Resolutions with Reports to the House of Delegates
# RESOLUTIONS WITH REPORTS
TO THE HOUSE OF DELEGATES

New York Hilton Midtown Hotel  
Grand Ballroom, 3rd Floor  
New York, New York  

August 14 – 15, 2017

## TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Preliminary Calendar</th>
<th>1</th>
</tr>
</thead>
<tbody>
<tr>
<td>Officers and Members of the Board of Governors</td>
<td>3</td>
</tr>
<tr>
<td>Committees of the House of Delegates</td>
<td>5</td>
</tr>
</tbody>
</table>

### REPORTS OF OFFICERS

<table>
<thead>
<tr>
<th>ITEM NO.</th>
<th>Report</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Report of the President</td>
</tr>
<tr>
<td>2*</td>
<td>Report of the Treasurer</td>
</tr>
<tr>
<td>3</td>
<td>Report of the Executive Director</td>
</tr>
<tr>
<td>4</td>
<td>Report of the Committee on Scope and Correlation of Work</td>
</tr>
</tbody>
</table>

### RESOLUTIONS WITH REPORTS

<table>
<thead>
<tr>
<th>ITEM NO.</th>
<th>Resolution</th>
</tr>
</thead>
<tbody>
<tr>
<td>8</td>
<td>Report of the Scope Nominating Committee</td>
</tr>
<tr>
<td>11-1 through 11-4</td>
<td>Proposed Amendments to the Constitution, Bylaws and House Rules of Procedure</td>
</tr>
<tr>
<td>11A</td>
<td>Report of the Standing Committee on Constitution and Bylaws</td>
</tr>
<tr>
<td>100</td>
<td>Standing Committee on Paralegals</td>
</tr>
</tbody>
</table>
| 101 | Timothy Stanley, ABA Member  
| | Edward J. Walters, ABA Member |
| 102A-C | Tort Trial and Insurance Practice Section |

---

Resolutions with Reports numbered 100 through 121, 400A and 400B can be found in this book. Proposals to amend the Association's Constitution, Bylaws and House Rules of Procedure are numbered 11-1 through 11-4 and also can be found in this book. Any additional Resolutions with Reports submitted by state or local bar associations will be numbered in the "10" series. Late Resolutions with Reports will be numbered in the "300" series. These reports will be distributed at the opening session of the House of Delegates meeting. Informational Reports can be found on the ABA's website at http://www.americanbar.org/groups/leadership/house_of_delegates/2017-newyork-annual-meeting.html (click on Informational Reports).

*This report will be sent electronically prior to the opening session of the House of Delegates meeting.*
<table>
<thead>
<tr>
<th>Committee/Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section of Dispute Resolution</td>
<td>103</td>
</tr>
<tr>
<td>Standing Committee on the American Judicial System</td>
<td></td>
</tr>
<tr>
<td>Section of Litigation</td>
<td></td>
</tr>
<tr>
<td>Tort Trial and Insurance Practice Section</td>
<td></td>
</tr>
<tr>
<td>Criminal Justice Section</td>
<td></td>
</tr>
<tr>
<td>Washington State Bar Association</td>
<td></td>
</tr>
<tr>
<td>Hawaii State Bar Association</td>
<td></td>
</tr>
<tr>
<td>King County Bar Association</td>
<td>104</td>
</tr>
<tr>
<td>Beverly Hill Bar Association</td>
<td></td>
</tr>
<tr>
<td>Commission on Law and Aging</td>
<td>105</td>
</tr>
<tr>
<td>Standing Committee on Legal Aid and Indigent Defendants</td>
<td></td>
</tr>
<tr>
<td>Criminal Justice Section</td>
<td>106</td>
</tr>
<tr>
<td>Senior Lawyers Division</td>
<td>107</td>
</tr>
<tr>
<td>Law Student Division</td>
<td>108</td>
</tr>
<tr>
<td>Section of International Law</td>
<td></td>
</tr>
<tr>
<td>Standing Committee on Client Protection</td>
<td></td>
</tr>
<tr>
<td>Standing Committee on Professional Discipline</td>
<td>110</td>
</tr>
<tr>
<td>Commission on Interest on Lawyers' Trust Accounts</td>
<td></td>
</tr>
<tr>
<td>Standing Committee on Specialization</td>
<td>111</td>
</tr>
<tr>
<td>Criminal Justice Section</td>
<td></td>
</tr>
<tr>
<td>Commission on Disability Rights</td>
<td></td>
</tr>
<tr>
<td>Section of Civil Rights and Social Justice</td>
<td></td>
</tr>
<tr>
<td>Section of Real Property, Trust and Estate Law</td>
<td></td>
</tr>
<tr>
<td>Commission on Law and Aging</td>
<td>113</td>
</tr>
<tr>
<td>Commission on Intellectual Property Law</td>
<td></td>
</tr>
<tr>
<td>Section of Intellectual Property Law</td>
<td>114</td>
</tr>
<tr>
<td></td>
<td>A-C</td>
</tr>
</tbody>
</table>
Commission on Immigration
Section of Civil Rights and Social Justice
Commission on Hispanic Legal Rights and Responsibilities
Commission on Domestic and Sexual Violence
Standing Committee on Legal Aid and Indigent Defendants
Massachusetts Bar Association
Criminal Justice Section
New York County Lawyers Association
Section of Litigation
New York City Bar Association
Working Group on Unaccompanied Minor Immigrants
Section of International Law

Section of Litigation
Judicial Division

Commission on the Lawyer's Role in Assuring Every Child's Right to a High-Quality Education
Section of Civil Rights and Social Justice
Commission on Youth at Risk
Center on Children and the Law
Standing Committee on Public Education

Commission on the Lawyer's Role in Assuring Every Child's Right to a High-Quality Education
Section of Civil Rights and Social Justice
Commission on Youth at Risk
Standing Committee on Election Law
Center on Children and the Law
Standing Committee on Public Education

Commission on the Lawyer's Role in Assuring Every Child's Right to a High-Quality Education
Section of Civil Rights and Social Justice
Center on Children and the Law
Commission on Youth at Risk

Standing Committee on Gun Violence
Section of Civil Rights and Social Justice
Section of Litigation
Commission on Youth at Risk
Section of State and Local Government Law
All sessions of the House of Delegates will be held on Monday, August 14 and Tuesday, August 15, 2017, in the Grand Ballroom, 3rd Floor, at the New York Hilton Midtown Hotel, in New York, New York. It is anticipated that the first session of the House meeting will begin at 9:00 a.m. on Monday morning and will recess at approximately 5:30 p.m. On Tuesday morning, the meeting will reconvene, and will adjourn that afternoon when the House has completed its agenda.

The Final Calendar of the House of Delegates meeting will be placed on House members’ desks at the opening session on Monday morning, August 14. 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 9, 2017 filing deadline. Resolutions with Reports numbered 100 through 121, 400A and 400B appear in this book. Proposals to amend the Association’s Constitution, Bylaws and House Rules of Procedure are numbered 11-1 through 11-4 and also appear in this book. Informational Reports can be found on the ABA’s website at http://www.americanbar.org/groups/leadership/house_of_delegates/2017-newyork-annual-meeting.html (click on Informational Reports).

