <https://lawcommons.luc.edu/cgi/viewcontent.cgi?article=1232&context=clrj>; U.S. Dep't of Health & Hum. Servs., Office on Women's Health, *Effects of Domestic Violence on Children*, available at <https://www.womenshealth.gov/relationships-and-safety/domestic-violence/effects-domestic-violence-children> (last updated Apr. 2, 2019).

⁸ Phumzile Mlambo-Ngcuka, Executive Director, UN Women, Statement on Violence Against Women and Girls: The Shadow Pandemic (Apr. 6, 2020), available at <https://www.unwomen.org/en/news/stories/2020/4/statement-ed-phumzile-violence-against-women-during-pandemic>.

⁹ U.S. Dep't of Health & Hum. Servs., *supra* note 7.

¹⁰ COURTNEY A. FRANKLIN, THE INTERGENERATIONAL TRANSMISSION OF INTIMATE PARTNER VIOLENCE (Crime Victims Inst.), available at http://www.crimevictimsinstitute.org/documents/CVI_Intergenerational.pdf (last visited Nov. 16, 2021).

¹¹ Basile, K.C., DeGue, S., Jones, K., Freire, K., Dills, J., Smith, S.G., Raiford, J.L. (2016). *STOP SV: A Technical Package to Prevent Sexual Violence*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, available at <https://www.cdc.gov/violenceprevention/pdf/SV-Prevention-Technical-Package.pdf>.

Policies, and Practices (“Technical Packages”).¹² Each Technical Package is a compilation of a select group of strategies

...based on the best available evidence to help communities and states sharpen their focus on prevention activities with the greatest potential to prevent [GBV] and its consequences across the lifespan. . . . Commitment, cooperation, and leadership from numerous sectors, including public health, education, justice, health care, social services, business and labor, and government can bring about the successful implementation of this package.¹³

These Technical Packages recommend a variety of strategies and approaches across sectors to prevent GBV, noting generally that “prevention has always centered on issues related to gender, and gender equality is central to...prevention.”¹⁴ The five evidence-based strategies and corresponding approaches articulated in the Technical Packages are summarized as follows:

Strategy	Approaches
1. Teach safe and healthy relationship skills to prevent violence	<ul style="list-style-type: none"> • Promoting healthy sexuality • Social-emotional learning programs for youth • Teaching healthy, safe dating and intimate relationship skills to adolescents • Healthy relationship programs for couples • Empowerment-based training
2. Promote social norms that protect against violence	<ul style="list-style-type: none"> • Mobilizing men and boys as allies in prevention • Bystander empowerment and education • Family-based programs
3. Create protective environments	<ul style="list-style-type: none"> • Improving safety and monitoring in schools • Establishing and consistently applying workplace policies to improve climate • Addressing community-level risks through environmental approaches
4. Provide opportunities to empower and support girls and women	<ul style="list-style-type: none"> • Strengthen household financial security • Strengthen work-family supports • Strengthening economic supports for women and families • Strengthening leadership and opportunities for girls

¹² Niolon, P. H., Kearns, M., Dills, J., Rambo, K., Irving, S., Armstead, T., & Gilbert, L. (2017). *Preventing Intimate Partner Violence Across the Lifespan: A Technical Package of Programs, Policies, and Practices*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, available at <https://www.cdc.gov/violenceprevention/pdf/ipv-technicalpackages.pdf>.

¹³ Id., at

¹⁴ Basile, *et al*, *supra* note 11, at 12.

5. Support survivors to increase safety and lessen harms	<ul style="list-style-type: none"> • Victim-centered services • Housing programs • First responder and civil legal protections • Patient-centered approaches • Treatment and support for survivors • Treatment for at-risk children, youth and families
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The ABA has stood in support of many of these strategies and approaches in the past;¹⁵ this resolution now focuses specifically on preventing violence by teaching safe and healthy relationship skills that emphasize affirmative, voluntary, competent consent.

II. Components of Prevention Education

The preteen and teen years are a critical time for implementing primary prevention.¹⁶ During middle school, the brain develops rapidly—in particular, emotional and social maturity, and empathy.¹⁷ At the same time, preteens and teens are learning the skills they need to build healthy, positive relationships with others.¹⁸ School environments provide a great opportunity for primary prevention because most youths attend school, and much of the social learning youths undergo takes place at school.¹⁹ Evidence suggests that early prevention programs for youth and adolescent populations reduce both perpetration and victimization, with outcomes including increases in healthy relationship skills and reductions in attitudes accepting or justifying GBV.²⁰

Such programs generally share the following traits:

A. Encourage Healthy Relationships for All, Based on Mutual Respect and Affection and Free from Violence, Coercion, and Intimidation

¹⁵ See, e.g., [2014am-112a](#), [2018am-104e](#), [2003my-106b](#), [2013am-117](#), [2015my-109b](#), [2019my-115](#), [2015my-109a](#), [2014my-109b](#), [2010my-115](#), [1996am-113](#), [2015am-109a](#), [2000am-109a](#), [2006am-110](#), [1995am-126](#), [2020am-113a](#).

¹⁶ Futures Without Violence, *The Developing Brain*, available at <https://www.futureswithoutviolence.org/the-developing-brain/> (last visited Nov. 16, 2021) [hereinafter *The Developing Brain*]. Some people may believe that education about DSVST is not applicable to youth, but such is not in keeping with current statistics. One in five teenage girls has experienced physical or sexual assault by a dating partner. African American youth are overrepresented as victims and perpetrators of teen dating violence, with 14 percent reporting that they were victims of abuse, compared to 7 percent of their white youth counterparts. J.G. Silverman et al., *Dating Violence Against Adolescent Girls and Associated Substance Use, Unhealthy Weight Control, Sexual Risk Behavior, Pregnancy and Suicidality* (Aug. 1, 2001), available at <https://jamanetwork.com/journals/jama/fullarticle/194061>; Ctrs. for Disease Control & Prevention, *Physical Dating Violence Among High School Students—United States, 2003*, 55 MMWR 532 (May 19, 2006).

¹⁷ *The Developing Brain*, *supra* note 12.

¹⁸ *Preventing Teen Dating Violence*, YOUTH.GOV, available at <https://youth.gov/youth-topics/teen-dating-violence/prevention> (last visited Nov. 16, 2021).

¹⁹ David A. Wolfe & Peter Jaffe, *Emerging Strategies in the Prevention of Domestic Violence*, 9 DOMESTIC VIOLENCE & CHILDREN 133, 138 (Winter 1999), available at http://www.ncdsv.org/images/FutureOfChildren_EmergingStrategiesInThePreventionOfDV_winter1999.pdf.

²⁰ *Id.* at 16.

Prevention efforts should include teaching skills that promote healthy relationships, including focusing on mutual respect and affection and free from violence, coercion, and intimidation. The CDC highlights the importance of programs that promote healthy, non-violent relationships, stating: “Fostering expectations for healthy relationships and teaching healthy relationship skills are critical to a primary prevention approach to the problem of IPV.”²¹

A review of thirteen healthy relationship programs across the country resulted in the identification of the following six categories of skills that can help reduce violence in relationships: (1) being able to recognize characteristics of healthy and unhealthy relationships; (2) understanding and having respect for personal boundaries; (3) emotional regulation skills; (4) communication skills; (5) sexual relationship skills; and (6) other relationship skills.²²

Programs that educate participants about healthy relationships can shape youths’ expectations and attitudes, as well as provide them with skills they will take into adulthood.

B. Teach How to Identify and Respond to Attitudes and Behaviors Contributing to Sexual and Domestic Violence

Prevention efforts should include dispelling myths about GBV and shifting social and cultural norms that perpetuate violence and sexism. GBV myths and stereotypes include the notions that domestic violence “only involves physical abuse”, GBV victims “could easily leave if they wanted to,” and that “victims are to blame for the violence.”²³ Promoting gender equality in society is a fundamental component of reducing violence. Accordingly, the CDC emphasizes the need for education that fights against harmful gender norms and social tolerance for GBV.²⁴

C. Emphasize the Importance of Affirmative, Voluntary, and Competent Consent

Prevention efforts should include education on affirmative consent and emphasis on its importance. Affirmative consent is the informed and unambiguous, conscious, voluntary, and mutual agreement to engage in sexual activity.²⁵ Education on affirmative consent includes both the types of behavior that constitute sexual assault and violence, and the characteristics of a healthy sexual relationship. Teaching affirmative consent is critical for building healthy and respectful relationships.

²¹ NIOLON ET AL., *supra* note 11, at 17.

²² RAND CORP., HEALTHY RELATIONSHIP APPROACHES TO SEXUAL ASSAULT PREVENTION 13–14 (2021), available at https://www.defenseculture.mil/Portals/90/Documents/A2S/Factors/SAPR/RAND_RR4241.pdf?ver=zwE7SKvN0qItidHgePTU6A%3D%3D.

²³ Lynn Westbrook, *Information Myths and Intimate Partner Violence: Sources, Contexts, and Consequences*, 60 J. OF THE AM. SOC’Y FOR INFO. SCI. & TECH. 826 (2009).

²⁴ NIOLON ET AL., *supra* note 11, at 15.

²⁵ SPEAK ABOUT IT, *Affirmative Consent*, available at <https://wespeakaboutit.org/affirmative-consent> (last visited Nov. 16, 2021).

Traditionally, conversations around affirmative consent have taken place at institutions of higher education. Approximately 1,400 institutions colleges and universities in the United States now include affirmative consent as part of their sexual assault policies.²⁶ However, U.S. Department of Education data revealed that in the 2017–2018 school year, there were nearly 15,000 reports of sexual violence at K–12 schools,²⁷ underscoring the need for youth and adolescents to receive sex education that includes consent and violence. Moreover, evidence indicates that sexual assault among college students is very under-reported and thus the true toll is far greater.²⁸

D. Evidence-Based and Consistent with Health and Physical Education Learning Standards

The CDC has recognized the importance of evidence-based violence prevention strategies and developed a tool to assist individuals making decisions about adopting certain programs.²⁹ The tool evaluates effectiveness on a continuum, measuring programs and practices on a scale ranging from well-supported to harmful.³⁰ Effectiveness is important because it demonstrates that the prevention strategy will benefit its participants and have both long-term and short-term preventive effects.³¹ The CDC has also provided a framework to help decision-makers evaluate programs in the area of sexual violence in particular.³²

The Society of Health and Physical Educators (SHAPE) sets the standard for health and physical education in the United States and has provided standards for national sex education, covering sexual health, consent and healthy relationships, and interpersonal violence.³³ SHAPE leaves the implementation of prevention programs to individual local

²⁶ Sandy Keenan, *Affirmative Consent: Are Students Really Asking?*, N.Y. TIMES (Aug. 2, 2015), available at <https://www.nytimes.com/2015/08/02/education/edlife/affirmative-consent-are-students-really-asking.html>

²⁷ Moriah Balingit, *Sexual Assault Reports Sharply Increased at K-12 Schools, Numbering Nearly 15,000, Education Department Data Shows*, WASH. POST (Oct. 15, 2020), available at <https://www.washingtonpost.com/education/2020/10/15/sexual-assault-k-12-schools/>.

²⁸ Chen Y, Ullman SE. Women's reporting of sexual and physical assaults to police in the national violence against women survey. *Violence Against Women*. 2010;16(3):262-279. doi:10.1177/1077801209360861; Baumer EP, Lauritsen JL. Reporting crime to the police, 1973-2005: A multivariate analysis of long-term trends in the national crime survey (NCS) and national crime victimization survey (NCVS). *Criminology*. 2010;48(1):131-185. doi:10.1111/j.1745-9125.2010.00182.x; Bosick SJ, Rennison CM, Gover AR, Dodge M. Reporting violence to the police: Predictors through the life course. *J Crim Justice*. 2012;40(6):441-451. doi:10.1016/j.jcrimjus.2012.05.001

²⁹ RICHARD W. PUDDY & NATALIE WILKINS, UNDERSTANDING EVIDENCE PART 1: BEST AVAILABLE RESEARCH EVIDENCE: A GUIDE TO THE CONTINUUM OF EVIDENCE OF EFFECTIVENESS 3–4 (2011), available at https://www.cdc.gov/violenceprevention/pdf/understanding_evidence-a.pdf.

³⁰ *Id.* at 9.

³¹ *Id.* at 12.

³² CTRS. FOR DISEASE CONTROL & PREVENTION, *Prevention Strategies*, available at <https://www.cdc.gov/violenceprevention/sexualviolence/prevention.html> (last reviewed Feb. 5, 2021).

³³ SHAPE America: Society of Health & Physical Educators, available at <https://www.shapeamerica.org/about/default.aspx> (last visited Nov. 16, 2021);

FUTURE OF SEX EDUCATION INITIATIVE, NATIONAL SEX EDUCATION STANDARDS: CORE CONTENT AND SKILLS 15 (2nd Ed., 2021), available at <https://www.shapeamerica.org/uploads/2021/standards/National-Sex-Education-Standards.pdf>.

school districts, stating that each district knows best the needs of their students and the context in which they are learning, but lays out the characteristics of effective sex education, including that it is research-based, focuses on specific behavioral outcomes, and helps students recognize the harmfulness that occurs when engaging in unhealthy practices.³⁴

III. Conclusion

Protection, prosecution, shelter, and rehabilitation are not enough to end sexual and domestic violence. For true culture change to happen, proactive education and prevention is also needed. Too often, young people don't know how to ask for and receive consent, or how to engage in healthy relationships. Access to this information is a critical part of the solution to end cycles of abuse, especially when the cycles are generational. It is particularly critical that young people receive reliable, accurate information in a digital age where harmful explicit materials are one click away.

There is no shortage of proven, evidence-based programs to help prevent abuse in schools, on teams, and in student relationships. Washington, Oklahoma, New Jersey, Oregon, California, and dozens of other states have enacted laws to promote education on healthy relationships, dating violence, consent and sexual assault, consistent with the CDC's Technical Packages for preventing domestic and sexual violence. Youth intervention is the best option for lasting, positive impact.

To grow beyond a reactive strategy to stop gender-based violence, the culture in our community that leads to violence must be confronted head-on. Quite simply, making comprehensive prevention a priority will reduce the number of future victims.

Respectfully submitted,

Andrew King-Ries
Chair, Commission on Domestic & Sexual Violence

August 2022

³⁴ *Id.* at 10, 12–13.

GENERAL INFORMATION FORM

Submitting Entity: Commission on Domestic & Sexual Violence

Submitted By: Andrew King-Ries, Chair

1. Summary of the Resolution(s).

This resolution urges governments to enact laws and adopt policies designed to prevent gender-based violence, and to adopt and fund evidence-based prevention strategies, such as those developed by the Centers for Disease Control and Prevention.

2. Indicate which of the ABA's four goals the resolution seeks to advance and provide an explanation on how it accomplishes this. (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law)

This resolution seeks to advance the Rule of Law (Goal 4) by supporting the implementation of evidence-based strategies to prevent gender-based violence.

3. Approval by Submitting Entity.

The Commission on Domestic & Sexual Violence approved this resolution and report on 10/6/2021.

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

Yes.

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

There are no existing policies that would be affected by this resolution.

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

n/a

7. Status of Legislation. (If applicable)

n/a

8. Brief explanation regarding plans for implementation of the policy, if adopted by the

House of Delegates.

If adopted, supporting entities, together with GAO, can advocate for legislative change as described.

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

None.

10. Disclosure of Interest. (If applicable)

n/a

11. Referrals.

Criminal Justice Section
 Civil Rights and Social Justice Section
 Standing Committee on Legal Aid & Indigent Defense
 National Conference of Women's Bar Associations
 National Association of Women Judges
 National Association of Women Lawyers
 Center for Human Rights
 Coalition for Racial and Ethnic Justice
 Commission on Women in the Profession
 Commission on Youth at Risk
 Commission on Homelessness & Poverty
 Commission on Immigration
 Commission on Law & Aging
 Commission on Sexual Orientation & Gender Identity
 Standing Committee on Gun Violence
 Government & Public Sector Lawyers Division
 Solo, Small Firm, & General Practice Division
 Judicial Division
 Law Student Division
 Young Lawyers Division
 Senior Lawyers Division
 Public Education Division
 Litigation Section
 Torts, Trial, and Insurance Practice Section
 Family Law Section
 Health Law Section

12. Name, telephone, email prior to the meeting

Vivian Huelgo, 202-662-8637, vivian.huelgo@americanbar.org

800

13. Name, telephone, email of presenter in the House

Andrew King-Ries, 406-214-5445, Andrew.KingRies@mso.umt.edu

EXECUTIVE SUMMARY1. Summary of the Resolution.

This resolution urges governments to enact laws and adopt policies designed to prevent gender-based violence, and to adopt and fund evidence-based prevention strategies, such as those developed by the Centers for Disease Control and Prevention.

2. Summary of the issue that the resolution addresses.

Gender-based violence is a pervasive problem around the world, impacting as many as one in three women, and causing long-term physical and mental health problems for victims and children who are exposed to violence. One strategy for ending GBV is to stop the violence before it occurs.

Primary prevention efforts reduce GBV by promoting healthy, respectful, nonviolent relationships, dispelling myths about GBV, and shifting attitudes and behaviors that perpetuate violence.

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

The proposed policy urges governments to adopt and fund evidence-based prevention strategies, such as those developed by the Centers for Disease Control and Prevention.

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

None have been identified.

AMERICAN BAR ASSOCIATION

**COMMISSION ON DOMESTIC & SEXUAL VIOLENCE
STANDING COMMITTEE ON GUN VIOLENCE
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
NATIONAL ASSOCIATION OF WOMEN LAWYERS
COMMISSION ON HOMELESSNESS AND POVERTY**

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association urges federal, state, local, territorial, and
2 tribal governments to enact legislation, adopt policies, and authorize appropriate funding to
3 close the so-called “boyfriend,” “stalking,” and “*ex parte*” loopholes in firearms laws and
4 regulations, by—

5
6 1. Prohibiting the purchase, possession, or receipt of firearms and ammunition:

7
8 a. by persons subject to protective orders issued to prevent domestic violence,
9 dating violence, or stalking, including emergency *ex parte* orders; and

10
11 b. by persons convicted of misdemeanor crimes of domestic violence, dating
12 violence, or stalking; and

13
14 2. Requiring such persons to safely relinquish prohibited firearms and ammunition to
15 law enforcement, a federally licensed firearms dealer, or a gun range for the duration
16 of the prohibition, according to the practices of the jurisdiction, including by:

17
18 a. Developing and implementing policies and protocols to ensure such persons
19 relinquish their firearms and ammunition as required by law or as ordered by
20 a court;

21
22 b. Recovering firearms and ammunition from such persons who fail to relinquish
23 them as required by law or as ordered by a court;

24
25 c. Developing laws, protocols, or policies that allow such persons to relinquish
26 firearms and ammunition without thereby admitting to being a person in
27 possession of contraband;

28
29 d. Developing and implementing policies and protocols to timely notify law
30 enforcement, courts, and the victim(s) when relinquishment, removal,
31 restoration, and attempted purchase of firearms or ammunition occurs; and
32

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- e. Developing and implementing policies and protocols to ensure the safety of the victims of such behaviors whenever relinquishment, removal, restoration, or attempted purchase of firearms and ammunition occurs.