Any late Resolutions with Reports, those received after May 9, 2017, will be considered by the House if the Committee on Rules and Calendar recommends a waiver of the time requirement and the recommendation is approved by a two-thirds vote of the delegates voting. Late Resolutions with Reports will be posted to the ABA website prior to the opening session of the House, along with any additional Resolutions with Reports submitted by state or local bar associations.

The preliminary calendar of the House of Delegates meeting is as follows:
The Chair of the House of Delegates,
Deborah Enix-Ross, Presiding

Presentation of Colors

Invocation

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

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

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

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

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

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

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

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

9. Presentation of 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
    100-121 Resolutions with Reports
    300 Late Resolutions with Reports
    400A-B Resolutions with Reports on Archiving

ADJOURNMENT
AMERICAN BAR ASSOCIATION
2016-2017
BOARD OF GOVERNORS

OFFICERS

President
President-Elect
Chair, House of Delegates
Secretary
Secretary-Elect
Treasurer
Treasurer-Elect
Immediate Past President
Executive Director

Linda A. Klein, Atlanta, GA
Hilarie Bass, Miami, FL
Deborah Enix-Ross, New York, NY
Mary T. Torres, Albuquerque, NM
Mary L. Smith, Lansing, IL
G. Nicholas Casey, Jr., Charleston, WV
Michelle A. Behnke, Madison, WI
Paulette Brown, Morristown, NJ
Jack L. Rives, Chicago, IL

BOARD OF GOVERNORS

President
President-Elect
Chair, House of Delegates
Secretary
Secretary-Elect
Treasurer
Treasurer-Elect
Immediate Past President
First District
Second District
Third District
Fourth District
Fifth District
Sixth District
Seventh District
Eighth District
Ninth District
Tenth District
Eleventh District
Twelfth District
Thirteenth District
Fourteenth District
Fifteenth District
Sixteenth District
Seventeenth District
Eighteenth District

Linda A. Klein, Atlanta, GA
Hilarie Bass, Miami, FL
Deborah Enix-Ross, New York, NY
Mary T. Torres, Albuquerque, NM
Mary L. Smith, Lansing, IL
G. Nicholas Casey, Jr., Charleston, WV
Michelle A. Behnke, Madison, WI
Paulette Brown, Morristown, NJ
Wendell G. Large, Portland, ME
Barry C. Hawkins, Stamford, CT
Penina K. Lieber, Pittsburgh, PA
Hon. Herbert B. Dixon, Jr., Washington, DC
E. Fitzgerald Parnell III, Charlotte, NC
David F. Bienvenu, New Orleans, LA
J. Timothy Eaton, Chicago, IL
Andrew Joshua Markus, Miami, FL
Joe B. Whisler, Kansas City, MO
David S. Houghton, Omaha, NE
Hon. Leslie Miller, Tucson, AZ
Harry Truman Moore, Paragould, AR
Maryann Elizabeth Foley, Anchorage, AK
John L. McDonnell, Jr., San Francisco, CA
A. Vincent Buzard, Pittsford, NY
Hon. William C. Carpenter, Jr., Wilmington, DE
Alan Van Etten, Honolulu, HI
Paula E. Boggs, Sammamish, WA
<table>
<thead>
<tr>
<th>Category</th>
<th>Year</th>
<th>Name</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>Goal III Disability Member-at-Large</td>
<td>2019</td>
<td>Scott C. LaBarre</td>
<td>Denver, CO</td>
</tr>
<tr>
<td>Goal III Minority Members-at-Large</td>
<td>2017</td>
<td>Ruthe Catolico Ashley</td>
<td>Vallejo, CA</td>
</tr>
<tr>
<td>Goal III Women Members-at-Large</td>
<td>2018</td>
<td>Orlando Lucero</td>
<td>Albuquerque, NM</td>
</tr>
<tr>
<td>Judicial Member-at-Large</td>
<td>2019</td>
<td>Lorelie S. Masters</td>
<td>Washington, DC</td>
</tr>
<tr>
<td>Law Student Member-at-Large</td>
<td>2018</td>
<td>Hon. Ramona G. See</td>
<td>Torrance, CA</td>
</tr>
<tr>
<td>Section Members-at-Large</td>
<td>2017</td>
<td>John Louros</td>
<td>Brooklyn, NY</td>
</tr>
<tr>
<td></td>
<td>2017</td>
<td>William R. Bay</td>
<td>Saint Louis, MO</td>
</tr>
<tr>
<td></td>
<td>2017</td>
<td>Donald R. Dunner</td>
<td>Washington, DC</td>
</tr>
<tr>
<td></td>
<td>2017</td>
<td>William N. Shepherd</td>
<td>West Palm Beach, FL</td>
</tr>
<tr>
<td></td>
<td>2018</td>
<td>Ilene K. Gotts</td>
<td>New York, NY</td>
</tr>
<tr>
<td></td>
<td>2018</td>
<td>Bernard T. King</td>
<td>Syracuse, NY</td>
</tr>
<tr>
<td></td>
<td>2018</td>
<td>Linda L. Randell</td>
<td>Hamden, CT</td>
</tr>
<tr>
<td></td>
<td>2019</td>
<td>Benjamin E. Griffith</td>
<td>Oxford, MS</td>
</tr>
<tr>
<td></td>
<td>2019</td>
<td>Kevin L. Shepherd</td>
<td>Baltimore, MD</td>
</tr>
<tr>
<td>Young Lawyer Members-at-Large</td>
<td>2017</td>
<td>Min K. Cho</td>
<td>Orlando, FL</td>
</tr>
<tr>
<td></td>
<td>2018</td>
<td>Erica R. Grinde</td>
<td>Missoula, MT</td>
</tr>
</tbody>
</table>
COMMITTEES OF THE HOUSE OF DELEGATES

ADVISORY COMMITTEE TO THE CHAIR OF THE HOUSE OF DELEGATES

MEMBERS:  
Philip S. Anderson, Little Rock, AR  
Martha W. Barnett, Tallahassee, FL  
Laurel G. Bellows, Chicago, IL  
Allen E. Brennecke, Marshalltown, IA  
Robert M. Carlson, Butte, MT  
L. Stanley Chauvin, Jr., Louisville, KY  
N. Lee Cooper, Birmingham, AL  
Robert J. Grey, Jr., Richmond, VA  
William C. Hubbard, Columbia, SC  
Linda A. Klein, Atlanta, GA  
Karen J. Mathis, Denver, CO  
J. Michael McWilliams, Baltimore, MD  
Patricia Lee Refo, Phoenix, AZ  
H. Thomas Wells, Jr., Birmingham, AL  
Stephen N. Zack, Miami, FL