REPORT

Case Study: Brad Gray made an explicit threat to murder his ex-girlfriend, Paige Mitchell, with a firearm. Law enforcement seized his handgun when responding to the incident leading to the conviction. However, law enforcement returned the firearm despite the conviction and the threat; they had no cause to continue holding it, because, according to federal (and state) law, since Gray and Mitchell were in a dating relationship, the perpetrator was not prohibited from possessing the firearm. Gray used the returned handgun to murder Mitchell and her teenage daughter, Kaci, before killing himself.¹

Case Study: Shalinda Gordon was a pillar of her community, mentoring and counseling young people in juvenile detention and supporting troubled children and youth. She did everything that survivors are told to do. When she experienced violence at the hands of her former boyfriend, she sought and was granted a protective order. But because they had never been married, cohabited, or shared a child in common, he was not prohibited by federal law from possessing firearms due to the protective order. He shot and killed her, then shot himself.²

I. INTRODUCTION

Firearms Possession and Lethality

Women in the U.S. are killed by intimate partners and stalkers at alarming rates: 1 in 3 female murder victims and 1 in 20 male murder victims are killed by intimate partners.³ And firearms play a key role in turning abuse into murder: Domestic violence incidents involving firearms are twelve times more likely to result in death than incidents involving other weapons or bodily force.⁴ Likewise, more than half of women murdered with guns are killed by family members or intimate partners.⁵

¹ Taylor, S. (2019, February 14). Wrongful death lawsuit foiled in Moundville case. *Tuscaloosaneews.com*. <https://www.tuscaloosaneews.com/news/20190214/wrongful-death-lawsuit-filed-in-moundville-case>

² Abel, A. (2018, December 28). Friends remember Nashville mother, mentor killed in deadly shooting. *Fox 17, WZTV Nashville*. <https://fox17.com/news/local/friends-remember-nashville-mother-mentor-killed-in-deadly-shooting>

³ Catalano S, Smith E, Snyder H, Rand M. *Selected findings: female victims of violence*. Washington, DC: US Department of Justice, Bureau of Justice Statistics;2009. Available at <https://www.bjs.gov/content/pub/pdf/fvv.pdf>; Bridges, F. S., Tatum, K. M., & Kunselman, J. C. (2008). Domestic violence statutes and rates of intimate partner and family homicide: A research note. *Criminal Justice Policy Review*, 19(1), 117-130.

⁴ Saltzman, L. E., Mercy, J. A., O'Carroll, P. W., Rosenberg, M. L., & Rhodes, P. H. (1992). Weapon involvement and injury outcomes in family and intimate assaults. *JAMA*, 267(22), 3043-3047; Campbell, Jacquelyn C et al. "Risk factors for femicide in abusive relationships: results from a multisite case control study," *Am J Public Health*. 2003 July; 93(7): 1089–1097. Available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447915/>

⁵ Campbell, Jacquelyn C et al. "Risk factors for femicide in abusive relationships: results from a multisite case control study," *Am J Public Health*. 2003 July; 93(7): 1089–1097. Available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447915/>

Female intimate partners are more likely to be murdered with a firearm than all other means combined,⁶ and even when a firearm is not used directly against the victim, an abuser's mere possession of a firearm correlates with increased severity of abuse.⁷ The risk is not limited to the victim: 44% of mass shootings between 2008 and 2013 involved abusive intimate partners.⁸

Intimate partner violence and stalking are deeply correlated: 76% of intimate partner femicide victims have been stalked by their intimate partner, and 54% of femicide victims reported stalking to police before they were killed by their stalkers.⁹ Moreover, 1 in 6 women and 1 in 19 men have experienced stalking victimization which made them feel "very fearful" or believe that they or someone close to them would be harmed or killed.¹⁰

Current Federal Law

Federal law prohibits purchase and possession of a firearm by any person who has been convicted of a qualifying misdemeanor crime of domestic violence ("MCDV"), or is subject to a qualifying domestic violence protection order ("PO").¹¹ Between November 30, 1998, and September 30, 2021, domestic violence was the second-most frequent cause for NICS denial of a firearms permit. Only felony convictions exceeded the domestic violence prohibitors.¹²

The MCDV prohibition includes the following requirements:

- The misdemeanor is a crime under state, tribal or federal law.
- The crime for which the offender was convicted contains one of the following elements: the use or attempted use of physical force or the threatened use of a deadly weapon.
- The defendant was represented by counsel or knowingly and intelligently waived the right to counsel.

⁶ The Violence Policy Center, "When Men Murder Women: An Analysis of 2010 Homicide Data, Females Murdered by Males in Single Victim/Single Offender Incidents" September 2012. Available at <http://www.vpc.org/studies/wmmw2012.pdf>

⁷ Zeoli, A. M., Malinski, R., & Turchan, B. (2016). Risks and targeted interventions: Firearms in intimate partner violence. *Epidemiologic Reviews*, 38(1), 125-139. doi: 10.1093/epirev/mxv007.

⁸ Everytown for Gun Safety (2014). *Guns and violence against women: America's uniquely lethal domestic violence problem*. Retrieved from <http://everytown.org/documents/2014/10/gun-laws-and-violence-against-women.pdf>.

⁹ McFarlane, J. M., Campbell, J. C., Wilt, S., Sachs, C. J., Ulrich, Y., & Xu, X. (1999). "Stalking and intimate partner femicide." *Homicide Studies*, 3(4), 300-316. Available at <https://jhu.pure.elsevier.com/en/publications/stalking-and-intimate-partner-femicide-4>

¹⁰ Black, M.C., Basile, K.C., Breiding, M.J., Smith, S.G., Walters, M.L., Merrick, M.T., Chen, J., & Stevens, M.R. (2011). "The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report." Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention. Available at https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf

¹¹ 18 U.S.C. § 922(d)(8),(g)(8).

¹² Federal Bureau of Investigation. (2021). *Federal denials: Reason why the NICS Section denies, November 30, 1998 – September 30, 2021*. https://www.fbi.gov/file-repository/federal_denials.pdf/view

- In jurisdictions where the defendant was entitled to a jury trial, the case was tried by a jury, or the defendant knowingly and intelligently waived the right to a jury trial by guilty plea or otherwise.
- The misdemeanor must have been committed by a person who, at the time of commission of the crime, was a current or former spouse, parent, or guardian of the victim, or was a parent of a child of the victim, or had cohabited or formerly cohabited with the victim as a spouse, parent, or guardian, or was similarly situated to a spouse, parent, or guardian of the victim.
- The prohibition is permanent unless the defendant has had the conviction set aside or expunged, was pardoned, or had civil rights restored (i.e., the right to sit on jury, the right to vote, and the right to hold public office).

The PO prohibition includes the following requirements:

- The order was issued after a hearing, of which the offender received actual notice, and at which such person had an opportunity to participate;
- The order restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
- The order includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury.

Gaps in Federal Law

Fifteen years ago, recognizing that dating abusers pose the same danger to their victims as spousal abusers do, Congress updated the federal crime of domestic violence to include dating partners.¹³ Unfortunately, Congress has yet to make the corresponding update in the firearms code. There, federal law defines “intimate partner” to include spouses, former spouses, individuals who share a child in common, and individuals who cohabitate or have cohabited.¹⁴ Importantly, it does not include dating partners or stalkers who do not live with their victim or share children in common with them.

These gaps in federal law are known as the “boyfriend loophole” and the “stalking loophole”. This resolution urges closing these loopholes by adding dating partners and

¹³ 18 USC 2261.

¹⁴ 18 U.S.C. § 921(a)(32).

stalkers to the definitions of ‘intimate partner’¹⁵ and ‘misdemeanor crime of domestic violence’¹⁶ to bring those definitions into the 21st century.

While the details of state laws vary, over half of states¹⁷ do not have a final domestic violence protective order firearms prohibitor (although some allow judges to prohibit possession at their discretion). Eighteen states¹⁸ do not have a misdemeanor crime of domestic violence firearms prohibitor, and two states¹⁹ have conditional prohibitors. The federal law must also be updated to ensure equal protections for all gender-based violence (“GBV”) victims nationwide.

Gaps in Policies and Procedures

Many people who are legally prohibited from owning guns can purchase or otherwise obtain them, often due to gaps in policy and procedure. Local records often do not contain sufficient detail to flag offenders, and local and state records are not universally uploaded to federal databases. Offenders can purchase firearms at gun shows or from private sellers, thereby bypassing the background check system altogether.

Systems are also critically under-resourced: in 2013 and 2014, 20% of firearm permit denials for misdemeanor crimes of domestic violence were issued *after* the prohibited abuser had taken possession of the firearm, because the background check was unable to be completed within 72 hours.²⁰ Further, approximately 32% of all federal firearm permit denials issued after 72 hours were related to domestic violence.²¹

II. CLOSING THE LOOPHOLES

Data shows that most incidents of intimate partner violence were between non-married individuals, and over half of all intimate partner homicides are perpetrated by dating partners.²² The risks of dating violence skews young: 25% of homicides of adolescent girls between the ages of 11 and 18 are committed by intimate partners. The majority of these are committed using firearms.²³

One study noted that “relying on marriage, cohabitation, and childbearing as criteria for who should be subject to domestic violence firearms restrictions means that a growing portion of the population is not protected by federal policy designed to keep guns out of

¹⁵ 18 USC 921(a)(32).

¹⁶ 18 USC 921(a)(33).

¹⁷ AK, AZ, AR, DC, GA, ID, IN, KS, KY, MI, MS, MO, MT, NE, NV, NM, NC, ND, OH, OK, PA, SC, SD, VT, WY.

¹⁸ AK, AR, FL, GA, ID, KS, KY, MI, MO, MS, NH, NM, NY, NC, ND, OH, OK, VA, WI, WY, TN

¹⁹ MD, ND

²⁰ Brooks, C., Frandsen, R.J., Karberg, J.C., and Lambing, B. (October 2021, NCJ 301318) *Background Checks for Firearm Transfers, 2018* Retrieved from <https://bjs.ojp.gov/content/pub/pdf/bcft18.pdf>.

²¹ Ibid.

²² Sorenson SB, & Spear D. (2018). New data on intimate partner violence and intimate relationships: Implications for gun laws and federal data collection. *Preventive Medicine*.

²³ Adhia, A., Kernic, M. A., & Hemenway, D. (2019). Intimate partner homicide of adolescents. *Journal of the American Medical Association Pediatrics*. doi:10.1001/jamapediatrics.2019.0621

the hands of abusers.”²⁴ Another study found that when a domestic violence protective order covers dating partners, there is a 13% reduction in intimate partner homicide and a 16% reduction in firearm intimate partner homicide.²⁵

Americans who experience stalking are at least 200 times more likely to be murdered than Americans who are not stalked.²⁶ 76% of women murdered by intimate partners and 85% of women who survived murder attempts were stalked first.²⁷

Firearms are the weapons of choice for homicidal abusers. Most intimate partner homicides are committed using firearms – more than every other means combined.²⁸

- In 2020, 60% of intimate partner homicides were committed by dating partners.²⁹
- Most intimate partner violence is committed by dating partners,³⁰ and 80% of domestic violence calls to law enforcement involve dating partners.³¹
- A male abuser’s access to a firearm increases the risk of intimate partner femicide by 1,000%.³²
- Between 1994 when the first domestic violence prohibitor was passed into federal law in the Violence Against Women Act and 2020, annual spousal homicides have decreased by more than 50%. In this same time period, annual homicides of dating partner, who are not protected by federal law, have only decreased by 5%.³³

²⁴ *Id.*

²⁵ Zeoli AM, McCourt A, Buggs S, Frattaroli S, Lilley D, & Webster DW. (2018). Analysis of the strength of legal firearms restrictions for perpetrators of domestic violence and their associations with intimate partner homicide. *American Journal of Epidemiology*.

²⁶ Meloy, J. R. (1999). Stalking: An old behavior, a new crime. *Forensic Psychiatry*, 22(1), 85-99.

²⁷ McFarlane, J. M., Campbell, J. C., Wilt, S., Sachs, C. J., Ulrich, Y. & Xu, X. (1999). Stalking and intimate partner femicide. *Homicide Studies*, 3(4), 300-316.

²⁸ Violence Policy Center (2020). *When men murder women: An analysis of 2018 homicide data*. <http://www.vpc.org/studies/wmmw2020.pdf>.

²⁹ Federal Bureau of Investigation. (2021). *Expanded homicide data*. Crime Data Explorer. <https://crime-data-explorer.app.cloud.gov/pages/explorer/crime/shr>.

³⁰ Truman, J.L. and Morgan, R.E. (2014). *Nonfatal domestic violence: 2003-2012*. U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics. <https://www.bjs.gov/content/pub/pdf/ndv0312.pdf>.

³¹ Sorenson, S. B. & Spear, D. (2018). New data on intimate partner violence and intimate relationships: Implications for gun laws and federal data collection. *Preventive Medicine*, 107, 103-108. <https://doi.org/10.1016/j.ypmed.2018.01.005>

³² Spencer, C. M. & Stith, S. M. (2020). Risk factors for male perpetration and female victimization of intimate partner homicide: A meta-analysis. *Trauma, Violence, & Abuse*, 21(3), 527-540. DOI: 10.1177/1524838018781101.

³³ Federal Bureau of Investigation. (2021). *Expanded homicide data*. Crime Data Explorer. <https://crime-data-explorer.app.cloud.gov/pages/explorer/crime/shr>

- While intimate partner homicides using all other methods are decreasing, the overall rate is increasing, driven by an increase in firearm homicides.³⁴
- Almost 10% of Americans experience nonfatal intimate partner violence with a firearm, including 13.6% of women. Of Americans experiencing nonfatal intimate partner violence with a firearm, 43% reported being injured.³⁵
- States that prohibit both intimate partners as defined by federal law and dating abusers from possessing firearms have a 10% lower rate of intimate partner homicide.³⁶

Emergency CPO prohibitor

Federal law does not prohibit purchase and possession of firearms by persons subject to temporary *ex parte* domestic violence protective orders. A ten-city study found 1/5 of homicide victims with temporary protective orders were murdered within two days of obtaining the order; 1/3 were murdered within a month.³⁷

A 2017 study noted that “[a]lthough a woman's risk of homicide is highest when she is trying to end the relationship, most state laws regarding restraining orders are consistent with federal law, which limits the prohibitions to only certain domestic violence restraining orders and emergency orders are not among them.”³⁸ Only 22 states prohibit or may prohibit purchase and/or possession by persons subject to temporary *ex parte* domestic violence protective orders outright or after certain conditions are met.³⁹

Evidence shows that policies that prohibit firearm purchase and possession by persons subject to domestic violence protective orders are effective. One study found that when state laws prevented individuals under domestic violence protective orders from accessing firearms, there was a 25 percent reduction in the risk of intimate partner homicide by firearm.⁴⁰ Another study found that when states had firearm prohibitions for

³⁴ Fridel, E. E. & Fox, J. A. (2019). Gender differences in patterns and trends in U.S. homicide, 1976-2017. *Violence and Gender*, 6(1), 27-36. doi: 10.1089/vio.2019.0005

³⁵ Adhia, A., Lyons, V. H., Moe, C. A., Rowhani-Rahbar, A., & Rivara, F. P. (in press). Nonfatal use of firearms in intimate partner violence: Result of a national survey. *Preventive Medicine*. <https://doi.org/10.1016/j.ypmed.2021.106500>

³⁶ Zeoli, A. M., McCourt, A., Buggs, S., Frattaroli, S., Lilley, D., & Webster, D. W. (2017). Analysis of the strength of legal firearms restrictions for perpetrators of domestic violence and their association with intimate partner homicide. *American Journal of Epidemiology*. doi: 10.1093/aje/kwx362

³⁷ Vitti, K. A. & Sorenson, S. B. (2008). Restraining orders among victims of intimate partner homicide. *Injury Prevention*, 14(1), 191-195.

³⁸ Sorenson S. B. (2017). Guns in Intimate Partner Violence: Comparing Incidents by Type of Weapon. *Journal of women's health* (2002), 26(3), 249–258. doi:10.1089/jwh.2016.5832

³⁹ Giffords Law Center. Domestic Violence and Firearms. <https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/domestic-violence-firearms/>

⁴⁰ Zeoli AM, & Webster DW. (2010). Effects of domestic violence policies, alcohol taxes and police staffing levels on intimate partner homicide in large US cities. *Injury Prevention*.

temporary *ex parte* domestic violence protective orders there was a 13% decrease in intimate partner homicide and a 17% decrease in firearm intimate partner homicide.⁴¹

Safeguards

The scope of historically proposed legislation to close the boyfriend and stalking loopholes is much narrower than is often recognized. These are small, discrete changes that protect victims of dating violence and stalking from armed abusers, just as victims of domestic violence are protected. Specifically, closing these loopholes does not:

- *Create a new firearms prohibitor:* Closing the boyfriend and stalking loopholes ensures that existing firearms restrictions apply to all domestic abusers. It does not create a new category of people who are restricted from possessing firearms.
- *Restrict firearm access based on an accusation or otherwise violate due process:* The domestic violence prohibitors require a court adjudication, and adding dating and stalking partners does not change that. Recent legislative proposals have also required that notice and opportunity to be heard must be provided before an *ex parte* order can trigger the protection order prohibitor.
- *Apply retroactively:* Closing the loopholes does not impose a criminal punishment based on conduct that occurred before the loophole was closed. The penalty would accrue to adjudicated abusers who illegally possesses a firearm after the loophole is closed, not to abusers who legally possess firearms before the loophole is closed. Federal courts have twice ruled that firearms prohibitors do not violate the *ex post facto* clause of the Constitution.⁴² None of the prohibitors is retroactive, and this proposed definition change to an existing prohibitor does not change that.
- *Permanently restrict gun rights:* In the case of a final protective order, the restriction expires when the protective order expires. In the case of a misdemeanor conviction, adjudicated abusers can have their gun rights restored by having their records expunged or set aside, obtaining a pardon, or having their civil rights restored.
- *Violate the 2nd Amendment:* The Supreme Court ruled, in an opinion authored by Associate Justice Antonin Scalia, that the right to possess firearms is not unlimited, and the government can restrict firearms access by dangerous people.⁴³ Moreover, the Supreme Court has thrice heard challenges to the existing domestic violence prohibitors, and they have upheld the prohibitors in each case.⁴⁴ Adding dating

⁴¹ Zeoli AM, McCourt A, Buggs S, Frattaroli S, Lilley D, & Webster DW. (2018). Analysis of the strength of legal firearms restrictions for perpetrators of domestic violence and their associations with intimate partner homicide. *American Journal of Epidemiology*.

⁴² *United States v. Brady*, 26 F.3d 282 (2d Cir.), cert. denied, 115 S.Ct. 246 (1994)(denying *ex post facto* challenge to a 922(g)(1) conviction) and *United States v. Waters*, 23 F.3d 29 (2d Cir. 1994)(*ex post facto* based challenge to a 922(g)(4) conviction)

⁴³ *District of Columbia v. Heller* (554 U.S. 570 (2008)).

⁴⁴ *United States v. Hayes* (555 U.S. 415 (2009)); *United States v. Castleman* (134 S. Ct. 1405 (2014)); *Voisine v. United States* (136 S.Ct. 2272 (2016)).

partners and stalking to the existing prohibitors does not impact their constitutionality.

Regarding the inclusion of emergency orders of protection, courts have consistently upheld temporary *ex parte* domestic violence protective orders against due process challenges.⁴⁵ In *Mathews v. Eldridge*, the Supreme Court found action prior to notice and hearing to be constitutional where sufficient safeguards are provided. To determine what safeguards must be provided, the court must consider three factors: (1) the private interest that will be affected, (2) the risk of an erroneous deprivation under existing procedures and the probable value of additional procedures, and (3) the government's interests, including the burdens imposed by additional procedural requirements.⁴⁶

The United States District Court for the Western District of Wisconsin in *Blazel v. Bradley* held that a Wisconsin law allowing victims of domestic abuse to seek *ex parte* restraining orders against their abusers was constitutional and satisfied due process requirements.⁴⁷ First the *Blazel* court considered the test articulated in *Mathews*, but found that the factors failed to provide “substantial guidance.” Thus, for further guidance on erroneous deprivation, the *Blazel* court considered a line of Supreme Court cases reviewing state statutes allowing repossession of property or garnishment without prior notice and hearing. These creditor repossession cases concluded that due process requires either a pre-deprivation hearing or a minimum of four procedural safeguards: (1) participation by a judicial officer, (2) a prompt post-deprivation hearing, (3) verified petitions or affidavits containing detailed allegations based on personal knowledge, and (4) risk of immediate and irreparable harm. The *Blazel* court found that the procedure under Wisconsin law included these four procedural safeguards.

III. REQUIRING RELINQUISHMENT

Federal firearm statutes and state court orders can be potent tools for protecting victims of GBV from further harm and holding dangerous offenders accountable. Effective enforcement of firearm prohibitions, however, is no simple task. A 2010 study found that only 12% of prohibited respondents to domestic violence protective orders in New York and Los Angeles who possessed firearms relinquished those firearms or had them recovered.⁴⁸

⁴⁵ See e.g., *Nollet v. Justices of Trial Court of Com. of Mass.*, 83 F. Supp. 2d 204 (D. Mass. 2000) *aff'd sub nom. Nollet v. Justices of Trial Court of Com. of Massachusetts*, 248 F.3d 1127 (1st Cir. 2000); *Pendleton v. Minichino*, 506673, 1992 WL 75920 (Conn. Super. Ct. Apr. 3, 1992); *Hamilton ex rel. Lethem v. Lethem*, 126 Haw. 294, 270 P.3d 1024 (2012) (judgment vacated on other grounds); *State v. Poole*, 745 S.E.2d 26 (N.C. Ct. App.) *writ denied, review denied, appeal dismissed*, 749 S.E.2d 885 (N.C. 2013)

⁴⁶ *Mathews v. Eldridge*, 424 U.S. 319 (1976).

⁴⁷ *Blazel v. Bradley*, 698 F. Supp. 756 (W.D. Wis. 1988).

⁴⁸ Webster, D. W., Frattaroli, S., Vernick, J. S., O'Sullivan, C., Roehl, J., & Campbell, J. (2010). Women with protective orders report failure to remove firearms from their abusive partners: Results from an exploratory study. *Journal of Women's Health*, 19(1), 93 – 98. doi: 10.1089/jwh.2007.0530

Though people may be prosecuted and incarcerated for illegally retaining their firearms after a criminal conviction or civil protection order is issued, federal law provides no standard mechanism to proactively ensure such individuals relinquish their firearms.

A. Develop Policies and Protocols for Relinquishment and Recovery

Successful prosecutions and seizure actions often require close collaboration among officials at the multiple levels of government. In many instances, information and evidence indicating a violation of the federal prohibitions may be known only to local or tribal officials, while their federal counterparts, who may have the exclusive authority to take action under the federal laws, remain unaware of the federal offense.

By establishing policies and procedures for addressing GBV-related firearm offenses, including improving communication and information sharing among relevant agencies at all levels of government, communities can take full advantage of available tools to protect victims and hold offenders accountable.

Cross-Deputization

One approach that has met with success is the cross-deputization of prosecutors and/or law enforcement officers as federal prosecutors/officers. A single person assuming both roles is ideally positioned to identify cases for further investigation, to investigate the cases or to ask others to investigate them, and to decide (or make appropriate recommendations about) whether to pursue a prosecution at the state/tribal/territorial level or in federal court.

This approach was recently codified in the Violence Against Women Act Reauthorization Act of 2022. The Act authorizes the Attorney General to deputize Special Assistant US Attorneys to enforce federal domestic violence firearms prohibitors or to assist the U.S. Attorneys' offices in prosecuting persons who have violated federal domestic violence firearms prohibitions. It also authorizes ATF to deputize local law enforcement to seize illegally held firearms in coordination with ATF.⁴⁹

Cross-deputization has been a key component of the U.S. Department of Justice's (U.S. DOJ) Tribal Special Assistant U.S. Attorney (SAUSA) program. Under the program, tribal prosecutors are cross-deputized as SAUSAs and therefore are able to prosecute crimes in both tribal court and federal court, as appropriate. In 2012, the U.S. DOJ's Office on Violence Against Women (OVW) established the Violence Against Women Tribal SAUSA Pilot Project to increase the use of tribal SAUSAs in cases involving violence against Native women. OVW granted awards to four tribes in Nebraska, New Mexico, Montana, North Dakota, and South Dakota to fund cross-designated tribal prosecutors. The goal of the Tribal SAUSA Pilot Project was "to increase the likelihood that every viable criminal offense is prosecuted in Tribal court, federal court or both. The program enabled Tribal prosecutors to bring violence against women cases in federal court and to serve as co-counsel with federal prosecutors on felony investigations and prosecutions of offenses

⁴⁹ Violence Against Women Act Reauthorization Act of 2022 (Division W of Public Law No: 117-103; 136 Stat. 49)

arising out of their respective Tribal communities.” SAUSAs under the project have brought several successful federal prosecutions for firearms-related domestic violence crimes that occurred on tribal lands.

Communities developing a coordinated approach seem to have the best success in combating these crimes. Creation of formal lines of communication and information-sharing among participants at all levels of government is critical. This may include either formal or informal agreements that delineate the various participants’ roles and responsibilities and establish mechanisms for making and responding to referrals for investigation by federal officials.

Compliance monitoring

Communities around the country have implemented compliance monitoring procedures that help courts and others to detect non-compliance with firearm prohibitions and surrender provisions without requiring a significant outlay of resources and without placing the burden on the victim to notify authorities or the court of a respondent’s failure to comply with orders.

Communities should consider several potential approaches to establishing compliance monitoring mechanisms and to adopt those strategies that are best suited to the governing legal standards and to the procedures and other characteristics of their legal systems. For instance, in some settings the use of compliance review hearings may be the best use of the court’s time and other resources, whereas in other communities a more form-intensive process with direct communication from relevant non-court agencies may be more appropriate. In designing their own process for surrender/seizure of firearms and for monitoring compliance, communities should consider adopting the following elements:

- Courts should establish the foundation for an effective process by issuing orders to surrender firearms (or use supplemental forms) that use clear and specific terms, including as to the exact firearms involved, the location of the firearms, and where, when, and how to surrender firearms to the receiving agency
- Defendants should be provided with an instruction sheet, developed in collaboration with law enforcement, for the surrender process, including information regarding:
 - Deadline to surrender
 - Where to surrender
 - How to surrender
 - Type of proof required.
- Forms should be used to facilitate and monitor compliance with the surrender process, including for example a defendant/respondent’s affidavit of firearms possession or non-possession; receipt or affidavit of surrender of firearms; forms returned to court by receiving law enforcement agency indicating compliance or non-compliance, etc.

- Relevant stakeholders (courts, law enforcement, prosecutors, probation, defense attorneys, victim advocates) should work together to create a collaborative mechanism to ensure that defendants comply with orders to surrender firearms.
- The compliance review process should include effective means to alert a court of non-compliance; some alternatives include:
 - Direct communication between accepting agency and court
 - Court sets hearing, cancelled if proof of compliance received
 - Defendant required to provide receipt or other proof of compliance.
- An effective mechanism should be in place to address non-compliance, as authorized by law; some alternatives include:
 - Issuance of search and/or arrest warrant
 - Revocation of probation
 - Violation charged by prosecutor.
- Agencies involved in surrender process should designate dedicated personnel to the task.
- A protocol for alerting a victim as to the status of surrender process should be in place (including notice of failure to surrender and any subsequent court hearings/steps taken).
- Where prosecutors charge for violations of orders to surrender, a mechanism should be established for the prosecutor's office to learn about the violations (e.g., from law enforcement, probation, victims/advocates).
- Where surrender of license/permits has been ordered, the relevant state department should be involved in the development and implementation of a compliance-review process.

Storage of Firearms

Ideally, any firearms seized from or surrendered by prohibited individuals should be stored under control of a designated law enforcement agency.

Some communities encounter challenges related to the proper storage and maintenance of seized and surrendered firearms, including a lack of adequate storage space and the need to store what may be very valuable firearms in a climate-controlled environment.

To overcome these obstacles, communities have pursued a range of creative strategies, including:

- Using existing, but under-utilized or capacious storage facilities, including National Guard armories, shooting ranges, etc.

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- Entering into contracts with federally licensed firearms dealers to store and maintain firearms, with fees passed on to the prohibited individuals.
- Allowing law enforcement agencies themselves to charge a fee for storage.
- Granting immunity to law enforcement agencies storing firearms from liability for damage to stored firearms (absent recklessness, gross negligence, or intentional misconduct).

No matter what storage method is employed by a community, the responsible agencies should implement a protocol for release of firearms to the prohibited person or an eligible third-party, including background checks and other safeguards.

B. 5TH Amendment (surrender without admitting possession)

The 5th Amendment provides that a person shall not “...be compelled in any criminal case to be a witness against himself...”⁵⁰ States have codified analogous versions of this protection. This privilege extends to persons compelled to provide evidence of a testimonial or communicative nature.⁵¹

Various jurisdictions have been faced with the issue of whether a prohibited person's surrender of their firearm is privileged under the 5th Amendment. The New York State Court of Appeals addressed this issue in *People v. Havrish*. There, a defendant was charged with acts of violence in connection to a domestic violence incident, and an order of protection was issued requiring the defendant to surrender any and all firearms owned or possessed. The defendant relinquished firearms to law enforcement but advised that the ex-wife had one of the handguns. Defendant's ex-wife denied possession, plus asserted her belief that defendant still had the handgun, and it was not licensed. Ultimately defendant notified law enforcement where the handgun was located, and they recovered it from defendant's living room. Defendant was charged with criminal possession of a weapon. The New York State Court of Appeals ruled the act of producing the handgun was (1) sufficiently testimonial because the act of production revealed that he knowingly possessed the weapon, and (2) incriminating because the defendant essentially committed every element of the possession offense in front of law enforcement.⁵²

Some states have accounted for 5th Amendment concerns raised by prohibited persons. These states have codified safeguards that weigh a prohibited person's 5th Amendment rights and the government's interest in ensuring the safety of victims. California law specifically provides for grant use immunity for relinquishing the firearm or ammunition if the prohibited person declines to relinquish their firearm based on their 5th Amendment

⁵⁰ U.S. Consti. Amend. V. (see also - https://www.law.cornell.edu/nyctap/I07_0043.htm)

⁵¹ *Schmerber v. California*, 384 U.S. 757 (1966) (see also - https://www.law.cornell.edu/nyctap/I07_0043.htm)

⁵² https://www.law.cornell.edu/nyctap/I07_0043.htm

right⁵³. Alternatively, Wisconsin law places a 48-hour time limit for the prohibited person to surrender their firearm. In the 48-hour time period, the protective order shall be stayed for this specific purpose.⁵⁴

The main goal is to remove firearms from prohibited persons and ensure victims' safety. To overcome the self-incrimination obstacle, communities can adopt the following strategies:

- Establish legal protections against self-incrimination, such as use and derivative use immunity, to persons complying with a court order.
- Institute a grace period that stays only the surrender/relinquish provision of a protective order for a specific period of time allowing the person to comply. The other provisions of the order, however, should not be stayed.

C. Notice

Attempted purchase of a firearm by a GBV perpetrator is often a sign of potentially lethal escalation of violence, and local law enforcement needs to be informed in order to take the necessary steps to protect victims and survivors.

The NICS Denial Notification Act of 2022, passed with the Violence Against Women Act and signed into law in March 2022, requires notification of state and local law enforcement when an abuser fails a firearms background check, and requires notification of state, tribal, and local law enforcement when an abuser obtains a firearm via default proceed and is then determined to be a prohibited person.⁵⁵

However, law enforcement are not the only system players who need to be aware of a prohibited person's attempted illegal purchase. Victims must also receive notice, so they can plan for their own safety, and courts responsible for issuing a prohibitive order must also be made aware of an attempt to violate that order. Adding victims and courts to the NICS Denial Notification Act will close a significant loophole in what is otherwise an important step forward.

D. Safety

Finally, recognizing that both removal and restoration of prohibited firearms and ammunition come with a heightened risk of violence, communities must establish policies and protocols to ensure that the victim is not only notified, but has the necessary resources to keep themselves and their family safe. Notice should be accompanied by firearm-

⁵³ Cal. Fam. Code 6389(d) <http://efsgv.org/wp-content/uploads/2016/02/Removal-Report-Updated-2-11-16.pdf> (see pages 42-45, article from Prosecutors Against Gun Violence))

⁵⁴ Wis. Stat. Ann. § 813.1285(1g)(a)-(c); Wis. Stat. Ann. § 813.1285(2)(a); <http://efsgv.org/wp-content/uploads/2016/02/Removal-Report-Updated-2-11-16.pdf> (page 45)

⁵⁵ NICS Denial Notification Act of 2022 (Division W of Public Law No: 117-103; 136 Stat. 49)

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specific safety planning information and referrals to either community-based or systems-based victim service providers, who can assist with developing a safety plan.

Respectfully submitted,

Andrew King-Ries, Chair
Commission on Domestic & Sexual Violence

August 2022

GENERAL INFORMATION FORM

Submitting Entity: Commission on Domestic & Sexual Violence

Submitted By: Andrew King-Ries, CDSV Chair

1. Summary of the Resolution(s). This resolution urges governments to enact legislation, adopt policies, and authorize appropriate funding to close the so-called “boyfriend,” “stalking,” and “*ex parte*” loopholes in firearms laws and regulations by prohibiting the purchase, possession, or receipt of firearms and ammunition by persons who commit domestic violence, dating violence, or stalking, and by requiring such persons to safely relinquish such firearms and ammunition.
2. Indicate which of the ABA's four goals the resolution seeks to advance and provide an explanation on how it accomplishes this. *(1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law)* This resolution seeks to advance the Rule of Law (Goal 4) by prohibiting demonstrably dangerous persons from having access to firearms.
3. Approval by Submitting Entity. The Commission on Domestic & Sexual Violence approved this resolution and report on April 4, 2022.
4. Has this or a similar resolution been submitted to the House or Board previously? No.
5. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? There are no existing policies that would be affected by this resolution.
6. If this is a late report, what urgency exists which requires action at this meeting of the House? n/a
7. Status of Legislation. (If applicable) Provisions similar to those recommended were included in the House version, but dropped from the Senate version, of what became the Violence Against Women Act Reauthorization Act of 2022 (Division W of Public Law No: 117-103; 136 Stat. 49). Efforts continue to incorporate these provisions into federal law via some other mechanism.
8. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. If adopted, supporting entities, together with GAO, can advocate for legislative change as described in the resolution.
9. Cost to the Association. (Both direct and indirect costs) None.
10. Disclosure of Interest. (If applicable) n/a

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11. Referrals.

Criminal Justice Section
Civil Rights and Social Justice Section
Standing Committee on Legal Aid & Indigent Defense
National Conference of Women's Bar Associations
National Association of Women Judges
National Association of Women Lawyers
Center for Human Rights
Coalition for Racial and Ethnic Justice
Commission on Women in the Profession
Commission on Youth at Risk
Commission on Homelessness & Poverty
Commission on Immigration
Commission on Law & Aging
Commission on Sexual Orientation & Gender Identity
Standing Committee on Gun Violence
Government & Public Sector Lawyers Division
Solo, Small Firm, & General Practice Division
Judicial Division
Law Student Division
Young Lawyers Division
Senior Lawyers Division
Litigation Section
Torts, Trial, and Insurance Practice Section
Family Law Section
Health Law Section

12. Name, telephone, email prior to the meeting

Vivian Huelgo, 202-662-8637, vivian.huelgo@americanbar.org

13. Name, telephone, email of presenter in the House

Andrew King-Ries, 406-214-5445, Andrew.KingRies@mso.umt.edu

EXECUTIVE SUMMARY1. Summary of the Resolution.

This resolution urges governments to enact legislation, adopt policies, and authorize appropriate funding to close the so-called “boyfriend,” “stalking,” and “ex parte” loopholes in firearms laws and regulations by prohibiting the purchase, possession, or receipt of firearms and ammunition by persons who commit domestic violence, dating violence, or stalking, and by requiring such persons to safely relinquish such firearms and ammunition.

2. Summary of the issue that the resolution addresses.

Current federal law prohibits perpetrators of domestic violence from possessing firearms, but is silent regarding perpetrators of dating violence and stalking.

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

This resolution urges governments to “close the boyfriend, stalking, and *ex parte* loopholes” by including perpetrators of dating violence and stalking in the existing federal prohibition.

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

The National Rifle Association opposes this position.