CREDENTIALS AND ADMISSIONS

CHAIR: Hon. Adrienne Nelson, Portland, OR  
VICE-CHAIR: Mark Johnson-Roberts, Tigard, OR  
MEMBERS: Mark D. Agrast, Washington, DC  
Hon. Pamila J. Brown, Ellicott City, MD  
Colin H. Lindsay, Louisville, KY  
Barbara Mendel Mayden, Nashville, TN  
Myra L. McKenzie-Harris, Rogers, AR

DRAFTING POLICIES AND PROCEDURES

CHAIR: Christina Plum, Milwaukee, WI  
VICE-CHAIR: Barbara J. Howard, Cincinnati, OH  
MEMBERS: Lee A. DeHihns III, Marietta, GA  
Michael Pellicciotti, Olympia, WA  
Pauline A. Weaver, Fremont, CA
ISSUES OF CONCERN TO THE LEGAL PROFESSION

CHAIR: Mark I. Schickman, San Francisco, CA
VICE-CHAIR: W. Anthony Jenkins, Detroit, MI
ADVISORS: Robert E. Hirshon, Ann Arbor, MI
Judy Perry Martinez, New Orleans, LA
MEMBERS: Nathan D. Alder, Salt Lake City, UT
Hulett A. Askew, Atlanta, GA
Stephen E. Chappelear, Columbus, OH
Dana Marie Douglas, New Orleans, LA
H. Russell Frisby, Jr., Washington, DC
Jeffrey B. Golden, London United Kingdom
Kay H. Hodge, Boston, MA
Robert E. Juceam, New York, NY
David P. Miranda, Albany, NY
Rhoda Shear Neft, Pittsburgh, PA
Manuel A. Quilichini, San Juan, PR
Alice E. Richmond, Boston, MA
Joseph J. Roszkowski, Cumberland, RI
Pauline A. Schneider, Washington, DC
Hon. Elizabeth Snow Stong, Brooklyn, NY
Jo-Ann Wallace, Washington, DC
Adam Keith Zickerman, Flagstaff, AZ

RESOLUTION AND IMPACT REVIEW

CHAIR: John C. Yang, McLean, VA
VICE-CHAIR: Kelly-Ann F. Clarke, Bellaire, TX
MEMBERS: Michael G. Bergmann, Chicago, IL
Gabrielle M. Buckley, Chicago, IL
Luis E. Dubon III, San Juan, PR
William Ferreira, Morristown, NJ
Sharon Gerstman, Buffalo, NY
Juanita C. Hernandez, Washington, DC
William D. Johnston, Wilmington, DE
Frank X. Neuner, Jr., Lafayette, LA
Joseph D. O'Connor, Bloomington, IN
Darrel J. Papillion, Baton Rouge, LA
Beverly J. Quail, Denver, CO
Andrew M. Schpak, Portland, OR
Robyn S. Shapiro, Milwaukee, WI
Neal R. Sonnett, Miami, FL
RULES AND CALENDAR

CHAIR: Paula J. Frederick, Atlanta, GA
MEMBERS: Laura V. Farber, Pasadena, CA
Suzanne E. Gilbert, Orlando, FL
Rew R. Goodenow, Reno, NV
Amit D. Ranade, Seattle, WA

SELECT COMMITTEE OF THE HOUSE

CHAIR: Sandra R. McCandless, San Francisco, CA
VICE-CHAIR: Carlos A. Rodriguez-Vidal, San Juan, PR
REPORTER: Bonnie E. Fought, Hillsborough, CA
MEMBERS: Lynn M. Allingham, Anchorage, AK
David Wright Clark, Jackson, MS
Jonathan J. Cole, Nashville, TN
James M. Durant III, Lemont, IL
Pamela C. Enslen, Kalamazoo, MI
Ellen J. Flannery, Washington, DC
C. Elisia Frazier, Pooler, GA
Glenn P. Hendrix, Atlanta, GA
Jill Marie Kastner, Milwaukee, WI
Mark A. Robertson, Oklahoma City, OK
Hon. Jennifer A. Rymell, Fort Worth, TX
Reginald M. Turner, Jr., Detroit, MI
Robert N. Weiner, Washington, DC
Walter H. White, Jr., Washington, DC

STEERING COMMITTEE OF THE NOMINATING COMMITTEE

CHAIR: Hon. James S. Hill, Mandan, ND
VICE-CHAIR: Eileen M. Letts, Chicago, IL
MEMBERS: Mark H. Alcott, New York, NY
John Preston Bailey, Wheeling, WV
Thomas P. Gadsden, Philadelphia, PA
Allen C. Goolsby, Richmond, VA
Paula H. Holderman, LaGrange, IL
Barbara Kerr Howe, Towson, MD
Amie C. Martinez, Lincoln, NE
Edith G. Osman, Miami, FL
Linda Sue Parks, Wichita, KS
Michael Haywood Reed, Philadelphia, PA
Geraldine G. Sanchez, Portland, ME
Mario A. Sullivan, Chicago, IL
Palmer Gene Vance II, Lexington, KY
Charles John Vigil, Albuquerque, NM
Karol Corbin Walker, Newark, NJ
Carolyn B. Witherspoon, Little Rock, AR
TECHNOLOGY AND COMMUNICATIONS

CHAIR: Daniel Warren Van Horn, Memphis, TN
VICE-CHAIR: Margaret D. Plane, Salt Lake City, UT
MEMBERS: Richard S. Brown, Oconomowoc, WI
Lori Ann Colbert, Anchorage, AK
Meredith I. Friedman, Woodbridge, NJ
Janet Green-Marbley, Columbus, OH
Akira Heshiki, Portland, OR
Randall D. Noel, Memphis, TN

TELLERS

CHAIR: Shenique A. Moss, Detroit, MI
MEMBERS: Allison Block-Chavez, Albuquerque, NM
Katherine S. Chappelear, Columbus, OH
Lacy L. Durham, Dallas, TX
Mark David Nichols, Deerfield Beach, FL
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 distributed at the time of the Annual Meeting of the House of Delegates.
REPORT OF THE EXECUTIVE DIRECTOR
to the
HOUSE OF DELEGATES
(submitted June 9, 2017)

This report highlights American Bar Association activities from December 9, 2016 to June 9, 2017.

Introduction

The legal landscape is in the midst of profound change that is testing the profession like never before. For the past decade, rapidly advancing technology and new methods of delivering legal services have challenged us to fundamentally examine how our profession can best meet the needs of today’s society. It is imperative the American Bar Association stop playing “catch-up” and instead take a leading role to help the profession adapt to the changing world. Otherwise, we risk losing relevance with those we are dedicated to serve.

According to American Bar Foundation research, today less than one-quarter of civil justice problems in the United States are brought to an attorney. The research also shows many people on the lower end of the socio-economic scale don’t seek legal help because they don’t recognize their issues as legal problems. Instead, they see them as personal difficulties, moral failings, or issues that just happen in life. Meanwhile, today middle income individuals are more likely to engage in self-help and online services to obtain legal assistance at a minimal cost.

The traditional one-on-one model, where one lawyer works in-person with one client at a time, at a cost that the lawyer determines is fair, will be difficult to sustain in the coming years. The world’s changing technology-driven delivery system has transformed how consumers receive, and expect to receive, goods and services. This will necessitate a reevaluation of the traditional delivery model for the legal profession. These consumer-centric market changes must also maintain our commitment to increase access to justice while broadening opportunities for lawyers, protecting the public, and preserving our professional independence.

To address these new realities, the ABA must be thinking outside the box. We should be working from a clean canvas and use creative thinking and collaborations to help develop these new delivery models. Artificial intelligence (AI) is here, but lawyers provide creativity, judgment, and a moral code that machines do not. How do we best harness the many opportunities AI can provide to support our efforts?

Virtual law firms, unbundled or discrete legal services, real-time chat consultations, and secure online portals for document review and signatures, are all part of the current toolkit that can help to address our new reality. Just one example: South Carolina has adopted fast-track jury trials that, with the parties’ consent, limit direct and cross examinations, have smaller juries, and forego the right to appeal.
Certainly, legal technology companies are here to stay. Investors pumped $66 million into legal tech companies in 2012. That number rose to $456 million in 2013 and to more than $1 billion in 2014 and every year since. They are now filling that clean canvas, often without the appropriate participation of our profession.

The ABA must take the lead in spurring, testing, and supporting efforts such as these. If not the ABA, then who? We must promote innovations to create new avenues for access to justice; develop new career opportunities for current and future lawyers; and ensure that we stay true to our core values of professional independence and client protection. We must play a major role to ensure that our profession and justice system remain relevant, responsive, effective, and accessible for all.

Through the ABA’s new Center for Innovation and other forward-focused initiatives detailed in this report, we are stepping up to address the new realities facing the legal profession and our Association. By investing and embracing new technologies and practices today, we will ensure our continued role as the leading voice of the legal profession in the years ahead.

Membership

Membership trends in FY 2017 show continued promising results in the recruitment of law students, along with slower growth in the number of associates, and a decrease in lawyer members. As of June 2, 98,064 law students were members of the ABA, up 37.1 percent from the same time in 2016. Associate membership grew by 0.7 percent to 15,154 members during that period. The Association also experienced a 4.9 percent drop in lawyer members, from 265,503 at the same time in 2016 to 252,621 today.

Increasing ABA membership -- and related dues revenue -- are top priorities of the Association. We have expanded our membership outreach to offer an assortment of new programs, and we have also revamped many of our existing member value components.

New Bar Admittee (NBA) outreach is an ongoing campaign. To date, staff has received lists of recently admitted attorneys from 49 states and territories and is following up with ABA leaders to obtain assistance in securing lists from the two remaining states -- Missouri and Wisconsin. Staff has also uploaded over 21,500 newly admitted lawyer members. For context, this is a serious drop compared to previous years, which saw 35,000 NBAs uploaded in FY 2016 and an average of 44,000 uploads in the eight years prior to that. Fewer law students across the country has led to fewer NBAs, which underscores the challenge we face bringing greater numbers of young lawyers into the ABA pipeline.

The ABA bolstered its telemarketing efforts this spring. An email was sent to members to encourage them to sign up online for a free six-month trial membership, including a free section. Leads were generated using list sources from our non-member database, Martindale Hubbell, and 27 lists from state bars and licensing agencies around the country. This campaign’s calls will continue through the summer and fall of 2017. To date, over 8,000 members have been recruited through this campaign.
The “Bar Birthday” program was re-launched in January 2017, refreshing a successful campaign from 2016 that brought in about nearly 2,000 new members with a six-month trial membership plus free section offer. The campaign consists of a monthly email designed to emulate a “Paperless Post” invitation to celebrate the members’ “Bar Birthday” (anniversary month of when they were admitted to the bar) leading them to a microsite to claim their free section membership offer. Since January, the campaign has generated more than 600 new members to the Association.

Looking to build on the success of our targeted ‘Powerful Career Women’ recruitment campaign last year that focused on adding women members to the Association, our membership team has concentrated on practice settings to design content and benefits for members and potential members based on their specific legal needs. After meeting with many sections, the “Me in Membership” campaign was initiated, which uses a segmented recruitment approach by targeting non-members with a six-month trial membership plus free section membership offer, highlighting benefits that are specific to the individual’s practice setting. The five segments being tested this year are: solo, small firm, litigators, business attorneys (transactional), and young lawyers. Since April, nearly 400 new members have been added through the campaign.

An online campaign, #ABASTANDS4, utilizes social media to help spotlight the Association’s advocacy and social justice activities. All posts lead to a microsite that provides more information and an opportunity for members to become involved. #ABASTANDS4 is expected to generate new memberships from those who become familiar with the ABA’s positive role in advancing justice and the rule of law.

The ABA introduced auto-renew in May for members who want to keep a credit card stored securely on file to pay their annual dues invoice without needing to complete an annual bill or manual payment. ABA dues and any current or added Section, Division, and Forum dues will be included in the annual charge.

Building on our recent success attracting law students into the Association. Currently, 95 schools participate in the Full School Enrollment Program, 15 more than last year at this time, thanks to the efforts of ABA leaders, including the Board of Governors, who responded to the “BOG challenge” issued by President Klein.

As of mid-May, nearly 14,000 law students have enrolled in ABA Premium. Anyone signing up through BABRI’s Bar Review course has the opportunity to sign-up for ABA Premium and receive the lowest price offered, which includes a $250 discount. Additional Premium promotions include web ads on both the ABA and Law Student Division websites, social media posts and ads, targeted emails, and advertisements in the Student Lawyer magazine and e-newsletter.

ABA’s membership acquisition team is working to launch the ABA Rep Rewards program in July 2017. The program will incentivize ABA law student representatives for recruiting ABA Premium students, recruiting law students into Sections, Divisions, and Forums.
The ABA continues to see positive results from our Group Billing and Full Firm programs. As of May 19, Group membership stood at 71,793, which is an increase of 1.4 percent in the past year, and the related FY 2017 dues revenue collection is up 1.0 percent from this time last year, at $19,582,027. Full Firm membership stands at 24,841 which is an increase of 6.7 percent over the prior year, and associated dues revenue is up 5 percent from this time last year, at $5,247,513. Currently, 100 firms participate in Full Firm.

Nearly 150 new group accounts have been created for FY 2018 as a result of sales calls being made by membership staff. Members at group billed firms retain at a rate of over 92 percent, and more than 800 new group accounts have been created since these sales efforts began in 2014.

Membership staff has offered several current full firms an opportunity to increase the number of members in sections by participating in the Full Firm Section Membership dues pilot. Through the pilot, firms with low section membership will be eligible to receive a 25 percent discount on new and existing Section enrollments for FY 2018. We will be able to determine whether the pilot results in increased section memberships at these firms by early fall 2017.

Three NLJ 500 firms joined the Full Firm Membership Program in recent weeks. Lathrop & Gage LLP, based in Kansas City, Missouri, has nearly 300 lawyers, and we will gain over 160 new members. Curtis, Mallet-Prevost, Colt & Mosle, based in New York, has over 300 attorneys, with over 170 international lawyers. We will add over 50 new domestic attorney members and more than 150 new international attorneys. Sirote & Permutt, PC, based in Birmingham, AL has over 100 attorneys, and we will gain approximately 30 new members.