**AMERICAN BAR ASSOCIATION
COMMISSION ON DOMESTIC & SEXUAL VIOLENCE
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
CRIMINAL JUSTICE SECTION
NATIONAL ASSOCIATION OF WOMEN LAWYERS**

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association urges federal, state, local, territorial, and
- 2 tribal governments to enact laws that provide a civil rights cause of action and remedies
- 3 for those subjected to acts of gender-based violence; and
- 4
- 5 FURTHER RESOLVED, That the American Bar Association urges lawyers, bar
- 6 associations, victim advocacy organizations, and others to take steps to increase
- 7 awareness of such civil rights laws and to advance initiatives to facilitate their use.

REPORT*

In 1994, after four years of hearings, Congress enacted a federal civil rights remedy as part of the Violence Against Women Act (“VAWA Civil Rights Remedy”), which provided a private right of action against an individual who committed an act of gender violence.¹ The law was modeled after other federal civil rights legislation that addressed analogous harms.² The Supreme Court, in *United States v. Morrison*, struck down the federal law as an unconstitutional exercise of Congress’ Commerce Clause powers and of Congress’ enforcement powers under the Fourteenth Amendment.³ Notwithstanding that decision, both preexisting and later-enacted state and local remedies provide a private right of action for gender violence as a civil rights violation. Public attention in the years since the *Morrison* decision rightly has focused on the ways gender violence persists and on the gaps in legal remedies for survivors. State and local civil rights remedies, which are currently on the books in over 20 states, promote accountability and provide redress for survivors and can and should be more widely used.

Much recent law reform and public attention addressing gender violence has been directed at the workplace. At the same time, advocates and policymakers know that sexual harassment at work is but one form of gender violence. Gender violence is also prevalent in schools, in public spaces, and in intimate partner relationships that have no relationship to the workplace. As policymakers assess gaps in the law, proposals should take into account the range of contexts in which gender violence occurs.

This resolution focuses on laws framing gender violence as a civil rights violation and, specifically, on laws that would hold the individual who committed the harm accountable. These laws apply regardless of the relationship between the person who committed, and the person subjected to the harm. If part of the goal of legal remedies is to promote accountability by those who commit harm, individual accountability should be a core component of a comprehensive accountability scheme.

* With permission, this report is based on *State Civil Rights Remedies for Gender Violence: A Tool for Accountability*, 87 U. Cin. L. Rev. 171 (2018) by former Commission member Julie Goldscheid, a Professor of Law at CUNY Law School, and co-author Rene Kathawala, pro bono counsel for Orrick, Herrington & Sutcliffe LLP (firm is provided only for identification purposes, and this report does not set forth the views of Orrick or its clients). The survey of state laws and case references were reviewed and updated prior to submission of this report.

¹ Violence Against Women Act of 1994 (VAWA), Pub. L. No. 103-322, § 40302, 108 Stat. 1902, 1941-42 (codified as amended at 42 U.S.C. § 13981 (2000)), invalidated by *Morrison*, *supra* note 5, 529 U.S. 598 (2000). Julie Goldscheid, *Gender-Motivated Violence: Developing a Meaningful Paradigm for Civil Rights Enforcement*, 22 HARV. WOMEN’S L. J. 123, 128-180 (1999) [hereinafter *Meaningful Paradigm*]. For accounts of the VAWA Civil Rights Remedy’s legislative history, see, e.g., Sally Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 FORDHAM L. REV. 57, 64 - 78 (2002); Sally Goldfarb, *Violence Against Women and the Persistence of Privacy*, 102 Ohio St. L. J. 1 (2000); Victoria F. Nourse, *Where Violence, Relationship, and Equality Meet: The Violence Against Women Act’s Civil Rights Remedy*, 11 WIS. WOMEN’S L.J. 1, 1-2 (1996); Fred Strebeigh, EQUAL: WOMEN RESHAPE AMERICAN LAW 309-445 (2009).

² For summaries of the law’s purpose and history, see, e.g., *supra* note 9; for additional commentary, see, e.g., Catherine A. MacKinnon, *Disputing Male Sovereignty*, 114 HARV. L. REV. 135 (2000); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender and the Globe*, 111 YALE L. J. 619 (2001); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L. J. 441 (2000); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2002); Goldscheid, *Meaningful Paradigm*, *supra* note 1; Julie Goldscheid, *The Civil Rights Remedy of the 1994 Violence Against Women Act: Struck Down but Not Ruled Out*, 39 FAM. L. Q. 157, 158 (2005) [hereinafter, Goldscheid, *Struck Down but Not Ruled Out*].

³ *Morrison*, 529 U.S. 598 (2000).

I. BACKGROUND: THE FEDERAL CIVIL RIGHTS REMEDY AND ITS AFTERMATH

The VAWA Civil Rights Remedy was intended to complement Reconstruction-era and other civil rights statutes by providing a civil cause of action for gender-based discrimination and violence, in order to provide a uniform federal law framing gender violence as a civil rights violation.⁴ Before the VAWA Civil Rights Remedy was enacted, then-existing laws would provide at least some measure of redress for gender violence committed at work,⁵ committed by state actors,⁶ or committed by groups of individuals.⁷ Notwithstanding those laws, advocates and Congress recognized that no federal law provided a federal civil rights cause of action for the most common form of gender violence: that committed by private individuals. The goals of these civil rights remedies can be thought of as two-fold: as a practical tool that would provide a cause of action for survivors, and as an aspirational, or symbolic remedy that would more accurately capture the dignitary nature of the harm. For gender violence in particular, a re-framing through a civil rights lens would transform the terms of debate, would bring public attention to the severity and impact of the harm, and would counter the historic gender subordination that treats gender violence as a private matter, and that fuels and perpetuates abuse.

The VAWA Civil Rights Remedy, as enacted, provided a private right of action for a “crime of violence” that was “gender-motivated.”⁸ It made clear that a claim would not be dependent on any associated criminal proceeding and that the remedy would be available regardless of the relationship between the parties.⁹ During the six years the law was in effect, over 60 reported decisions invoked the law.¹⁰ The legislative history of the VAWA Civil Rights Remedy directed courts to analyze the two-part “gender-motivation” requirement in the same way it would assess bias in other civil rights statutes, by evaluating the “totality of the circumstances” for evidence such as epithets, patterns of behavior, statements evincing bias, and other circumstantial as well as direct evidence.¹¹ Despite concerns before its enactment that the statutory definitions would preclude relief, most courts recognized that claims alleging domestic violence and sexual assault satisfied the statutory elements.¹²

⁴ See, e.g., Goldfarb, *supra* note 1, at 72-73.

⁵ Civil Rights Act of 1964, 42 U.S.C. § 2000e-17 (2018) [hereinafter Title VII].

⁶ 42 U.S.C. § 1983 (2018).

⁷ 42 U.S.C. § 1985(3) (2018).

⁸ 42 U.S.C. § 13981(b), (d)(1) - (2) (1994), overruled by *U.S. v. Morrison*, 529 U.S. 598 (2000). The statute contained a two-part definition of the term “crime of violence,” under which the plaintiff first would have to establish that the “act or series of acts ... would constitute a felony against the person” or “against property if the conduct presents a serious risk of physical injury to another,” 42 U.S.C. § 13981 (d)(2)(A); and that the act came within the meaning of 18 U.S.C. § 16 (1994), which is a federal statute defining “crime of violence.” To establish the “gender motivat[ion]” element, a plaintiff would have to prove that the act was committed “because of gender or on the basis of gender,” and “due, at least in part, to an animus based on the victim’s gender.” 42 U.S.C. § 13981(d)(1) (1994) (subsequently repealed).

⁹ 42 U.S.C. § 13981(e)(1) & (2).

¹⁰ See, e.g., Goldscheid, *Struck Down but Not Ruled Out*, *supra* note 2, at 164-65; Julie Goldscheid & Risa E. Kaufman, *Seeking Redress for Gender-Based Bias Crimes--Charting New Ground in Familiar Legal Territory*, 6 MICH. J. OF RACE & L. 265, 271-83 (2001) [hereinafter, Goldscheid & Kaufman, *Charting New Ground*].

¹¹ See S. Rep. No. 103-138, at 52-53, 64 (1993); see also, e.g., Goldscheid, *Meaningful Paradigm*; Goldscheid & Kaufman, *Charting New Ground*, *supra* note 10, at 271-73.

¹² Goldscheid & Kaufman, *Charting New Ground*, *supra* note 10, at 261, 271-83

Nevertheless, challenges to the law's constitutionality proved successful, and the Supreme Court struck down the federal law in *United States v. Morrison*.¹³ The Court deemed the law beyond Congress' powers under both the Commerce Clause and under Section 5 of the Fourteenth Amendment. Following that decision, proposals were introduced in Congress that would retain the essence of the private right of action but would include a "jurisdictional element" that would require proof of economic impact in each case, to address the *Morrison* Court's concerns that the 1994 remedy, as written, reached beyond Congress' Commerce Clause powers.¹⁴ Those proposals did not advance in Congress.¹⁵

However, the *Morrison* Court invited local responses. As Justice Rehnquist opined:

... If the allegations here are true, no civilized system of justice could fail to provide [Christy Brzonkala, the plaintiff in the case] a remedy for the conduct of respondent Morrison. But under our federal system that remedy must be provided by the Commonwealth of Virginia, and not by the United States.¹⁶

It further opined that it could:

... think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.¹⁷

Indeed, a few jurisdictions took up the Court's invitation to enact state and local laws. California, Illinois, New York City, and Westchester enacted state and local civil rights remedies modeled after the federal law.¹⁸ However, the VAWA Civil Rights Remedy was not the first legislative enactment to frame gender violence as a civil rights violation. State civil rights remedies, many of which were on the books before VAWA's enactment, provide civil relief for gender-motivated violence. Some of those laws are freestanding, and some are linked to states' bias crime or civil rights statutes. Nevertheless, those laws have not been widely publicized or widely used.

II. SURVEY OF STATE CIVIL RIGHTS REMEDIES

State civil rights remedies providing a private cause of action against someone who has

¹³ *Morrison*, 529 U.S. 598 (2000).

¹⁴ See, e.g., Violence Against Women Civil Rights Restoration Act of 2000, H.R. 5021, 106th Cong. (2000).

¹⁵ Nothing would preclude reintroduction of the Violence Against Women Civil Rights Restoration Act of 2000 or a modified version of a similar law. The scope and utility of such a proposal is beyond the scope of this essay.

¹⁶ *Morrison*, 529 U.S. at 627.

¹⁷ *Id.* at 618.

¹⁸ *Id.* at note 45 (citing *Cal. Civil Code § 52.4* (West 2004); 740 Ill. Comp. Stat. Ann. 82/10 (West 2004); N.Y.C. Admin. Code § 8-901 (2000); Westchester County, NY, Laws of Westchester County ch. 701 (2001), and noting that New York City's City Council expressly referenced the *Morrison* decision in its legislative findings stating that it enacted this law "[i]n light of the void left by the Supreme Court's decision," to ensure that victims had an "officially sanctioned and legitimate cause of action for seeking redress for injuries resulting from gender-motivated violence." N.Y.C. Admin. Code § 8-902 (2000)).

committed an act of gender-motivated violence take several different approaches. They can roughly be categorized as follows:

- (1) laws enacted after *United States v. Morrison*, which track the general structure of the VAWA Civil Rights Remedy; and
- (2) civil remedies provided as part of or in connection with the state's civil rights laws, which are framed as:
 - (a) those providing a civil cause of action for bias-motivated violence or intimidation based on a protected category, including "sex" or "gender;" and
 - (b) those providing a civil cause of action for interference with other state or federal rights, which include the right to be free from gender-based violence.¹⁹

A. Post-Morrison Provisions Modeled on VAWA Civil Rights Remedy

1. California. California's anti-gender violence statute, enacted in response to the *Morrison* decision, provides redress virtually identical to the prior VAWA remedy. The statute affords a right of action for victims of gender violence and authorizes recovery of damages, injunctive relief, and related attorney fees in a civil suit against the individual who committed harm.²⁰ Though the case law interpreting this statute is limited, it provides some insight into how courts may interpret the statutory requirements. The statute sets out two alternative bases for establishing a claim: either (1) a criminal offense involving the use, attempted use, or threatened use of physical force where the offense was committed, at least in part, based on the gender of the victim; or (2) the physical intrusion of a sexual nature under coercive conditions.

A few decisions have interpreted the first definition, in which claims would be based on an underlying criminal offense with physical force that is based in part on gender animus. In *F.P. v. Monier*, the California Supreme Court affirmed a trial court's judgment that the plaintiff had alleged the requisite criminal offense.²¹ The decision was based on numerous allegations, including that the 17-year-old defendant had molested plaintiff numerous times when she was 10 years old and that he committed acts of unlawful penetration, sodomy, and oral copulation.

With respect to the second means of establishing a claim, courts have upheld claims based on allegations of physical invasions of a sexual nature that occurred under coercive conditions, regardless of a particular showing of gender animus. This showing was established under the particularly appalling facts presented in *F.P. v. Monier*, discussed above. Similarly, a California court found a triable issue of fact as to whether a supervisor

¹⁹ This review of state laws includes those that apply to gender violence committed at work or in educational institutions, but that are not limited to those settings. It does not survey the statutory frameworks available in every state specifically providing redress for sex discrimination, including sexual harassment and assault, at work or in educational institutions. Although some of those employment discrimination statutes allow for individual liability, their main focus is on institutional, not individual, accountability.

²⁰ Cal. Civ. Code § 52.4 (2002). This enactment complements other bias-crime-related legislation already in effect in California. See *infra* Section II.B.1.a.

²¹ *F.P. v. Monier*, 3 Cal. 5th 1099, 1115 (Cal. 2017).

coerced the plaintiff into committing sexual acts in *Doe v. Starbucks, Inc.*²² There, the minor plaintiff was a barista at a local Starbucks and claimed that her shift supervisor coerced her into having repeated sexual encounters with him. The plaintiff alleged that her supervisor repeatedly asked her out and that she finally said “yes” to make him stop asking. Her supervisor kept demanding sexual favors and the plaintiff complied because she felt she had to, or she would lose her job. Their encounters continued for months and, when a coworker asked the plaintiff about it, her supervisor yelled at the plaintiff for confirming it and claimed there was no coercion. The court denied the defendant’s motion to dismiss, and the case was later settled out of court.

2. Illinois. The Illinois Gender Violence Act (“IGVA”), enacted in 2004, provides a private cause of action for any person who has been subjected to “gender-related violence.”²³ Although there is not a large body of case law, a few decisions arose from workplace-related harassment and a few involved assaults by medical professionals. For example, in *Smith v. Farmstand*, the court affirmed a jury verdict for a male former butcher who sued his former employer and other employees for race and sex discrimination.²⁴ His IGVA claims against two employees were based on testimony involving allegations of inappropriate touching of a sexual nature. Similarly, a federal district court in *Zamudio v. Nick & Howard LLC* denied an employer’s motion to dismiss IGVA claims based on allegations that “going up the skirts of female employees was [Defendant’s] preferred method of harassment,” and that other female employees were subjected to similar lewd touching and unwelcome sexual advances.²⁵

Other decisions involve sexual assaults by medical professionals. In *Flores v. Santiago*, an appellate court upheld plaintiff’s claims for common law battery and violation of the IGVA based on allegations that during her visits to the defendant doctor’s office, he doped her with narcotics and engaged in sexual relations.²⁶ Similarly, in *Johnson v. David*, the court upheld an IGVA claim based on allegations that the pre-employment physical exam to which the plaintiff was subjected was substantially different than what was required, specifically, “because the penile portion of the examination was not a necessary part of the examination and did not relate to anything a correctional officer would be doing in his line of work.”²⁷

Other decisions confirm that the term “person” under the IGVA is limited to natural persons, meaning that the IGVA does not apply to corporations and that a cause of action may only be brought against an “individual human being.”²⁸ In *Doe ex rel. Smith v.*

²² *Doe v. Starbucks, Inc.*, No. SACV 08-0582 AG CWX, 2009 WL 5183773, at *1, 4-5 (C.D. Cal. Dec. 18, 2009).

²³ 740 Ill. Comp. Stat. Ann. 82/1 (2004), *et seq.*

²⁴ *Smith v. Farmstand*, No. 11-CV-9147, 2016 WL 5912886, at *9-11 (N.D. Ill. Oct. 11, 2016) (claim involving harassment by a man of a male).

²⁵ *Zamudio v. Nick & Howard LLC*, No. 15 C 3917, 2015 WL 6736679, at *2 (N.D. Ill. Nov. 4, 2015).

²⁶ *Flores v. Santiago*, 986 N.E.2d 1216, ¶ 6, (Ill. App. Ct. 2013).

²⁷ *Johnson v. David*, No. 12-CV-1038-SCW, 2017 WL 1090811, at *3 (S.D. Ill. Mar. 23, 2017).

²⁸ *See Doe v. Freeburg Cmty. Consol. Sch. Dist. No. 70*, No. 14-CV-674-NJR-DGW, 2015 WL 3896960, at *4 (S.D. Ill. June 23, 2015) (“The context surrounding the word ‘person’ in the Gender Violence Act is sufficient to overcome the presumption under the Statute on Statutes that the term ‘person’ includes corporations.”); *Fuesting v. Uline, Inc.*, 30 F. Supp. 3d 739, 743 (N.D. Ill. 2014) (internal quotations omitted); *Doe ex rel. Smith v. Sobeck*, 941 F. Supp. 2d 1018, 1026-1027 (S.D. Ill. 2013).

Sobeck, the guardian of a developmentally disabled female participant in a developmental training program brought an action against the program's management under the IGVA and other federal and state laws.²⁹ The complaint alleged that the program's management had failed to separate and protect the female participant from the advances and ultimate rape committed by a male participant in the program. After noting that the IGVA does not apply to corporations, the court reasoned that a claim could be alleged against the individual managers if they "personally encouraged or assisted" in an act of gender-related violence, but that plaintiff had failed to plead such a claim.

3. New York City. In 2000, the New York City Council unanimously passed its Victims of Gender-Motivated Violence Protection Act ("GMVA") to address "the void" left in light of the *Morrison* decision.³⁰ In significant ways, the GMVA goes further than the civil remedy created as part of the 1994 VAWA. For example, it grants a longer statute of limitations (seven years compared to VAWA's four). It defines a crime of violence to include misdemeanors (as defined by state or federal law) as well as felonies. Additionally, the GMVA, like other state and local remedies, allows for recovery of attorneys' fees and punitive damages, which are not typically available in tort claims under New York law.³¹

Nevertheless, limited case law interprets the GMVA.³² A decision in one case involving claims based on multiple allegations spanning a number of years and several states nevertheless dismissed the claims. In *Gottwald v. Sebert*, recording star, Kesha Rose Sebert ("Ke\$ha") brought claims against her recording company's executive and his companies based on allegations of sexual assault, sexual harassment, and contractual violations.³³ The court dismissed the Local Law 73 claims, all of which were based on actions that took place outside of New York City and which would have been time-barred under New York law. The court additionally opined that, "[a]lthough [defendant's] alleged actions were directed to [plaintiff], who is female, the [counter claims] do not allege that defendant harbored animus toward women or was motivated by gender animus" when he allegedly behaved violently toward plaintiff. The court went on to state that "[e]very rape is not a gender-motivated bias crime," though in so doing it appeared to reference New York State's criminal bias crimes law rather than the VAWA civil rights remedy on which the New York City law was modeled. The court cited a number of general employment discrimination cases but not the extensive and analogous case law interpreting claims of sexual violence and harassment as sex discrimination. Moreover, it ignored the substantial legislative history discussing and case law interpreting, "gender-motivation" under the VAWA Civil Rights Remedy while it was in effect.