In other membership news, Open Road Films, an independent motion picture distribution company, is releasing a feature film on October 13 called *Marshall* about an early case in former Supreme Court Justice Thurgood Marshall’s career. Given the film’s focus on the law, the company has offered exclusive pre-release screenings and other programming options to the ABA and its members. The Association is planning movie screenings at the upcoming Annual Meeting, regional conferences, and select cities, along with a sweepstakes featuring tickets to the “Red Carpet Opening” and a bound script autographed by the cast.

**Finances**

As of April 30, 2017, the Association generated consolidated operating revenues of $137.2 million and incurred operating expenses of $137.6 million, which resulted in a deficit of $0.4 million. Our primary problem remains on the revenue side, highlighted by the decline in dues collections. Efforts to improve non-dues revenue are not yet yielding the results we need. In-depth financial information is provided in the Treasurer’s report, and you’re welcome to contact our Financial Services staff or me at any time with questions or concerns.

As noted in my November 2016 report to the House, the ABA Board of Governors directed reductions of $10.7 million in general operations spending in FY 2018. After a special meeting of the Board in April 2017, I prepared a memo for ABA staff and entities detailing the
Board's decisions on fiscal concerns. We utilized both bottom-up and top-down approaches to ensure we identified optimal potential cost reductions.

Throughout this process, I engaged in a number of discussions and conference calls to inform members of the actions necessary to achieve such a significant spending reduction. Thanks to the efforts of our officers and Board members, there is substantial understanding of the need for reduced spending, and we have widespread support for the actions necessary to achieve our financial goals, as detailed in the April memo (see link, above).

ABA Blueprint

ABA Blueprint is a very valuable tool, and we continue to promote it to both members and non-members. Blueprint connects solo and small firm lawyers with essential software and services to help them better manage the business side of their practices. Since its launch last fall, more than 15,000 unique users have visited the website, www.abahub.com. Recent promotions have included a Google Adwords campaign that highlights the site through search engine marketing, and we have publicized benefits of Blueprint at ABA meetings and on social media. We continue to work with Blueprint vendors on additional marketing, such as billing inserts, emails, and e-newsletter promotions.

ABA Insurance

ABA's exclusive program offering specially-priced personal and firm insurance offerings continues to grow. In January, we added several new product lines, including Cyber-Liability, Employment Practice Liability, Business Overheard Expense, Accidental Death, Group Medical for small firms, and Medicare Supplement. We further bolstered our portfolio with AirMed and Hospital Income products in May and expect to launch ID Theft protection later this month (June). To date, the insurance program website, www.abainsurance.com, has received more than 125,000 page views.

We are continuing to enhance and expand the insurance program. Also in January, the website was updated to allow visitors to select coverage based on Personal Coverage and Firm Coverage, making navigation easier for member-product search criteria. USI Affinity, which administers the program, has conducted several webinars this year to raise awareness and educate members on the distinctive products offerings. Additionally, new members of the ABA are now being offered Guarantee Issue Life and Disability insurance within the first 90 days of joining.

ABA Email

Since hiring an Email Manager last summer, the ABA has achieved remarkable progress to reduce the voluminous number of emails sent by the Association. In the second quarter of FY 2017, 17,603,798 ABA messages were sent out, down from 66,215,491 during the same time period in 2016 -- a reduction of nearly 49 million emails (about 73.5 percent). Progress began at the beginning of this fiscal year -- 70,116,603 emails sent so far in FY 2017 compared with 146,212,674 in FY 2016 (a 52 percent reduction).
Numerous Association entities led the way with reduced email rates using our new protocols and common-sense practices. The ABA Journal reduced its messages by 80 percent from the second quarter of FY 2016 to 2017 by monitoring open rates and dropping those who did not open its emails over a three-week period. Publishing saw a decline of about 75 percent during the same time period through increased cross-promoting of products and services from other Association entities.

The overall success the ABA has achieved stems from several new email policies implemented in recent months:

- Email lists exceeding 150,000 addresses require authorization from the Email Manager before being used
- Anti-spam and best business practices training is now required for all ABA email senders
- The Email Manager spot checks emails for quality after being sent

As we move forward, the ABA will continue to work to reduce messages sent from the Association, while focusing on ways to make their content more impactful and targeted.

ABA Website

Our ABA website, www.americanbar.org, is the main vehicle current and potential members interact with the Association. With some 1.5 million visitors every month, it is also the ABA’s “virtual headquarters” to the world where legal professionals, media, and the public can learn more about the positive work in so many areas.

Last updated in a comprehensive manner in February 2011, technological advances have rendered the website outdated for the needs of today’s Association and its members. Searching for content is difficult, and many areas of the website are inaccessible to the mobile devices most lawyers use in their daily lives. The technological gap with mobile devices is especially troubling given recent statistics showing lawyers, like the rest of society, rely overwhelmingly on mobile friendly devices for their communications.

Updating the ABA website and making it more user-friendly is a strategic priority, and the project has benefitted from an extraordinarily collaborative process. We have been working on plans to improve the website consistently with members and staff for more than a year and a half, since the creation of the Website Task Force in October 2015.

I am pleased to report the website redesign process is within budget and well on track, with a target rollout in the first quarter of calendar year 2018. We have successfully completed five of eight “sprint” design phases and will move to extensive testing, bug fixing, and migration/creation of new online materials this fall.

The first of two usability studies was completed early in April, giving us the opportunity to observe how “live” users navigate the site, so that we can fine tune elements that have already been developed. The migration of information from the current site was jump-started with two
Town Hall sessions for staff in April, allowing ABA entities to begin cleaning up their old website content and prepare to move to the new site.

Since the Board of Governors authorized us to move forward last September, we have worked with members, staff, and our website consultant to develop business rules in three areas. This will ensure necessary processes are in place and enforced for the new website. The three areas for business rules are: (1) Quality Assurance; (2) Taxonomy; and (3) Pricing for ABA products and services.

We strived to be as inclusive and transparent as possible throughout the website redesign process. We've held a great number of open meetings and forums, including conference calls with broad participation, along with presentations to entities directly impacted by the redesign. We have adopted many of the suggestions we received during this process, and the final version we will roll out in 2018 will be much more responsive to the needs of our members, entities, and staff as a result. Our website team is absolutely committed to work effectively with members and staff at all levels.

ABA Leverage

January 2017 marked the beginning of the third year of operations for ABA Leverage. Thus far, ABA Leverage has contracted with more than 30 clients (firms, legal associations, and law schools). Currently booked business, through 2020, should realize over $600,000 in commissions for the ABA, and we have the potential for an additional $100,000. To date, our contracts show savings as high as 35 percent (averaging about 12 percent), which amounts to more than $2.3 million dollars back to our clients.