In *Breest v. Haggis*, a 26-year-old woman who worked as a freelance publicist for a company that hosts film premiers alleged that she was sexually assaulted by the

²⁹ 941 F. Supp. 2d 1018 (S.D. Ill. 2013).

³⁰ NYC Administrative Code § 8-902 (2000) (declaring legislative intent).

³¹ *Id.* at § 8-904(3) (authorizing recovery of attorneys' fees and costs). See *Local Domestic Violence Law Elicits Applause and Questions*, 224 N.Y.L.J. p. 5 col. 6 (Dec. 15, 2000).

³² In addition to the decisions discussed below, the court in *Cartright v. Lodge*, No. 15-CV-9939, 2017 WL 1194241 (S.D.N.Y. Mar. 30, 2017), granted a default judgment and assessed damages in a case based on allegations of violence and intimidation, including claims under the GMVA).

³³ *Gottwald v. Sebert*, 869 N.Y.S.2d 725 (N.Y. Sup. Ct. 2008).

defendant, who was a famous director, producer, and screenwriter.³⁴ The judge rejected the defendant's motion to dismiss her GMVA claims and concluded that the allegations of sexual assault, of comments indicating "disrespect for women," of the defendant's "enjoyment of some level of violence [as] against women," and lack of provocation or confusion sufficiently alleged "gender-motivation" as required by the statute.

By contrast, the Southern District of New York dismissed claims brought by a former Fox News correspondent against Fox and Charles Payne, one of its anchors, based on allegations of sexual assault, rape, sexual harassment, and other claims.³⁵ With respect to the GMVA claims, the trial court concluded that the allegations failed to state any facts showing defendant's "hostility based on gender" or any allegations that the defendant "harbored or expressed any animosity toward women." In employing that reasoning, the court disregarded the City Council's legislative history that the GMVA was enacted to fill the void left by *Morrison*. Additionally, it ignored the VAWA civil rights remedy's extensive legislative history directing courts to interpret the "gender motivation" requirement in the same way it would assess bias in other civil rights statutes. That case law makes clear that the statutory language requiring "animus" was not to be equated with "malicious" motivation, but instead, confirms that "animus" requires "at least a purpose that focuses upon women *by reason of their sex*."³⁶ Congress explicitly rejected suggestions to require proof of "animosity;" instead, it sought, through the "animus" requirement, to dispel suggestions that disparate impact claims could be brought under the statute.³⁷ Notably, defendants initially challenged the law's constitutionality, which led Public Advocate Letitia James to call for the New York City's Corporation Counsel to defend defendant Payne's constitutional challenge to Local Law 73; after the Corporation Counsel sought to intervene to defend the law's constitutionality, Mr. Payne announced his decision to drop his constitutional challenge, though he continues to defend himself on the merits.³⁸

4. Westchester County. Following New York City's lead, in 2001, the County of Westchester enacted a Victims of Gender-Motivated Violence Protection act ("VGVP")³⁹ that is very similar to New York City's Local Law 73, although unlike Local Law 73, the VGVP does not expressly provide for a longer statute of limitations. To date, there are no reported decisions interpreting the Westchester law.

5. Rockland County. Like New York City and Westchester County, Rockland County also enacted a civil rights remedy for gender violence, modeled after the federal law.⁴⁰ In the sole publicly available decision interpreting the law, a federal district court held that the law was not unconstitutionally vague.⁴¹ Critical to the court's conclusion was the

³⁴ *Breest v. Haggist*, No. 161137/2017 (Sup. Ct. N.Y. Jul. 26, 2018) (complaint and transcript on file with author).

³⁵ *Hughes v. Twenty-First Century Fox, Inc.*, 304 F. Supp. 3d 429, 438 (S.D.N.Y. 2018).

³⁶ *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993).

³⁷ See Nourse, *supra* note 1, at 29-33 (recounting legislative history).

³⁸ See Kelly Mena, *PA James Victory: City's Victims Protection Law Upheld*, KINGS COUNTY POLITICS (Feb. 21, 2018); see also *Hughes v. Twenty-First Century Fox, Inc.*, No. 1:17-cv-07093-WHP (S.D.N.Y. filed Feb. 19, 2018), (withdrawing defendant's constitutional challenge following City of New York's request to intervene in support of the law's constitutionality).

³⁹ See Westchester County, NY., Code of Ordinances § 701.01 (2001).

⁴⁰ Rockland County, N.Y., Admin. Code § 279-3 (2001).

⁴¹ See *Fierro v. Taylor*, No. 11 Civ. 8573, 2012 WL 6965719, *2 (S.D.N.Y. Oct. 22, 2012).

defendant's failure to offer authority in support of his argument that gender animus, or motivation, cannot be determined as a factual matter.

B. Civil Remedies for Gender Violence in State Bias Crime Provisions

State statutes providing a private right of action for bias-motivated violence often are part of the state's civil rights laws. Those laws can roughly be grouped into two categories: (1) those framed in terms of civil remedies enacted as part of the state's anti-bias crime provisions and civil rights statutes encompassing violence or intimidation motivated by "sex" or "gender;" and (2) those framed more generally in terms of civil remedies for damage resulting from violations of, or interfering with, state or federal rights.

1. Private right of action for gender-based violence or intimidation

a. California. In addition to and preceding the post-*Morrison* legislation discussed above, California law provides a civil remedy for bias-motivated violence as part of its "hate crime" law. In 1976, the California Legislature enacted the Ralph Act as Section 51.7 of its civil code, thereby providing civil redress for gender violence and also creating a new right to be free from violence.⁴² Approximately 50 written decisions consider gender bias-based claims under this statute; however, only a few decisions interpret the key statutory elements: (1) the act of violence, or intimidation by threat of violence, and (2) whether the act was motivated by the victim's identity in a listed protected class.

A recent decision easily found that allegations of sexual abuse and rape satisfy both elements of the statute. In *Roe v. California Department of Developmental Services*, the court upheld the civil rights claims on behalf of a woman with developmental disabilities and mental illnesses who had been sexually assaulted by the "psychiatric technician" assigned to work with her in her residential facility.⁴³ The court concluded that "rape is considered a 'violent' offense ... regardless of whether the defendant employed physical force." It dismissed arguments that the rape was not "because of gender" as "a silly argument," citing Title VII and VAWA civil right remedy cases similarly recognizing sexual assault and rape as gender-based crimes.

Courts have found the first element satisfied where facts alleged violence or threats of violence. In *Winarto v. Toshiba America Electronics Components, Inc.*, a female employee brought a claim against her employer alleging gender violence on the basis that her coworker often kicked her, feigned kicking her, called her "chick," said "I'm going to hurt you again, Chick," messed up her hair claiming it was a "girl thing," and grabbed handkerchiefs from her pocket.⁴⁴ The court found that violence was committed where at least one instance of kicking was undisputed and where several more acts were alleged. Although the acts of violence in *Winarto* involved acts of kicking, the court confirmed: "there is no requirement that the violence be extreme or motivated by hate in the plain language of the sections, or in the cases construing them; there is also no requirement that the act constitute a crime."

⁴² Cal. Civ. Code 51.7(a) (2015).

⁴³ No. 16-cv-03745, 2017 WL 2311303 (N.D. Cal. May 26, 2017).

⁴⁴ *Winarto v. Toshiba Am. Elec. Components, Inc.*, 274 F.3d 1276, 1290 (9th Cir. 2001).

The *Winarto* court articulated a “reasonable person” standard for determining whether a plaintiff was intimidated by a threat of violence. There, the court found that the plaintiff was intimidated by a threat of violence from the fact that she was injured while trying to run away from the defendant after the defendant said, “Chick, you’d better walk faster or I am going to hurt you again.” The court also noted that after being exposed to the defendant’s acts of violence, it was reasonable for her to be intimidated by his later, less violent acts of invading her personal space and touching her.

Similarly, in *Hern v. McEllen*, the plaintiff claimed gender violence based on several incidents of her neighbor spitting in her direction, following her, telling her that he was “watching” her, and leaving decapitated rats on her patio.⁴⁵ The court found that the jury was permitted to consider the defendant’s entire course of conduct as it relates to the plaintiff’s gender—it need not limit its consideration to acts that contemporaneously referenced plaintiff’s gender.

When examining the second element of motivation, courts have recognized circumstantial evidence to support claims that the defendant directed his actions based on the victim’s class-based identity. A single statement made during an incident may be enough. In *Myers*, the court determined that plaintiff’s testimony that a police officer’s reference to her as an “ugly white bitch” during an incident was sufficient evidence for a jury to conclude that race and sex were motivating factors for the police officer’s conduct.⁴⁶

In *Hern*, described above, the court found that a jury could have inferred that a neighbor’s repeated threatening interactions and demeaning gender-based comments confirmed that plaintiff’s gender was a principal motivation for his conduct.⁴⁷ The court ruled that jurors could consider the defendant’s entire course of conduct towards a plaintiff, apart from the defendant’s conduct committed contemporaneously with the act.⁴⁸ Similarly, in *Winarto*, the Ninth Circuit Court of Appeals ruled that it was reasonable to infer that gender was a motivating factor because it was undisputed that the defendant derisively called the plaintiff a “chick” and messed with her hair claiming that it was a “girl thing.”⁴⁹ Conversely, courts have rejected claims where the complaint contained only conclusory allegations of discriminatory prejudice.⁵⁰

b. Illinois. The Illinois Hate Crime Act (“IHCA”) provides that, independent of any criminal prosecution, anyone suffering personal injury or property damage as a result of a bias crime may bring a civil suit for actual damages, punitive damages, attorneys’ fees, costs,

⁴⁵ *Hern v. McEllen*, No. A125358, 2011 WL 2112538, *4-5 (Cal. Ct. App. May 21, 2011) (finding evidence of intimidation by threat of violence when the defendant followed the plaintiff, warned her that he was “watching” her, and left a decapitated rat on her patio).

⁴⁶ *Myers v. City and Cty. of San Francisco*, No. C 08-1163 MEJ, 2012 WL 4111912, *31 (N.D. Cal. Sept. 18, 2012).

⁴⁷ *Hern*, *supra* note 109, at *14.

⁴⁸ *Id.* at *12.

⁴⁹ *Winarto*, *supra* note 103, at 1290.

⁵⁰ See *Sullivan v. City of San Rafael*, No. C 12-1922 MEJ, 2012 WL 3236058, *9 (N.D. Cal. Aug. 6, 2012) (finding no claim where plaintiff did not plead any facts to support allegations that police officers were motivated by animus against the plaintiff’s homosexuality); *Rodriguez v. City of Fresno*, 819 F. Supp. 2d 937, 953 (E.D. Cal. 2011) (finding that although the complaint alleged in conclusory manner that plaintiff was subjected to unreasonable force because of her “race and/or gender,” the complaint did not allege any facts to substantiate the claim).

and injunctive relief.⁵¹ Thus, under the IHCA, a plaintiff states a civil claim if he or she alleges injury from an assault or battery that was motivated because of his or her actual or perceived gender.⁵² No reported decisions apply the civil provision to gender-based violence claims.

c. Iowa. Iowa grants a civil remedy for gender violence that violates its bias crime statute.⁵³ However, no reported decisions apply the civil provision to gender-based violence claims.⁵⁴

d. Michigan. In Michigan, individuals who violate the state's ethnic intimidation statute may be civilly liable to their victims.⁵⁵ The statute encompasses bias crimes based on gender and can be brought "regardless of the existence or result of any criminal prosecution." A gender violence survivor bringing a civil claim under Michigan's ethnic intimidation statute may seek an injunction, actual damages (including damages for emotional distress), or other applicable relief. Despite the availability of a civil cause of action for gender-violence survivors, no reported decision addresses claims brought by such survivors under the ethnic intimidation statute.

e. Minnesota. In Minnesota, gender violence survivors have a civil cause of action for damages against their aggressors under the state's bias-offense statute.⁵⁶ This statute, which was enacted before the *Morrison* decision, tracks the structure of the VAWA civil rights remedy, though it also encompasses civil claims for violence based on a number of protected categories in addition to "sex." Survivors may bring civil claims regardless of whether a criminal proceeding was pursued. To prevail, a gender-violence survivor must prove by a preponderance of the evidence that the aggressor's violence constitutes a crime and that this violence was committed "because of" the survivor's gender.⁵⁷ Despite the availability of a civil cause of action for gender violence survivors, no reported decision addresses claims brought by such survivors under the bias-offense statute.

f. Nebraska. In Nebraska, individuals who violate the state's discrimination-based offenses statute, which includes gender, may be civilly liable to their victims.⁵⁸ Despite the availability of a civil cause of action for gender violence survivors, no Nebraska case

⁵¹ 720 Ill. Comp. Stat. Ann. 5/12-7.1(c) (1995). See Ill. Comp. Stat. Ann 12-7.1 (2018) for full text of civil provision of Illinois' bias crime law. Courts interpreting the state's bias crime law have held that bias need not have been the sole motive for the conduct. See, e.g., *People v. Davis*, 674 N.E.2d 895, 898 (Ill. App. Ct. 1996) (affirming battery conviction of white defendant who uttered racial slur, despite evidence that black victim had provoked the defendant); *In re Vladimir P.*, 670 N.E.2d 839 (Ill. App. Ct. 1996).

⁵² *Abdoh v. City of Chicago*, 930 F. Supp. 311, 313 (N.D. Ill. 1996).

⁵³ See Iowa Code Ann. § 729A.5 (1992).

⁵⁴ Cf., e.g., *Arrington ex rel. Arrington v. City of Davenport*, 240 F. Supp. 2d 984, 993 (S.D. Iowa 2003) (granting summary judgment for defendants for civil claim under § 729A.5 alleging racially biased violence by police officer where court found no evidence of racial motivation).

⁵⁵ Mich. Comp. Laws § 750.147b(3) (2014).

⁵⁶ Minn. Stat. § 611A.79 (2014).

⁵⁷ *Id.* at § 611A.79.1, .79.3. Cf., e.g., *Disability Support All. v. Billman*, No. 15-3649 (JRT/SER), 2016 WL 755620, *7 (D. Minn. Feb. 25, 2016) (employment case dismissed where plaintiffs pleaded no facts suggesting that defendant's "alleged conduct in violation of the ADA and the MHRA was committed because of [plaintiffs'] disability. The 'because of' language in the statute required plaintiffs to prove at least something about the defendant's state of mind at the time he committed the act in question.").

⁵⁸ See Neb. Rev. St. § 28-113 (2014).

law addresses claims brought by such survivors.⁵⁹

g. New Jersey. New Jersey's bias crime law, enacted in 1993, authorizes a victim of gender violence to bring a civil lawsuit for damages against the perpetrator.⁶⁰ The sole decision to address the law's substantive elements is *Hunt v. Callahan*.⁶¹ The court affirmed the dismissal of an employment-based harassment claim after concluding that the plaintiff's supervisor "did not use offensive language" and therefore did not intend to "intimidate" her based on her gender. In addition, the court opined that "[the supervisor] was merely voicing his opinion regarding acts he believed [the plaintiff] had engaged in and a political philosophy to which he believed she subscribed." The only other reported decision addressing gender-based claims dismissed the "bias crime" allegations since the plaintiffs also brought claims under New Jersey's Law Against Discrimination.⁶²

h. New York. In New York state, individuals who commit bias-motivated violence may be civilly liable to their victims.⁶³ Only one publicly available case invokes this provision. In *Friedlander v. Waroge Met. Ltd.*, a lesbian woman alleged that she was assaulted by a restaurant's manager and patrons due to her perceived sexual and gender identities.⁶⁴ No responsive pleadings were filed, and a default judgment of \$25,000 was eventually granted in Ms. Friedlander's favor.⁶⁵

i. Tennessee. In Tennessee, gender violence survivors have a civil cause of action for damages against their aggressors under the state's malicious harassment statute.⁶⁶ Despite the availability of a civil cause of action for gender violence survivors, no Tennessee case law addresses claims brought by such survivors under the malicious harassment statute.

j. Vermont. In Vermont, gender violence survivors have a civil cause of action against the individual who committed a gender-based bias crime.⁶⁷ Vermont case law has not yet addressed gender violence survivors' civil claims against their aggressors under the state's bias-motivated crime statute.

⁵⁹ Cf. *State v. Duncan*, 293 Neb. 359, 370-72 (2016) (phrase "because of," in statute providing enhanced penalties for third-degree assault and other offenses committed because of a person's association with a person of a certain sexual orientation requires state to prove that defendant would not have assaulted victim but for victim's association with person of a certain sexual orientation, and evidence was sufficient to support verdict that defendant would not have assaulted victim but for victim's association with people who were homosexual, as would support application of sentencing enhancement.).

⁶⁰ N.J. Stat. § 2A:53A-21(a) (2015).

⁶¹ Docket No. A-2780-11T3, 2012 N.J. Super. Unpub. LEXIS 2458, at *10 (App. Div. Nov. 5, 2012).

⁶² See, e.g., *Gibbs v. Massey*, No. 07-3604 (PGS), 2009 U.S. Dist. LEXIS 23578, *20-21 (D. N.J. Mar. 26, 2009).

⁶³ See N.Y. Civ. Rights L. § 79-n (McKinney 2015).

⁶⁴ No. 017910/2011, (Sup. Ct. Queens Cty.).

⁶⁵ See *Friedlander v. Waroge Met. Ltd. d/b/a/ Sizzler*, LAMBDA LEGAL, <https://www.lambdalegal.org/in-court/cases/friedlander-v-waroge-met> (last visited Mar. 6, 2018); *Court orders Sizzler to pay assault victim*, THE TIMES LEDGER (June 20, 2012, 7:25 PM).

⁶⁶ See Tenn. Stat. § 4-21-701 (2017). See also *Washington v. Robertson Cty.*, 29 S.W.3d 466, 471 (Tenn. 2000) (recognizing that claims of malicious harassment are "found within the Tennessee Human Rights Act, which, in general, addresses discrimination based on race, ... sex, gender[.]").

⁶⁷ See *Vt. Stat. Ann. tit. 13, § 1457* (2014) and *Vt. Stat. Ann. tit. 13, § 1455* (2014).

k. Washington. In Washington, in addition to a criminal penalty,⁶⁸ gender-violence survivors have a civil cause of action for damages against their aggressors under the state's malicious harassment statute.⁶⁹ Despite the availability of a civil cause of action for gender-violence survivors, no Washington case law addresses claims brought by survivors under this statute.

l. Washington, D.C. Washington, D.C. provides a civil remedy to persons incurring an injury based on an act that demonstrates the accused's prejudice based on gender, among other protected categories.⁷⁰ The sole reported decision applying the civil remedy denied the claim for lacking any allegations of bias-based criminal activity.⁷¹

2. Private right of action for interference with state or federal rights, including right to be free from gender-based violence.

a. Maine. Maine provides a private right of action for violence or the threat of violence that interferes with a person's rights under state or federal constitutional or statutory laws.⁷² In sum, this law establishes a civil cause of action for any person whose state and federal constitutional and statutory rights have been intentionally interfered with through actual or threatened violence, damage, destruction of property, or trespass. A gender-violence survivor bringing a civil claim under Maine's civil action statute may seek an injunction, restraining order, and other equitable and legal relief. Plaintiffs also have a right to jury trial, except for hearings regarding preliminary injunctions or temporary restraining orders. The two reported decisions interpreting this provision have rejected claims based on the absence of cognizable allegations.⁷³

b. Massachusetts. Massachusetts' Civil Rights Act ("MCRA") authorizes civil damages for bias-motivated threats, intimidation, and coercion that interfere with civil rights.⁷⁴ A number of decisions have been brought based on harassment and assault in the workplace. Although Massachusetts' workers' compensation statute precludes a claim in tort for sexual assault and rape,⁷⁵ survivors have successfully brought claims arising from

⁶⁸ See Wash. Rev. Code Ann. § 9A.36.080 (2010).

⁶⁹ See Wash. Rev. Code Ann. § 9A.36.083 (2017).

⁷⁰ See D.C. Code §22-3704 (2009).

⁷¹ See Uzoukwu v. Metro. Wash. Council of Gov'ts, 983 F. Supp. 2d 67, 94-96 (D.C. 2013) (declining to exercise jurisdiction over § 22-3704 claim as to certain defendants and separately holding that plaintiff failed to allege any facts indicating bias-based criminal activity against council).

⁷² 5 M.R.S.A. § 4682 (2014).

⁷³ See, e.g., Caldwell v. Fed. Express Corp., 908 F. Supp. 29, 32 (D. Me. 1995) (granting defendants' motion to dismiss in case alleging that job applicant was rejected for a permanent position because of her gender and also in retaliation with regard to charges she had filed alleging sexual harassment, concluding that to prevail, a plaintiff "must at a minimum identify a threat of force or violence"); Curtis v. Ryder Truck Rental, Inc., No. 05-130-P-H, 2006 WL 662395, **10-11 (D. Me. Mar. 13, 2006) (granting defendant's motion for summary judgment in hostile environment sexual harassment claim alleging harassment and concluding that allegations that Plaintiff was teased about the length of his hair by his coworkers were insufficient to sustain a claim).

⁷⁴ M.G.L.A. 12 §§ 11H, I, J (2014). Massachusetts civil rights law prohibits, among other things, bias based on gender, gender identity, and sexual orientation. See, e.g., M.G.L.A. ch. 93 § 102 (providing equal rights to, *inter alia*, contract, inheritance, convey real estate, to sue and be sued, and "to the full and equal benefit of all laws and proceedings for the security of persons and property" based on, e.g., "sex"). Massachusetts also provides civil remedies as well as sentence enhancement for criminal penalties for bias crimes based, *inter alia*, on gender identity. See M.G.L.A. ch. 265 § 39 (2014) (providing for sentence enhancement); M.G.L.A. ch. 266 § 127B (2014) (authorizing civil claims for violations of section 39).

⁷⁵ See Doe v. Purity Supreme, Inc., 422 Mass. 563, 566 (1996).

sexual assaults and batteries that violate the employee's civil rights.

For example, in *O'Connell v. Chasdi*, an employee brought civil rights claims as well as claims of assault, battery, and intentional infliction of emotional distress against her employer based on a fellow employee's sexual harassment on a business trip.⁷⁶ The Supreme Court of Massachusetts reversed a judgment in favor of the defendants on the MCRA claim and found the sexual harassment claim was cognizable under the MCRA. Similarly, in *Wood v. U.S.*, the court upheld a plaintiff's MCRA claim for sexual harassment by an Army major she worked for as a secretary.⁷⁷ In *Rinsky v. Boston University*, the plaintiff also asserted assault and battery, intentional infliction of emotional distress, and a claim under the MCRA based on sexual harassment by a client while working for her employer as a social work intern.⁷⁸ The court denied the defendants' motion to dismiss the MCRA claim, finding that the plaintiff had sufficiently pled allegations showing that the defendants threatened, intimidated, or coerced the plaintiff into continuing to subject herself to constant sexual harassment from her client.

c. New York. New York State's anti-discrimination statute prohibits discrimination and harassment based on sex, as well as race, creed, color, national origin, marital status, sexual orientation or disability.⁷⁹ This statute applies the broad anti-discrimination principle to contexts not explicitly covered by other statutory provisions.⁸⁰ A federal district court upheld claims that a high school student and his sister were subjected to harassment and discrimination based on the student's sexual orientation.⁸¹

d. North Carolina. In North Carolina, a gender-violence survivor has a civil cause of action against the aggressor only when the aggressor's conduct was a part of a gender-motivated conspiracy of two or more persons to interfere with the survivor's constitutional rights and the conduct "interfere[d], or [was] an attempt to interfere" with the survivor's exercise or enjoyment of such rights.⁸² To prove a conspiracy, a survivor must show (1) an agreement to commit a crime or wrongful act, (2) the alleged conspirators' wrongful acts in furtherance of the conspiracy and pursuant to a common scheme, and (3) a resultant injury.⁸³

North Carolina case law addressing claims brought by gender-violence survivors against their aggressors is limited. One decision held that in order to sustain a claim, the plaintiff must allege and prove the defendant's intent to interfere with his or her constitutional

⁷⁶ 400 Mass. 686 (1987).

⁷⁷ 760 F. Supp. 952 (D. Mass. 1991), *aff'd on other grounds*, 995 F.2d 1122 (1st Cir. 1993) (en banc).

⁷⁸ No. 10cv10779-NG, 2010 WL 5437289, *1 (D. Mass. Dec. 27, 2010).

⁷⁹ N.Y. Civil Rights Law § 40-c (2018).

⁸⁰ See *Wilson v. Hacker*, 101 N.Y.S.2d 461, 472-73 (N.Y. Sup. 1050) (applying civil rights statute to discrimination by labor unions notwithstanding lack of explicit prohibition of sex discrimination in applicable statute).

⁸¹ *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 149 (N.D.N.Y. 2011).

⁸² See N.C. Gen. Stat. Ann. § 99D-1(a)-(b) (2014).

⁸³ See, e.g., *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 666 S.E.2d 107, 115 (N.C. 2008). The aggressor's prohibited conduct may include "use [of] force, repeated harassment, violence, physical harm to persons or property, or direct or indirect threats of physical harm to persons or property to commit an act in furtherance of the object of the conspiracy." N.C. Gen. Stat. Ann. § 99D-1(a)(2) (2017).

right.⁸⁴ However, in *Zenobile v. McKecuen*, the North Carolina Court of Appeals ruled that the plaintiff had alleged sufficient facts to state an interference-with-civil-rights claim based on the plaintiff's "civil rights as a woman."⁸⁵ The court recognized that the defendants conspired to render the plaintiff physically helpless, stripped her naked, and filmed her. They also destroyed evidence and harassed the plaintiff in an attempt to make her drop the investigation.

III. RECOMMENDATIONS AND CONCLUSION

As this review demonstrates, state civil rights remedies provide tools to hold those who commit sexual violence accountable. They can apply to cases of workplace sexual violence, since Title VII has been interpreted not to apply to individuals. They can also hold those who commit sexual and other forms of gender violence accountable in the myriad other settings in which sexual violence causes economic, psychological, and other harms to its targets. These laws can provide relief for those who do not wish to engage with, or those who have not been afforded relief through, the criminal justice system, although engaging with the criminal justice system would not bar a civil claim.⁸⁶

Yet the survey also reveals the relative dearth of reported decisions interpreting those laws. Some of the reported decisions interpret procedural issues, such as the statute of limitations or whether the suit was precluded by the state's employment discrimination law, and do not shed much light on their substance. Importantly, a number of decisions easily recognize that allegations of sexual assault, or comments and epithets reflecting gender bias, stated a claim. By contrast, other decisions dismissed claims for failing to adequately allege a predicate act of violence sufficient to satisfy the statute. This case law suggests that statutes seeking to fill gaps and provide relief for gender-based violence define the predicate act broadly to capture the range of acts or series of acts that are the basis for gender-based violence and intimidation.

Although suits seeking individual liability may not be a feasible strategy in all cases,⁸⁷ they remain a critical component of a comprehensive accountability scheme. At least some of the barriers to private suits against individuals in tort law do not apply since, for example, most of these laws provide attorneys' fees to the prevailing party. Moreover, these laws hold transformative power to shift norms by framing gender violence in terms of civil rights, rather than private, individualized harm.

⁸⁴ For example, in *Alexander v. Diversified Ace Servs. II*, Luanesha Alexander, an employee of Diversified Ace Services II, brought a civil action alleging sexual harassment and gender-based violence as well as allegations of a conspiracy to "interfere with" her right to work in an environment "free of sexually abusive and discriminatory conduct". No. 1:11CV725, 2014 U.S. Dist. LEXIS 15508, *2-4, 31-33 (M.D.N.C. Feb. 7, 2014). The court rejected the claim for failure to "sufficiently identify[y]" the survivor's constitutional right that the aggressor had conspired to violate. *Id.* at *33-38.

⁸⁵ 548 S.E.2d 756, 760 (N.C. App. 2001).

⁸⁶ Notably, a number of the statutes enacted as part of their state's "bias-crime" laws explicitly provide a civil cause of action regardless of whether the case led to a criminal prosecution or conviction. *See, e.g., D.C. Code § 22-3704* (2018); 720 Ill. Comp. Stat. Ann. § 5/12-7.1(c) (2018); Mich. Comp. Laws § 750.147b(3) (2018); Minn. Stat. § 611A.79(3) (2018); Vt. Stat. Ann. Tit. 13 § 1457 (2018).

⁸⁷ *See* Goldscheid, *Meaningful Paradigm*, *supra* note 3, at 768-70 (explaining that suits against individuals may be less frequently made than those against institutions due to, *inter alia*, defendants' limited financial resources, survivors' lack of interest in re-engaging with an abuser, lack of access to counsel).

The recent rise in visibility of sexual abuse by individuals holding powerful positions highlights the importance of creating meaningful legal schemes for accountability and of framing sexual and other forms of gender-based violence as the civil rights violations that they are. State civil rights remedies can be more widely used to redress harm and advance accountability—they should not be overlooked as we advance legal and social change to promote equality, dignity, and justice for all.

Respectfully submitted,

Andrew King-Ries
Chair, Commission on Domestic & Sexual Violence

August 2022

APPENDIX A

State	Civil action modeled after VAWA civil rights remedy	Civil action for gender violence as part of bias-crime or civil rights statute	Civil action for violating other civil rights
CA	Cal. Civil Code § 52.4 (2002)	Cal. Civ. Code 51.7 (2015)	Cal. Civ. Code 51.7(a) (Ralph Act)
		Cal. Civ. Code 52(b)	
IL	740 ILCS 82/1, <i>et seq.</i> (West 2004)	ILCS 5/12-7.1(c) (2018)	720 ILCS 5/12-7.1 (1995)
IA		I.C.A. § 729A.5 (West 1992)	
ME			5 M.R.S.A. § 4682 (2014)
MA		M.G.L.A. 12 § 11H, I, J (2014)	M.G.L.A. 12 § 11H, I, J (2014)
		M.G.L.A. Ch. 266 § 127B (2018)	
		M.G.L.A. Ch. 93 § 102 (2018)	
MI		M.C.L.A. § 750.147b (2014)	
MN	M.S.A. § 611A.79 (2014)	M.S.A. § 611A.79 (2014)	
NE		Neb. Rev. St. § 28-113 (2014)	
NJ		N.J.S.A. § 2A:53A- 21 <i>et seq.</i> (2015)	
NY	New York City, N.Y., Code Tit. 8, Ch. 9 §§ 8-901 <i>et seq.</i> (2000)	N.Y. Civ. Rights L. § 79-n (McKinney 2015); N.Y. Civ. Rights L. § 40-c	
	County of Westchester, § 701.01 <i>et seq.</i> (2001)		
	Rockland Cty. Admin. Code 279-3 (2001)		
NC			N.C.G.S.A. § 99D-1(a)-(b) (2014) (conspiracy to interfere with civil rights)
TN		Tenn. Stat. § 4-21- 701 (2017) (malicious harassment statute)	
VT		Vt. Stat. Ann. Tit. 13, § 1457 (2014)	
WA		RCWA § 9A.36.083 (2017) (malicious harassment)	
DC		CS ST § 22-3704 (2009)	

Julie Goldscheid and Rene Kathawala, *State Civil Rights Remedies for Gender Violence: a Tool for Accountability*, 87 U. Cin. L. Rev. 171 (2018) Available at: <https://scholarship.law.uc.edu/uclr/vol87/iss1/5>

GENERAL INFORMATION FORM

Submitting Entity: Commission on Domestic & Sexual Violence

Submitted By: Andrew King-Ries, Chair

1. Summary of the Resolution(s). This resolution urges legislatures to enact civil rights statutes specifically aimed at remedying the harms of gender-based violence; and urges lawyers and others to make such remedies widely known and available.
2. Indicate which of the ABA's four goals the resolution seeks to advance and provide an explanation on how it accomplishes this. (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) This resolution seeks to advance the Rule of Law (Goal 4) by providing a civil rights cause of action for individuals subjected to acts of gender-based violence.
3. Approval by Submitting Entity. The Commission on Domestic & Sexual Violence approved this proposal on April 11, 2022.
4. Has this or a similar resolution been submitted to the House or Board previously?
No.
5. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? There are no existing policies that would be affected by this resolution.
6. If this is a late report, what urgency exists which requires action at this meeting of the House? n/a
7. Status of Legislation. (If applicable) n/a
8. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. If adopted, supporting entities, together with GAO, can advocate for legislative change as described.
9. Cost to the Association. (Both direct and indirect costs) None.
10. Disclosure of Interest. (If applicable) None.
11. Referrals.
Criminal Justice Section
Civil Rights and Social Justice Section
Standing Committee on Legal Aid & Indigent Defense
National Conference of Women's Bar Associations
National Association of Women Judges
National Association of Women Lawyers

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Center for Human Rights
Coalition for Racial and Ethnic Justice
Commission on Women in the Profession
Commission on Youth at Risk
Commission on Homelessness & Poverty
Commission on Immigration
Commission on Law & Aging
Commission on Sexual Orientation & Gender Identity
Standing Committee on Gun Violence
Government & Public Sector Lawyers Division
Solo, Small Firm, & General Practice Division
Judicial Division
Law Student Division
Young Lawyers Division
Senior Lawyers Division
Litigation Section
Torts, Trial, and Insurance Practice Section
Family Law Section
Health Law Section

12. Name, telephone, email prior to the meeting

Vivian Huelgo, 202-662-8637, vivian.huelgo@americanbar.org

13. Name, telephone, email of presenter in the House

Andrew King-Ries, 406-214-5445, Andrew.KingRies@mso.umt.edu

EXECUTIVE SUMMARY

1. Summary of the Resolution.

This resolution urges legislatures to enact civil rights statutes specifically aimed at remedying the harms of gender-based violence and urges lawyers and others to make such remedies widely known and available.

2. Summary of the issue that the resolution addresses.

Congress enacted a federal civil rights remedy as part of the 1994 Violence Against Women Act which provided a private right of action against an individual who committed an act of gender violence. The law was modeled after other federal civil rights legislation that addressed analogous harms. In 2000, the Supreme Court struck down the federal law as an unconstitutional exercise of Congress' Commerce Clause powers and of Congress' enforcement powers under the Fourteenth Amendment. Notwithstanding that decision, both preexisting and later-enacted state and local remedies provide a private right of action for gender violence as a civil rights violation. Public attention in the years since the Supreme Court decision rightly has focused on the ways gender violence persists and on the gaps in legal remedies for survivors. State and local civil rights remedies, which are currently on the books in over 20 states, promote accountability and provide redress for survivors, and can and should be more widely adopted and utilized.

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

Increased availability and utilization of these civil rights remedies can bring much-needed declaratory, procedural, and economic justice for gender violence survivors, promoting the principles of equality and liberty for which civil rights long has stood. This resolution urges more widespread adoption of gender-based violence civil rights statutes, along with efforts to promote their accessibility and utilization.

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

None have been identified.

AMERICAN BAR ASSOCIATION
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
REPORT TO THE HOUSE OF DELEGATES
RESOLUTION

1 RESOLVED, That the American Bar Association urges federal, state, local, territorial, and
2 tribal legislatures to enact legislation that would require entities providing services over
3 the Internet to use strong encryption to secure personal data and to protect the
4 confidentiality of such communications, including those covered by the attorney-client
5 privilege,

6
7 FURTHER RESOLVED, That no legislation should ban or make it impracticable for
8 businesses to encrypt private data or provide “end-to-end encrypted” communications
9 services; and

10
11 FURTHER RESOLVED, That any search warrant issued to obtain encrypted digital
12 evidence must establish specific steps to protect the confidentiality of privileged attorney-
13 client communications and specify that any measures used to circumvent encryption do
14 not render the target device or data more susceptible to access by third parties.

REPORT

The privacy and security of personal data is essential to the proper functioning of modern society. In every sector, from government to commercial to educational and more, entities collect and use personal data to facilitate routine and essential activities and services. And personal data is constantly at risk of breach, misuse, or loss. Strong legal and technological protections are necessary to effectively protect against cybercriminals, fraudsters (utilizing compromised personal information), authoritarian governments, and other malefactors. One of the most important tools available to protect personal data is encryption. This Resolution calls on lawmakers to promote the use of strong encryption to protect private communications and data. The American Bar Association (ABA) has previously adopted strong policies and rules supporting protections for cybersecurity, attorney-client privilege, and civil liberties¹—this Resolution adopts a strong policy in support of encryption consistent with those values.