ABA Advantage

Our ABA Advantage program continues to provide value to our members, saving them at least $3 million during the first quarter of calendar year 2017 in discounted products and services. With revenue from about 20 companies, ABA Advantage generates close to $6 million in marketing fees, royalties, and sponsorships each year. The newest additions to the program offer savings on Dell computers and Whirlpool appliances. Through the first quarter of calendar year 2017, ABA members spent nearly $80 million with ABA Advantage program partners.

Center for Innovation

This year, the ABA Center for Innovation has progressed with its mission -- to encourage and accelerate innovations that improve the accessibility, effectiveness, and efficiency of legal services in this country. During its second quarter of operations, the Center advanced this mission in significant ways.

Following a rigorous selection process that included the review of nearly 50 applications, the Fellows Committee selected the inaugural class of NextGen and Innovation Fellows. NextGen Fellows are recent law school graduates who will spend a year in residence at ABA headquarters working on innovative legal services projects. They will each receive a salary and
benefits, as well as intensive training and support from Center members and staff. One ABA
NextGen Fellow will spend a year in residence at Microsoft headquarters in Redmond,
Washington. Innovation Fellows are experienced lawyers and other professionals, who will
spend approximately nine to 12 weeks in residence at the Center, receiving intensive training and
support from Center members and staff.

Guided by its Programs & Projects Committee, the Center has also encouraged and
accelerated legal services innovations. A few of the Center’s recent programs and projects are
described below.

Immigrantjustice.us

Within days of a 2017 Executive Order on immigration that resulted in the detention of
scores of immigrants at airports, the Center for Innovation worked with the American
Immigration Lawyers Association and the ABA Law Practice Division to launch
www.immigrationjustice.us, a site that supports pro bono attorneys seeking to help clients with
immigration law. The site provides necessary resources to help organize pro bono attorneys
nationwide. The Center also prepared a toolkit for fast-developing rapid response websites. This
project demonstrates how innovative thought and modern technology can help bar associations to
work together with agility and common purpose.

Hate Crimes Reporting App

Recent incidents of hate crimes across the United States helped spur the Center for
Innovation to action. With generous support from Cisco Systems, and in collaboration with
Suffolk Law School, CuroLegal, and Stanford Law School, the Center is developing an app that
will help people determine if they have been a victim of a hate crime and learn more about their
state’s hate crime statutes. It will also automate fact-gathering for hate crime reporting and
demystify the reporting process. We expect the app will be available this summer.

Online Dispute Resolution

The Center continues to assist the New York State Unified Court System with a court­
annexed online dispute resolution pilot project that will seek to resolve consumer debt cases
more efficiently and effectively. The ABA Judicial Division and ABA Section of Dispute
Resolution are leading this effort.

Legal Checkups

The Center has been working with the ABA Standing Committee on the Delivery of
Legal Services on a free online legal checkup tool. The checkup will consist of a carefully
designed system of branching questions and answers to help members of the public identify legal
issues in specific subject areas. Users are referred to other appropriate resources.
Free Legal Answers

Free Legal Answers, the ABA’s virtual legal advice clinic created to help low income individuals with their civil legal questions, is a proven help to those in need. Special thanks goes to George “Buck” Lewis of the Pro Bono Committee, and his firm Baker Donelson, for spearheading this important effort and providing their expertise and resources.

Nearly all states are participating or committed to participating with this initiative.

As of May 31, 38 states are connected to the site in various degrees of access by clients, pro bono attorneys, and/or state administrators. So far, 2,643 attorneys have registered to respond to questions and 6,645 client questions have been submitted since launch of the website in August 2016.

MCLE Accreditation Service

ABA Mandatory Continuing Legal Education (MCLE) Accreditation Service is our latest non-due revenue initiative. Similar to ABA Leverage, we use existing staff expertise and staffing to provide a service needed by others. Our charges are moderate but could result in substantial revenues for the Association over time. We currently project $300,000 in revenue for FY 2018, and expect to grow the Service to more than $600,000 annually over the next three to five years.

We are just beginning to market the Service. “Word of mouth” discussions led to the Service’s first contract in March. We also featured the Service at this year’s Bar Leadership Institute (BLI). The Service was created by Gina Roers-Liemandt, Director of MCLE and Professional Development. Contracts and Statements of Work have been created, and we continue to refine pricing policy, documentation, the implementation processes and other aspects of this new service.

ABA Publishing

I’m pleased to report ABA Publishing’s finances had a very positive spring and are trending favorably compared with last year. Through April of the current fiscal year, Publishing generated nearly $2.8 million in revenues compared to $2.3 million during the same period last year. Publishing’s profits through April stood at $1.1 million, compared with $650,000 during the same period in FY 2016 -- an increase of $504,000.

Key entities that contributed to this year’s improved performance include: the Center for Professional Responsibility; Section of Antitrust Law; Senior Lawyers Division; Section of Environment, Energy, and Resources; and the Section for Public Contract Law. Publishing has also made many structural changes to better align its editors, marketers, and production staff with entity Publishing programs, entity staff, and volunteer boards. Additionally, Publishing is expanding its social media presence on LinkedIn and Facebook. And we are working hard to improve advertising revenues (and as reflected in the paragraph above, we’re beginning to see positive results).
ABA Publishing was also honored that its title, “Broken Scales: Reflections on Injustice,” recently received a New York Times book review. Written by Joel Cohen with Dale J. Degenshein, the book focuses on ten people who suffered from or participated in legal system injustices. (You may read the review here.)

ABA Journal

The Journal Board’s Strategic Planning Committee met twice in May to focus on three overarching goals: Grow Revenue, Build Community, and Leverage Resources. The full Board of Editors will discuss the goals, objectives, implementation plans, and timelines at its June meeting in Washington, D.C.

The professional publication awards season came to a close with the Journal winning 11 national awards from the Azbee Awards, which named it a top three magazine of the year, and the Lisagor Awards, which honored it for best design (in the trade category) and best podcast.

The ABA granted permission to use a copy of the Journal as background set dressing in a feature film, “Inner City,” starring Denzel Washington. Many of the movie’s characters are attorneys and many scenes occur in law offices. The production team wanted to have the Journal on a desk or chair to add to authenticity.

ABA Rule of Law Initiative (ROLI)

On May 4, ROLI joined with the Standing Committee on Law and National Security and Georgetown University Law Center to convene a highly successful conference on “Rule of Law Approaches to Combating Violent Extremism (CVE).” The daylong forum at Georgetown drew 250 registrants from across the U.S. government, private sector, think tank, and NGO community. Coinciding with the conference, ROLI published the first in a new series of “Rule of Law Issue Papers” on the subject of CVE, identifying rule of law strategies for addressing extremism, a major preoccupation of the rule of law policy and donor communities.

On May 18, ROLI launched the nationwide rollout of the approved Guidelines for Speedy Trial in collaboration with the Philippine Judicial Academy and the Philippine Supreme Court’s Special Committee on Speedy Trial. More than 600 participants attended the seminar and training, including judges, clerks of courts, mediators, public prosecutors and public attorneys. Also in attendance were retired justices of the Philippine Supreme Court, and representatives from USAID, ROLI, and the Office of the Court Administrator. Supreme Court Associate Justice Diosdado M. Peralta presided over the seminar. On May 19, ROLI conducted the second training on Speedy Trial guidelines, training more than 450 judges, clerks of courts, mediators, public prosecutors and public attorneys.