There have been many instances over the last thirty years where government agencies and lawmakers, both in the United States and abroad, have introduced proposals or standards that would weaken encryption and put private data and communications at risk of unauthorized access. Recent proposals include setting government-reviewed standards for online platforms', automated scanning of private photos and data, requirements that electronic communications providers preserve an ability to decrypt any data or communication that they store or process, and orders that would compel a device manufacturer to create new tools to circumvent device security settings. This Resolution opposes such proposals, and requires that law enforcement undertake efforts and/or make requests to access or obtain digital evidence of illegal activity by proper legal process, and not by means that would weaken encryption.

Encryption in the Information Era

Encryption technologies are essential to the routine functioning of our modern communications systems, the preservation of human rights and freedom both domestically and internationally, and the maintenance of strong cybersecurity resiliency. As a large percentage of everyday activities involve digital devices and most of the new records and information are created digitally first, the ability to access and process digital data and communications is critically important for law enforcement and security agencies.

Encryption secures messages and data so that only intended viewers can access the content of the communication or of the data.² Encryption is commonplace in commercial

¹ See Section III, *infra*.

² <https://www.cisa.gov/uscert/ncas/tips/ST04-019> ("Encryption is especially important if you are trying to send sensitive information that other people should not be able to access. Because email messages are sent over the internet and might be intercepted by an attacker, it is important to add an additional layer of security to sensitive information.") Decoding a message is equivalent to unraveling the encryption on it. Proposals for a backdoor to break encryption are tantamount to asking for the "decoder ring" that unlocks all data and communications secured by that encryption. Because a "decoder ring" can be misused, for

software such as Gmail³ and Microsoft Office⁴, is applied by 87% of enterprises (50% apply it consistently)⁵, is used by government agencies such as the Department of Defense⁶ and in 2015 the Federal Chief Information Officer recommended use of encryption across Federal websites and web services.⁷

This digital transition has fundamentally changed the focus and nature of criminal investigations and security analysis. On the one hand, the proliferation of digital records, metadata, and communications has massively increased the potential pool of evidence from which investigators or analysts might be able to draw conclusions. On the other hand, the expansion and democratization of encryption tools has increased the odds that specific pieces of evidence will be inaccessible to governments and service providers alike.

A recent comprehensive study by the National Academy of Sciences (NAS) of the debate concerning use and potential regulation of encryption technologies summarized the important role that encryption plays in our modern communications systems and as a bulwark for protecting privacy and civil liberties. The NAS Report emphasizes that encryption is seen worldwide as an essential tool for protecting privacy and “has become an intrinsic part of the rights to freedoms of speech and belief.”⁸ The NAS Report also describes the information needs of law enforcement and intelligence agencies and the ways in which encryption can be an impediment to investigations. Specifically, encryption has reduced the volume of plaintext communications potentially accessible to law enforcement in routine investigations and has reduced access to evidence stored on encrypted devices like smartphones.⁹

But the widespread adoption of social media and messaging services has also dramatically expanded the volume of potentially accessible communications overall. And the NAS Report emphasizes that there are currently no “comprehensive and systemic data on the incidence and impact of encryption” on investigations.¹⁰ Reports and official testimony in recent years by several prominent law enforcement agencies, including the U.S. Department of Justice (DOJ), the Federal Bureau of Investigation (FBI), and the Manhattan District Attorney’s Office have highlighted recent statistics and specific

instance by a person or institution exceeding their authorized access or by an external malicious actor, privacy and security experts advocate for strong encryption without a built-in “decoder ring” or backdoor to undermine the encryption.

³ <https://www.computerworld.com/article/3322497/gmail-encryption.html>.

⁴ <https://docs.microsoft.com/en-us/microsoft-365/compliance/encryption?view=o365-worldwide>.

⁵ <https://www.entrust.com/-/media/documentation/reports/2021-global-encryption-trends-exec-summary-re.pdf>.

⁶ <https://www.defense.gov/News/News-Stories/Article/Article/943220/senior-officials-dod-supports-strong-encryption-for-defense-commercial-security/>.

⁷ <https://thehill.com/blogs/congress-blog/homeland-security/251500-which-government-agencies-encrypt-data-the-answer-may> (citing to

<https://obamawhitehouse.archives.gov/sites/default/files/omb/memoranda/2015/m-15-13.pdf>).

⁸ NAS Report at 34. <https://nap.nationalacademies.org/read/25010/chapter/5#34>.

⁹ NAS Report at 40–45, <https://www.nap.edu/read/25010/chapter/6#44>.

¹⁰ NAS Report at 43.

examples where investigators have been unable to access encrypted data stored on mobile phones or encrypted communications.¹¹

End to End Encryption (E2EE), Law Enforcement, and National Security

There are three distinct issues related to encryption that have raised concerns with law enforcement and national security officials over the last three decades, and each of these issues has led to different proposed legal, technological, and policy changes from law enforcement agencies.

The first issue is the inability of government investigators to access end-to-end encrypted (E2EE) communications. Of course, cyphers and other encryption techniques have been used for millennia, but the expanding use of electronic communications systems in the 1990s, coupled with the development with free encryption software, has made it possible for any person with a computer to communicate with someone anywhere in the world via E2EE encrypted messages. The loss of government control over encryption systems and concern over proliferation of encrypted messages led to proposals, spearheaded by the FBI and National Security Agency, for a “key escrow” system that would enable law enforcement to quickly and reliably access the plaintext of encrypted communications.¹² However, these proposed “key escrow” systems were shown to be insecure and overly complex and were ultimately abandoned in the late 1990s.

The second issue is the difficulty that government investigators face when they cannot access encrypted data stored on a computer or mobile device. This issue came to national prominence in 2016 when the FBI sued Apple seeking a court order to require the company to provide “technical assistance” to the Bureau in its attempt to recover data from an iPhone obtained during an investigation into a terrorist attack in San Bernardino, California.¹³ The FBI had specifically sought an order requiring Apple to modify software on the phone to make it easier to investigators to circumvent the passcode. The case was ultimately dropped after the FBI was able to gain access to the contents of the phone through other means. As the NAS Report later explained, there are multiple potential ways for law enforcement investigators to gain access to the encrypted contents of an encrypted device, including obtaining voluntary or compelled cooperation by individuals who have access to the device or seeking additional resources to circumvent encryption on the device.¹⁴ But despite these other avenues for obtaining access, law enforcement officials have repeatedly pressed Congress to enact laws that would require device manufacturers or other providers to enable access to encrypted devices.¹⁵ A recent report of a working group of leading policy experts convened by the Carnegie Endowment for International Peace theorized that focusing the policy debate on the specific issue of “law

¹¹ See NAS Report at 41–44.

¹² See Keys Under Doormats at 8 <https://www.schneier.com/wp-content/uploads/2016/09/paper-keys-under-doormats-CSAIL.pdf>.

¹³ EPIC: Apple v. FBI (2016) <https://epic.org/documents/apple-v-fbi-2/>.

¹⁴ NAS Report at 49.

¹⁵ See Susan Landau, *Punching the Wrong Bag*, Lawfare (Oct. 27, 2017), <https://www.lawfareblog.com/punching-wrong-bag-deputy-ag-enters-crypto-wars>.

enforcement access to mobile device data at rest” might create the best opportunity for productive policy solutions.¹⁶

The third issue, which has most recently drawn the attention of lawmakers on both sides of the Atlantic, is the impact that encrypted messaging systems have on platforms’ ability to screen and flag Child Sex Abuse Material and other illegal content using automated systems.¹⁷ Image matching tools in particular may implicate a high rate of false positives and enjoy deployment prior to validation of their reliability.¹⁸

This Resolution supports the use and adoption of strong encryption to advance its policy priorities as they relate to cybersecurity, attorney-client privilege, and civil liberties. There are alternatives for law enforcement and intelligence operations to obtain digital evidence that do not compromise these three essential values.

Attempts to circumvent or undermine encryption risk direct misuse, technical error, and incompatibility with future innovation. Service providers may be less able and less motivated to guard against cyberattacks, and consumers may be less likely to accept updates if they are suspicious of potential government interventions through such means.

What works in a well-regulated industry in a single jurisdiction “does not scale to a global ecosystem of highly diverse technologies, services, and legal systems.”¹⁹ Given the flexibility of laptops, desktops, and workstations especially, a lawful access approach is unlikely to be protected from workarounds by malicious actors.²⁰

Additionally, as security experts have noted: “One way that democratic societies protect their citizens against the ever-present danger of government intrusion is by making search expensive.”²¹

¹⁶ Carnegie Report (section “Focus on Mobile Phone Encryption”).

¹⁷ See Riana Pfefferkorn, *The Earn It Act: How to Ban End-to-End Encryption Without Actually Banning It*, Stanford Center for Internet and Society (Jan. 30, 2020), <https://cyberlaw.stanford.edu/blog/2020/01/earn-it-act-how-ban-end-end-encryption-without-actually-banning-it>.

¹⁸ <https://epic.org/wp-content/uploads/amicus/algorithmic-transparency/wilson/US-v-Wilson-EPIC-Amicus.pdf>.

¹⁹ Keys under doormats (<https://dspace.mit.edu/bitstream/handle/1721.1/97690/MIT-CSAIL-TR-2015-026.pdf?sequence=8&isAllowed=y>) (observing that “Law enforcement agencies in some countries can get a warrant to install malware on a suspect’s computer. Such agencies would prefer antivirus companies not to detect their malware; some might even want the vendors to help them, perhaps via a warrant to install an upgrade with a remote monitoring tool on a device with a specific serial number. The same issues arise with this kind of exceptional access, along with the issues familiar from covert police access to a suspect’s home to conduct a surreptitious search or plant a listening device. Such exceptional access would gravely undermine trust and would be resisted vigorously by vendors.”).

²⁰ <https://people.csail.mit.edu/rivest/pubs/EWG19b.pdf>.

²¹ *Id.* at 37.

Encryption Promotes Cybersecurity, Protects Confidential Communications, and Preserves Individual Rights

This Resolution advances the ABA's established priorities in promoting cybersecurity, protecting the confidentiality of attorney-client communications, and preserving individual rights to free speech and privacy.

Cyber Incidents Continue to Proliferate

Data breaches and cybersecurity incidents over the last ten years have exposed private files, communications, and information of hundreds of millions of Americans. These hacks have exposed sensitive information including social security numbers; federal agencies have reported more than \$15 billion in identity theft-related losses each year and hundreds of thousands of complaints of government document and benefits-related fraud, also annually. While encrypting data would not prevent every one of these incidents, encryption remains a viable means of strengthening the security of institutional, commercial, and personal data. Requests by law enforcement organizations (LEOs) for methods by which they can bypass encryption do not properly assess the balance of investigative needs and data security and privacy, especially when LEOs have other methods at their disposal for acquiring digital evidence, such as lawful hacking and access to cloud backups and metadata. Additionally, failing to safeguard the privacy of conversations raises First Amendment and attorney-client privilege concerns.

Continuing cyberattacks targeting both the private sector and all levels of government repeatedly illustrate the need for greater data protection, which strong encryption serves. As such, it is timely for the ABA to approve policy in support of encrypting communications and personal data. The Identity Theft Resource Center (ITRC) reported that the number of data breaches jumped 68% percent between 2020 and 2021, rising to a staggering 1,862 reported breaches (and breaking the previous record of 1,506 reported breaches from 2017). "There is no reason to believe the level of data compromises will suddenly decline in 2022," ITRC's CEO stated.²² Many of the breaches of the last 10 years, even taken individually, impacted tens or hundreds of millions of Americans, with compromised data including passwords, social security numbers, sealed court records, and security clearance information.²³

²² <https://www.cnet.com/news/privacy/record-number-of-data-breaches-reported-in-2021-new-report-says/> Statista provides a graph of number of reported data breaches dating back to 2005 (there were 157) here: <https://www.statista.com/statistics/273550/data-breaches-recorded-in-the-united-states-by-number-of-breaches-and-records-exposed/>.

²³ 2013 Adobe breach impacting 38 million, <https://krebsonsecurity.com/2013/10/adobe-breach-impacted-at-least-38-million-users/>; 2015 OPM hack impacting more than 18 million <https://edition.cnn.com/2015/06/22/politics/opm-hack-18-million/index.html> (compromised data including security clearance information <https://www.lawfareblog.com/why-opm-hack-far-worse-you-imagine>) ; 2016 Uber breach impacting 57 million <https://www.smh.com.au/business/companies/uber-to-pay-204m-to-settle-data-breach-cover-up-20180927-p5069k.html> ; 2017 Equifax breach impacting 147 million <https://consumer.ftc.gov/consumer-alerts/2019/07/equifax-data-breach-settlement-what-you-should-know>; 2018 Marriott data breach impacting hundreds of millions <https://www.csoonline.com/article/3441220/marriott-data-breach-faq-how-did-it-happen-and-what-was-the-impact.html>; 2019 Capital One breach impacting 100 million Americans

In 2016, 29% cases of identity theft reported to the Federal Trade Commission involved personal data being used to commit tax fraud. In more than 32% of reported cases, data was used to commit credit card fraud.²⁴ A 2015 DOJ report found that 86% of victims of identity theft experienced fraudulent use of existing account information, e.g. credit card or bank account information, and estimated that this fraud cost the U.S. economy more than \$15 billion.²⁵ More recently, in late 2020, websites used to generate auto insurance quotes were exploited to obtain personal data later used to submit fraudulent claims for pandemic and unemployment benefits.²⁶

Encryption Is An Essential Backbone of Modern Infrastructure

The modern commercial internet (even the internet of the 2000s) would be unfathomable without strong encryption protocols.²⁷ Promoting strong encryption is essential to maintain

<https://consumer.ftc.gov/consumer-alerts/2019/07/capital-one-data-breach-time-check-your-credit-report>; 2019 Facebook breach impacting 530 million <https://www.npr.org/2021/04/09/986005820/after-data-breach-exposes-530-million-facebook-says-it-will-not-notify-users>; 2019 breach of state government assets impacting more than 600,000 people in Oregon <https://www.oregonlive.com/data/2019/06/massive-dhs-data-breach-raises-questions-about-oregons-cybersecurity-protocols.html>; 2020 SolarWinds incident impacting “multiple U.S. government agencies, critical infrastructure entities, and private sector organizations” <https://www.cisa.gov/uscert/remediating-apt-compromised-networks> (compromised data including sealed court records <https://krebsonsecurity.com/2021/01/sealed-u-s-court-records-exposed-in-solarwinds-breach/>); 2020 breaches of government-held data in Philadelphia, Pennsylvania, <https://www.phila.gov/documents/notice-of-hipaa-breach/>, and in Torrance, California, <https://statescoop.com/hackers-post-torrance-california-data-online-after-denied-leak/>; 2021 breaches of state government assets in California, <https://krebsonsecurity.com/2021/03/phish-leads-to-breach-at-calif-state-controller/>, and Washington state, <https://wacities.org/advocacy/News/advocacy-news/2021/02/05/state-auditor-suffers-data-breach-includes-local-government-information>; 2021 LinkedIn breach impacting 700 million <https://blog.malwarebytes.com/awareness/2021/06/second-colossal-linkedin-breach-in-3-months-almost-all-users-affected/>; 2021 T-Mobile breach impacting 40 million (compromised data including Social Security Number and date of birth) <https://krebsonsecurity.com/2021/08/t-mobile-breach-exposed-ssn-dob-of-40m-people/>.

²⁴ <https://www.banking.senate.gov/imo/media/doc/Rotenberg%20Testimony%2010-17-17.pdf> (citing to https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-january-december-2016/csn_cy-2016_data_book.pdf) The FTC’s subsequent consumer sentinel data books did not break out reporting by percentage, but did report on the top categories of identity theft. These were credit card, employment-related or tax-related, and phone or utilities fraud in 2018; credit card, loan or lease, and phone or utilities fraud in 2019; credit card, government documents or benefits, and loan or lease fraud in 2020; and credit card, government documents or benefits, and loan or lease fraud in 2021. In 2020 and 2021, each of these top three categories had more than 100,000 complaints reported (and close to or exceeding 400,000 for credit card fraud and government documents or benefits fraud).

²⁵ <https://www.banking.senate.gov/imo/media/doc/Rotenberg%20Testimony%2010-17-17.pdf> The DOJ’s estimate rose to \$17.5 billion in 2016, <https://bjs.ojp.gov/content/pub/pdf/vit16.pdf>, and was still above \$15 billion in 2018 <https://bjs.ojp.gov/content/pub/pdf/vit18.pdf>.

²⁶ https://www.dfs.ny.gov/industry_guidance/industry_letters/il20210216_cyber_fraud_alert.

²⁷ <https://www.ietf.org/rfc/bcp/bcp200.html>;

https://obamawhitehouse.archives.gov/sites/default/files/docs/2013-12-12_rq_final_report.pdf at pg. 216 (“The use of reliable encryption software to safeguard data is critical to many sectors and organizations, including financial services, medicine and health care, research and development, and other critical infrastructures in the United States and around the world.”)

consumer trust in the safety of online transactions. Legislatures, agencies, and courts²⁸ should be promoting strong encryption internally as well.

In 1996, the NAS²⁹ held that cryptography “is a most powerful tool for protecting information” and that “many vital national interests require the effective protection of information.”³⁰ The 2019 Carnegie report noted that “[i]ndividuals around the world—from everyday citizens to at-risk groups such as journalists, activists, and marginalized groups fearing persecution—increasingly make use of encryption to protect not just against cyber crime but also unwanted disclosure and monitoring by technology platforms and other actors.”³¹

These cyber incidents are widespread, and any one of them can have a tremendous impact. The mounting threat of identity theft and data breach, and the risk of human rights and civil liberties violations, demand greater use of encryption as a data security technique. Despite this, there have still been repeated efforts over the last 30 years to weaken encryption. These efforts are not worth the perceived tradeoffs.

Policies That Undermine Encryption Do Not Properly Balance the Equities of Law Enforcement, Privacy, and Security

Over the last three decades law enforcement agencies have pushed for new authorities to compel exceptional access to encrypted data and communications.³² They argue that legal protections are provided through judicial authorization of warrants and that privacy concerns stem from potential unauthorized access.³³ However, the proposals to provide exceptional access to law enforcement have been shown to undermine security of essential encryption systems that protect data and communications.³⁴ Indeed, given the

²⁸ Nothing in this Resolution is intended to make it more difficult for the media and the public to access court records, trial exhibits, etc.

²⁹ <https://www.nap.edu/read/5131/chapter/14> .

³⁰ More here: <https://epic.org/issues/cybersecurity/encryption/>. Clear “rules of the road” from the government on encryption technologies could also yield benefits in the consumer protection realm, as consumers are often uncertain about the security protocols and/or access loopholes in various modes of communication.

³¹ <https://people.csail.mit.edu/rivest/pubs/EWG19b.pdf> .