On May 22 to 26 in San José, Costa Rica, ROLI conducted a five-day study tour for senior officials of the Peruvian justice system, including the Attorney General and the President of the Judiciary to Costa Rica to learn about the accusatorial system, and specifically the flagrancy procedure, a feature of both Costa Rica’s and Peru’s criminal code. Delegates visited
the General Prosecutor’s office, Judicial Power, Judicial Circuit of San José Jurisdiction, the Public Defender’s Office as well as the Inter-American Court of Human Rights.

On March 8, in recognition of International Women’s Day, ROLI’s seven legal aid clinics in the Central African Republic (CAR) hosted open-houses to generate community awareness about women’s rights and the services to support women that are available through ROLI’s clinics. Also in the CAR, ROLI collaborated with the United Nations Development Program (UNDP) to organize a training workshop in February for judicial sector actors and civil society organizations on the implementation of UNDP guidelines for the prevention of sexual violence. United Nations, government, and civil society representatives attended the workshop, including the United Nations Integrated Stabilization Mission in CAR, the United Nations Unit to Combat Sexual Violence, the United Nations Population Fund, the United Nations Children’s Fund, UN Women, the Central African Bar, the CAR police and gendarmerie, the Ministry of Social Affairs, the Association of Women Lawyers, the Public Prosecutor’s office, and the Ministry of Health.

From March 13 to 24, our Country Director in Mali and several lawyers collected testimony from victims of the 2012 to 2013 crisis in the north of the country. As a result of these interviews, 53 cases will be filed in northern Mali, about half of which are for female victims.

In Egypt, ROLI trained prosecutors on advocacy in March and offered basic and advanced Training for Trainer programs for faculty at the Prosecutors’ Criminal Research and Training Institute (CRTI). The participants will be serving as instructors for the 208 new prosecutors enrolled at the CRTI’s two-month induction training course which started on March 11.

Across Libya, ROLI’s Community Liaisons led 12 dialogue sessions in March covering topics such as community engagement of the Amazigh people, the rights of internally displaced persons, the impact of underage marriage, illegal immigration, the importance of the constitution, and the role of civil society in supporting reconciliation and peace building.

Through the USAID-funded Kazakhstan Judicial Program, ROLI hosted its first event under our investment dispute resolution component on Friday, February 3. In partnership with the Supreme Court of Kazakhstan, ROLI hosted a roundtable of stakeholders to discuss any potential gaps in legislation or implementation of new investment dispute resolution systems, and to gain international experience from an ROLI-supported expert. About 60 people attended the roundtable, representing a wide range of stakeholders from government ministries and agencies.

ROLI expertise on Syrian refugee rights continues to be in demand. In January, ABA ROLI staff provided a training to staff from over a dozen embassies, including the US, UK, German, Norwegian, Dutch, Canadian, Greek, and EU delegation on the legal rights of Syrians under the “temporary protection regime” in Turkey. In February, ROLI experts trained lawyers in the city of Antalya, Turkey at an event organized by International Organization for Migration and Association for Solidarity with Asylum Seekers and Migrants. In Ankara and Istanbul, Turkey ROLI trained staff of organizations including Care International and Support to Life on
the rights of refugees. ROLI participated in two workshops on education and protection held by United Nations High Commissioner for Refugees. In addition, ROLI held 31 legal information sessions for Syrian refugees in several cities in Turkey and responded to 306 requests for legal information through the SMS helpline.

**Fund for Justice and Education (FJE)**

Charitable donations to the FJE are up 30 percent ($425,384) year-to-date. The FJE anticipates that it will reach its goal of raising $2,992,782 this bar year.

With ROLI’s help, FJE received a $35,000 donation from a family foundation on behalf of the DRC Legal Scholarship Fund for Congolese Women.

President-Elect Hilarie Bass has been working very closely with the FJE Office on the upcoming Presidential Initiative: Achieving Long-Term Careers for Women in the Law. Supporters of the Initiative are at the forefront of solving a well-known problem in the legal profession: the unusually large number of women who leave the profession far too early; more often than not, before the age of 50. More than $160,000 in gifts and pledges has already been raised to help the ABA focus on reversing this tremendous loss of talent from the legal profession.

**Diversity**

In early March, the Office of Diversity & Inclusion launched the new and improved Diverse Speakers Directory. Open to ABA and non-ABA members, the Directory allows diverse lawyers to create a customized speaker profile and market their experience and skillset to more than 3,500 ABA entities seeking speakers around the country and the world. The Directory also serves as a resource for ABA entities seeking to identify diverse speakers for their Continuing Legal Education and other programs.

On March 15, the Office of Diversity & Inclusion facilitated, in partnership with the Office of the President, President-Elect Bass’ Meeting with the Presidents-elect of the National Affinity Bar Associations, including the National Bar Association; Hispanic National Bar Association; National Asian Pacific American Bar Association; and National Native American Bar Association. President-Elect Bass led a robust and informative discussion on several issues, including future opportunities for collaboration and communication between the ABA and National Affinity Bar Associations; common challenges facing these bar associations; and the Presidents-elects’ upcoming initiatives. The meeting also included presentations by the eight core Goal III diversity entities; Government Affairs Office; and Division for Bar Services.

The Hispanic Commission facilitated with Univision (the largest Spanish language media outlet in the United States, comprised of television, radio, and social media/digital platforms) a March 28 phone bank. Volunteer ABA Spanish speaking attorneys provided legal information and resources to the Hispanic and Spanish speaking community on the White House’s Executive Orders pertaining to immigration, deportation, and travel. The first phone
bank took place at Univision Chicago. The phone bank is in collaboration with the Commission on Immigration, the Center for Pro Bono, and the Standing Committee on Legal Aid and Indigent Defendants.

More than 75 applications were received by the May 1 deadline for the Business Law Section’s 2017 Fellows program. The program springboards young lawyers, lawyers of color, lawyers with disabilities and LGBT lawyers into leadership positions within the Section by subsidizing meeting attendance costs and providing mentorships for participants.

Advocacy

The ABA conducted its annual effort to connect Congressional lawmakers and their staffs with constituents in the legal profession during its ABA Day 2017 from April 25 to 27. This year, lawyers from all 50 states, along with the District of Columbia and US Virgin Islands, went to the Capitol to speak to members of Congress and their staffs and inform them of the importance of funding Legal Services Corporation (LSC), which provides civil legal aid to nearly 1.9 million low-income people annually who desperately need help to navigate the legal process so they can receive equal access to justice. ABA lawyers also spoke to Congressional members about issues impacting veterans. The ABA is advocating for legislation (H.R. 1993, the Homeless Veterans Legal Services Act) authorizing private-public partnerships with the Department of Veterans Affairs to improve access to justice for homeless veterans.