³² <https://www.fbi.gov/about/faqs/what-concerns-do-the-fbi-and-the-law-enforcement-communities-have-regarding-the-growing-use-of-encryption-products-by-the-public-both-domestically-and-abroad> ; <https://www.fbi.gov/news/speeches/going-dark-are-technology-privacy-and-public-safety-on-a-collision-course>; <https://www.nytimes.com/2015/08/12/opinion/apple-google-when-phone-encryption-blocks-justice.html>.

³³ <https://www.nytimes.com/2015/08/12/opinion/apple-google-when-phone-encryption-blocks-justice.html> (“The new Apple encryption would not have prevented the N.S.A.’s mass collection of phone-call data or the interception of telecommunications, as revealed by Mr. Snowden. There is no evidence that it would address institutional data breaches or the use of malware. And we are not talking about violating civil liberties — we are talking about the ability to unlock phones pursuant to lawful, transparent judicial orders.”).

³⁴ <https://carnegieendowment.org/2019/09/10/moving-encryption-policy-conversation-forward-pub-79573> (“In the case of data in motion, for example, our group could identify no approach to increasing law enforcement access that seemed reasonably promising to adequately balance all of the various concerns.”); <https://www.schneier.com/wp-content/uploads/2016/09/paper-keys-under-doormats->

stakes, some have argued that it is naïve to distinguish between lawful and unauthorized access.³⁵ Despite these concerns, government agencies have continued to present exceptional access proposals that would threaten data security for decades.³⁶

Many different groups have opposed these proposals that would undermine strong encryption, for example: a policy mechanism requiring tech vendors to create a backdoor “for lawful use by law enforcement only.” Groups rejecting such mechanisms include the President’s Review Group on Intelligence and Communications Technologies in 2013,³⁷ the “Keys Under Doormats” technical report published in 2015 by the Computer Science and Artificial Intelligence Laboratory at MIT,³⁸ and nonprofit groups focused on tech policy including the Electronic Privacy Information Center (EPIC) in 2020³⁹ and R Street Institute in 2021.⁴⁰

The most recent major proposal to undermine encryption is to impose hard or soft scanning requirements on providers, to screen types of illegal/inappropriate content. This

CSAIL.pdf at 1 (“[Political and law enforcement leaders] propose that data storage and communications systems must be designed for exceptional access by law enforcement agencies. These proposals are unworkable in practice, raise enormous legal and ethical questions, and would undo progress on security at a time when Internet vulnerabilities are causing extreme economic harm.”); *id.* at 17, see FN 31 *infra*;

https://obamawhitehouse.archives.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf at 216, see FN 30 *infra* ; https://www.usenix.org/sites/default/files/conference/protected-files/sec18_slides_landau.pdf at 16 (citing “I think that it’s a mistake to require companies that are making hardware and software to build a duplicate key or a back door even if you hedge it with the notion that there’s going to be a court order.”

Michael Chertoff, former DHS Secretary, July 2015, *The Atlantic*.); *Id.* (citing “American security is better served with unbreakable end-to-end encryption than it would be served with one or another front door, backdoor, side door, however you want to describe it.” General Michael Hayden, former NSA Director, February 2016, *Business Insider*); <https://www.lawfareblog.com/testing-encryption-insecurity-modest-proposal> (suggesting “backdoor” proposals be subject to twelve months of sustained attack, judged by NIST, before requiring adoption of “backdoor” by encryption providers, else security risks are too high).

³⁵ <https://www.rstreet.org/2021/10/18/deciphering-the-encryption-debate/> (“Even though some law enforcement bodies in democratic governments pushing for weakened encryption are well-intentioned, it would be foolish to assume these vulnerabilities would only be used in a legitimate manner.”)

³⁶ <https://blog.cryptographyengineering.com/2015/07/>;

https://www.cs.columbia.edu/~smb/classes/s18/l_cryptowars.pdf;

https://www.schneier.com/blog/archives/2015/06/history_of_the_.html;

<https://www2.epic.org/crs/R44481.pdf> .

³⁷ https://obamawhitehouse.archives.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf

(recommending “fully supporting and not undermining efforts to create encryption standards,” ... “making clear that [the government] will not in any way subvert, undermine, weaken, or make vulnerable generally available commercial encryption,” and “supporting efforts to encourage the greater use of encryption technology for data in transit, at rest, in the cloud, and in storage.”).

³⁸ [https://dspace.mit.edu/bitstream/handle/1721.1/97690/MIT-CSAIL-TR-2015-](https://dspace.mit.edu/bitstream/handle/1721.1/97690/MIT-CSAIL-TR-2015-026.pdf?sequence=8&isAllowed=y)

[026.pdf?sequence=8&isAllowed=y](https://dspace.mit.edu/bitstream/handle/1721.1/97690/MIT-CSAIL-TR-2015-026.pdf?sequence=8&isAllowed=y) (“Lawmakers should not risk the real economic, geopolitical, and strategic benefits of an open and secure Internet for law enforcement gains that are at best minor and tactical”; “This report’s analysis of law enforcement demands for exceptional access to private communications and data shows that such access will open doors through which criminals and malicious nation-states can attack the very individuals law enforcement seeks to defend.”).

³⁹ <https://epic.org/documents/the-earn-it-act-holding-the-tech-industry-accountable-in-the-fight-against-online-child-sexual-exploitation/> (arguing that strong encryption is vital to network security).

⁴⁰ See FN 28 *supra*.

requires access to the data or communications being scanned.⁴¹ This raises questions of consent and scope creep by authoritarian governments.⁴²

The authors of the 2021 “Bugs in our Pockets” report note that a fundamental tenet of the Carnegie principles⁴³ is that surveillance technologies “must have sufficient technical and policy controls that they cannot be repurposed in ways that decrease the safety and security of non-targeted individuals or of society at large.”⁴⁴ Weakening encryption would fail to satisfy this requirement, as exceptional access can be misused by those with authorized access or exploited by those who obtain unauthorized access in ways that would expose the personal data and/or communications of non-targeted individuals.

LEOs’ enhanced access to digital evidence is most often touted as justifying the privacy and security harms that result from undermining strong encryption. This Resolution is not at odds with law enforcement access to digital evidence, and in fact re-affirms the ABA’s support for this, where there is proper legal process, and through means other than weakening encryption. Lawful hacking, such as that used by the FBI to access the phone of the 2015 San Bernadino shooter, is one such method.⁴⁵ Access to metadata is another vehicle by which law enforcement can access digital evidence—as one author on JustSecurity notes: the FBI’s issue is not “going dark” but “going slowly.”⁴⁶ Similarly, the Center for Democracy and Technology (CDT) has observed:

“Suppose the agencies had a choice of a 1990-era package or a 2011-era package. The first package would include the wiretap authorities as they existed pre-encryption, but would lack the new techniques for location tracking, confederate identification, access to multiple databases, and data mining. The second package would match current capabilities: some encryption-related obstacles, but increased use of wiretaps, as well as the capabilities for location tracking, confederate tracking and data mining. The second package is clearly superior – the new surveillance tools assist a vast range of investigations, whereas wiretaps apply only to a small subset of key investigations. The new tools are used far more frequently and provide granular data to assist investigators.”⁴⁷

⁴¹ <https://www.justsecurity.org/78749/client-side-scanning-a-new-front-in-the-war-on-user-control-of-technology/> .

⁴² <https://www.lawfareblog.com/apple-client-side-scanning-system> .

⁴³ <https://carnegieendowment.org/2019/09/10/moving-encryption-policy-conversation-forward-pub-79573> .

⁴⁴ <https://arxiv.org/pdf/2110.07450.pdf> .

⁴⁵ <https://www.theverge.com/2021/4/14/22383957/fbi-san-bernadino-iphone-hack-shooting-investigation> ; or encrypted data that is backed up in cloud storage <https://www.justsecurity.org/79549/we-now-know-what-information-the-fbi-can-obtain-from-encrypted-messaging-apps/> .

⁴⁶ <https://www.justsecurity.org/24695/fbis-problem-going-dark-slow/> .

⁴⁷ <https://cdt.org/insights/%e2%80%98going-dark%e2%80%99-versus-a-%e2%80%98golden-age-for-surveillance%e2%80%99/> .

It is unrealistic to expect a perfect preservation of all evidence, and the preconditions required to ensure more comprehensive access to and preservation of evidence are not worth the tradeoffs to civil liberties. For example, allowing Signal, an app that enables users to send messages protected by end-to-end encryption, to exist without a backdoor is not anathema to law enforcement interests, and moreover advances privacy, First Amendment,⁴⁸ and attorney-client privilege interests.⁴⁹

It is important to note that while the ABA has an especially strong interest in protecting attorney-client communications, a core principle of this Resolution is protecting the confidentiality of conversations generally. This is why the authors of the 2021 “Bugs in our Pockets” report asked not about attorney-client privilege specifically but rather whether it is “prudent to deploy extremely powerful surveillance technology that could easily be extended to undermine basic freedoms?”⁵⁰ This Resolution is essential to safeguarding attorney-client communications and First Amendment-protected activities, as well as the security of personal data and the integrity of commercial and government systems.

Existing ABA Policy

The ABA House of Delegates has passed Resolutions and adopted policies that address strengthening cybersecurity, safeguarding personal data, and preserving the integrity of attorney-client privilege in light of technological advancements. This Resolution builds on and is consistent with those existing ABA policies.

These ABA policies include the following:

Adopting policies that recommend encryption explicitly or implicitly, e.g. Resolution [16M10A](#) (recommending email encryption, among other measures, to protect attorney-client communications from monitoring by US DOJ and BOP); Resolution [05A106B](#) (recommending encryption of court records); Resolution [13A118](#) (condemning unauthorized, illegal governmental, organizational and individual intrusions into computer systems and networks utilized by lawyers and law firms; characterizing unencrypted data transfer as transmission in an unsecure fashion); and Comment 8 to Rule 1.1 (“a lawyer shall keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology”).

Adopting policies that protect communications and individual data from lawful or unlawful government surveillance, e.g. Resolution [06M302](#), (opposing electronic surveillance beyond the scope of FISA and urging thorough investigation of

⁴⁸ Not merely in terms of code as speech, as noted briefly by the Heritage Foundation, <https://www.heritage.org/cybersecurity/report/encryption-commission-making-sense-critical-policy-options>, but also in terms of potentially chilling free speech by ensuring no private conversation using digital messaging (e.g. coordinating a lawful protest) can ever be truly private.

⁴⁹ Arguably also the interests of legal observers, as Access Now notes. <https://www.accessnow.org/human-rights-lawyers-encryption/>.

⁵⁰ <https://arxiv.org/pdf/2110.07450.pdf> Additionally, if encryption becomes non-viable for safeguarding attorney communications, this could result in access to justice issues, as the costs of alternative methods to protect communications will be passed along to clients. CITE.

intelligence community surveillance that may not have complied with FISA); Resolution 21A604 (recognizing privacy interests of individuals recorded by police-worn body cameras); Resolution 19M107A (urging legislation and policy requiring a warrant for seizures and services of electronic devices at the border, post-*Riley*); and Resolution 19A115D (limiting federal law enforcement ability to obtain information about or from members of news media).

Adopting policies that safeguard attorney-client communications specifically, e.g. Resolution 99A117 (attorney use of wireless phone to contact client not waiver of attorney-client privilege); Resolution 05A111 (opposing policies, practices, and procedures of governmental bodies that have the effect of eroding the attorney-client privilege in a corporate context); Resolution 03104M (protecting attorney-client privilege in the context of domestic and international money laundering and terrorist financing investigations), and Resolution 02M101C (protecting attorney-client privilege in the context of international money laundering investigations).

Additionally, the ABA's formation of the Cybersecurity Legal Task Force (CLTF) in 2012,⁵¹ which has sponsored several resolutions over the past 10 years encouraging stronger cybersecurity practices by government, commercial, and legal institutions,⁵² further underscores the importance of data protection such as encryption provides. Notably, prior to the formation of the CLTF, the ABA published a Data Breach and Encryption Handbook.⁵³

This Resolution is timely, as numerous bills relevant to encryption have been introduced in the 117th Congress.⁵⁴

Conclusion

The ABA has championed the cause of cybersecurity for more than a decade, has explicitly endorsed use of encryption as a means of protecting court data and attorney-client communications, and has recognized the importance of limitations on government surveillance where privacy and civil liberties interests may be in jeopardy. Building upon this foundation, this Resolution empowers the ABA to encourage use of encryption by government agencies to protect sensitive data, to discourage policies that would

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https://www.americanbar.org/groups/judicial/publications/judges_journal/2012/fall/cybersecurity_how_important_is_it/#5.

⁵² <https://www.americanbar.org/groups/cybersecurity/aba-policy-initiatives/>.

⁵³ <https://www.findlaw.com/legalblogs/in-house/aba-debuts-data-breach-and-encryption-handbook/>.

⁵⁴ See, e.g., Online Privacy Act <https://www.congress.gov/bill/117th-congress/house-bill/6027>; SAFE DATA Act <https://www.congress.gov/bill/117th-congress/senate-bill/2499>; Consumer Data Privacy and Security Act <https://www.congress.gov/bill/117th-congress/senate-bill/1494>; Understanding Cybersecurity of Mobile Networks Act <https://www.congress.gov/bill/117th-congress/house-bill/2685>; Ensuring National Constitutional Rights for Your Private Telecommunications Act <https://www.congress.gov/bill/117th-congress/house-bill/3520>; EARN IT Act <https://www.congress.gov/bill/117th-congress/senate-bill/3538>; Child RESCUE Act <https://www.congress.gov/bill/117th-congress/house-bill/5884>; America COMPETES Act of 2022 <https://www.congress.gov/bill/117th-congress/house-bill/4521> (discussing the efficacy of encryption to protect mobile networks, etc.).

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undermine encryption even in favor of other important social aims, and to re-affirm the Association's support of law enforcement access to digital evidence with lawful process.

Respectfully submitted,

Beth K. Whittenbury, Chair
Section of Civil Rights and Social Justice

August 2022

GENERAL INFORMATION FORM

Submitting Entity: Section of Civil Rights and Social Justice

Submitted By: Beth K. Whittenbury, Chair

1. Summary of the Resolution(s). This Resolution encourages the government's use of strong encryption to protect personal data transmitted over the Internet or stored on devices, urges restraint from enacting policies that would weaken strong encryption, and requires that warrants to obtain encrypted digital evidence not violate attorney-client privilege nor increase vulnerability to third parties.
2. Indicate which of the ABA's Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this. This Resolution meets Goal 1 – Serve our Members; and Goal 4 – Advance the Rule of Law. It safeguards data from bad actors who would exploit well-intentioned backdoors, protects attorney-client privilege, and re-affirms law enforcement access to digital evidence, with proper legal process, without weakening encryption.
3. Approval by Submitting Entity. Approved by the Section of Civil Rights and Social Justice as of April 13, 2022.
4. Has this or a similar resolution been submitted to the House or Board previously? No.
5. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? This Resolution builds upon and is consistent with the following policies:
16M10A (recommending email encryption, among other measures, to protect attorney-client communications from monitoring by US DOJ and BOP);
05A106B (recommending encryption of court records);
13A118 (condemning unauthorized, illegal governmental, organizational and individual intrusions into computer systems and networks utilized by lawyers and law firms; characterizing unencrypted data transfer as transmission in an unsecure fashion); Comment 8 to Rule 1.1 (“a lawyer shall keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology”);
06M302, (opposing electronic surveillance beyond the scope of FISA and urging thorough investigation of intelligence community surveillance that may not have complied with FISA);
21A604 (recognizing privacy interests of individuals recorded by police-worn body cameras);
19M107A (urging legislation and policy requiring a warrant for seizures and

services of electronic devices at the border, post-*Riley*);

19A115D (limiting federal law enforcement ability to obtain information about or from members of news media);

99A117 (attorney use of wireless phone to contact client not waiver of attorney-client privilege);

05A111 (opposing policies, practices, and procedures of governmental bodies that have the effect of eroding the attorney-client privilege in a corporate context);

03104M (protecting attorney-client privilege in the context of domestic and international money laundering and terrorist financing investigations), and relatedly

02M101C (protecting attorney-client privilege in the context of international money laundering investigations)

6. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A
7. Status of Legislation. (If applicable) Bills have been introduced in the 117th Congress and in state legislatures regarding encryption that are relevant to this Resolution. Key proposals include the following bills: H.R.6027 – Online Privacy Safety Act; S.2499 – SAFE DATA Act; S.1494 – Consumer Data Privacy and Security Act; H.R.2685 – Understanding Cybersecurity of Mobile Networks Act; H.R.3520 – Ensuring National Constitutional Rights for Your Private Telecommunications Act; S.3538 – EARN IT Act; H.R.5884 – Child RESCUE Act; and H.R.4521 – America COMPETES Act of 2022 (discussing the efficacy of encryption to protect mobile networks, etc.).

Enacted state legislation relating to encryption

- <https://www.ncsl.org/research/telecommunications-and-information-technology/data-security-laws-state-government.aspx>
- <https://www.ncsl.org/research/telecommunications-and-information-technology/data-security-laws.aspx>

8. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. The Association will work with relevant internal and external stakeholders and the Governmental Affairs Office to ensure the implementation of the policy.
9. Cost to the Association. (Both direct and indirect costs) The adoption of the proposed resolution would result in indirect costs related to ABA and Section staff time devoted to advocacy for the subject matter of the resolution, as part of overall staff responsibilities.

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

11. Referrals.
Criminal Justice Section

Cybersecurity Legal Task Force
 Government and Public Sector Lawyers Division
 Litigation Section
 Science & Technology Law Section
 Section of Administrative Law and Regulatory Practice
 Section of State and Local Government Law
 Law Student Division
 Young Lawyers Division

12. 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.*) Paula Shapiro
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13. 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 SUMMARY1. Summary of the Resolution.

This Resolution encourages the government's use of strong encryption to protect personal data transmitted over the Internet or stored on devices, urges restraint from enacting policies that would weaken strong encryption, and requires that warrants to obtain encrypted digital evidence not violate attorney-client privilege nor increase vulnerability to third parties.

2. Summary of the issue that the resolution addresses.

This Resolution addresses personal data security, cybersecurity, and proper legal access to digital evidence especially as relates to attorney-client privilege.

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

Strong encryption protects personal data and sensitive governmental communications. Weakening encryption compromises the confidentiality attorney-client communications. Weakening encryption also exacerbates the harm caused by cyber incidents.

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

Some opponents to strong encryption believe it impedes efforts to moderate social media content, or complicates law enforcement investigations of criminal activity. This Resolution affirms the necessity of law enforcement access to digital evidence of illegal activity, with proper legal process, through means other than weakening encryption.

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