Other ABA Day highlights included:

- Hundreds of meetings with members of the House and Senate or their staff, including meetings with Senate Majority Leader Mitch McConnell (R-KY), House Majority Whip Steve Scalise (R-LA), Senate Judiciary Committee Chair Chuck Grassley (R-IA), Senate Appropriations Committee Chair Thad Cochran (R-MS), House Financial Services Committee Ranking Member Maxine Waters (D-CA), and Senate Appropriations Committee Vice Chairman Patrick Leahy (D-VT)

- The ABA Justice Awards reception and dinner honoring Senators Mazie Hirono (D-HI) and Richard Shelby (R-AL) and Representatives Joseph Kennedy III (D-MA) and Mac Thornberry (R-TX) at the National Museum of Women in the Arts

- A breakfast briefing session with Senator Dan Sullivan (R-AK), Representatives Susan Brooks (R-IN) and Brian Fitzpatrick (R-PA) and LSC President James Sandman

- A morning briefing by Senator Al Franken (D-MN) and James Burnham, Special Assistant to the President, Office of White House Counsel

- Recognition of two ABA grassroots advocates -- Ed Harnden, respected employment lawyer and legal aid funding advocate, and Kids in Need of Defense -- at a Supreme Court reception hosted by Justice Elena Kagan
A special advocacy effort to support the LSC -- slated for elimination in the President's initial budget submission -- was launched by the Government Affairs Office (GAO) in early March. It encourages people (not limited to lawyers) to sign up through a web page to generate a personal message that was printed on a trading card and delivered to congressional offices on ABA Day. The ongoing campaign has seen extensive coverage in social media (our #LegalAidDefender hashtag generated more than 8 million impressions on Twitter), and our web portal has seen 7,000 sign-ups and counting. In all, more than 20,000 cards have been passed out to members of Congress.

On May 12, ABA President Linda Klein submitted testimony to the U.S. Senate Appropriations Subcommittee on Commerce, Justice, Science recommending funding the LSC at $450 million. The testimony emphasized the federal role in justice for all, recommends against placing an unfunded mandate for legal services on states and localities, and notes the complementary role legal services plays for the Congressional offices' constituent services representatives. President Klein also submitted testimony on April 27 to the U.S. House of Representatives Appropriations Subcommittee on Commerce, Justice, Science, and Related Agencies supporting funding for LSC at $450 million.

On May 5, President Klein sent a letter to the Department of Homeland Security (DHS) expressing concerns over standards that permit U.S. Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) officers to search and review the content of lawyers' laptop computers, cell phones, and other electronic devices at U.S. border crossings without any showing of reasonable suspicion. The ABA also asked DHS to modify and clarify the relevant CBP and ICE policies to state that when a lawyer is traveling across the border with an electronic device containing privileged or confidential electronic documents, those documents cannot be read, duplicated, seized or shared -- unless the officer first obtains a subpoena based on reasonable suspicion or a warrant supported by probable cause.

In March, the Standing Committee on the Federal Judiciary (FJC) submitted a statement for the Senate Judiciary Committee hearing on the nomination of Judge Neil Gorsuch to be Associate Justice of the U.S. Supreme Court explaining the Standing Committee's rating of "well qualified." Committee chair Nancy Degan, accompanied by the 10th Circuit lead investigator, Shannon Edwards, testified at the hearing and responded to questions from committee members.

On December 16, 2017 the Justice for All Reauthorization Act (S. 2577, H.R. 4602) was signed into law. The legislation provides funding to reduce the rape kit backlog, increase access to restitution for crime victims, and provide further incentives for compliance with the Prison Rape Elimination Act, among other reforms. The ABA has long supported victim-oriented reforms, including legislation such as this that protects the rights of sexual crime victims. The legislation will also renew the Leahy Innocence Protection Act, originally enacted in 2001 and supported by the ABA, to expand access to post-conviction DNA testing.

GAO prepared written testimony submitted to the House Judiciary Committee on March 16, 2017, opposing current legislative efforts to restructure the Ninth Judicial Circuit.
On March 28, GAO and representatives of the U.S. Chamber of Commerce and the National Association of Manufacturers met with the senior counsel to Senator Lindsey Graham (R-SC) to express their strong opposition to legislation previously introduced by Senator Sheldon Whitehouse (D-RI) and Representative Carolyn Maloney (D-NY) (S. 2489 and H.R. 4450, 114th Congress) that would subject many lawyers and law firms to the anti-money laundering and suspicious activity reporting requirements of the Bank Secrecy Act and therefore undermine the attorney-client privilege, the confidential lawyer-client relationship, and state court regulation of the legal profession. Senator Whitehouse and Representative Maloney are expected to reintroduce similar legislation in early April to coincide with the first anniversary of the Panama Papers scandal.

President Klein and GAO met with Senator Grassley (R-IA) on January 18, to discuss the lawmaker’s sentencing reform bill and possibilities for the ABA to assist with the legislation. The ABA delegation also discussed the traditional role of the FJC in the evaluation of federal judicial nominees during the Trump Administration. The ABA sought input from Grassley, the Senate Judiciary Committee Chair, on how the Association could continue to work effectively with his committee if the White House decided to end FJC’s longstanding pre-nomination evaluations of lower court nominees. That, unfortunately, happened late in March. GAO continues to work with the Judiciary Committee to develop a process that will enable us to conduct thorough judicial evaluations and provide our ratings in a timely fashion.

GAO worked closely with the ABA’s outside counsel Ropes & Gray LLP (serving in a pro bono capacity) on the Association’s lawsuit against the U.S. Department of Education challenging its administration of the Public Service Loan Forgiveness (PSLF) program. GAO assisted to identify and coordinate with the individual plaintiffs; develop the facts and legal theories for the case; worked closely with the Office of General Counsel to review and revise the draft complaint; and coordinated with Communications and Media Relations (CMR) for our messaging. The complaint was filed December 20, 2016 and garnered significant media attention, as well as grateful comments from ABA staff and many others.

The ABA continues to pursue the PSLF case vigorously. On May 24, 2017, the ABA and the individual plaintiffs filed a Motion and Memorandum in Support for Summary Judgment in the US District Court for the District of Columbia on our claims against the Department of Education for violations of the Administrative Procedure Act and of the plaintiffs’ due process rights in connection with the Department’s administration of the PSLF.

Our underlying lawsuit states the Department failed to follow statutory requirements and violated due process rights of four plaintiffs, including two ABA employees whose participation in the program was revoked. The summary judgment motion asks the court to compel the Department to stop issuing retroactive denials and restore the plaintiffs’ eligibility for the program. Although we cannot predict what the Court’s final decision may be on this Motion or when that decision might be issued, we are hopeful and this matter remains one of substantial importance to the ABA.
Law Day was a great media success for the ABA this year. In fact, CMR’s outreach resulted in news coverage across the country, including articles in the Augusta Chronicle, Financial News & Daily Record, Baltimore Sun, Champaign News-Gazette, Chicago Daily Law Bulletin, and Law360. Two CMR-authored opinion editorials on Law Day were also among noteworthy coverage, with one prepared for consumers appearing in mainstream publications such as Florida Sun-Sentinel, Inside Sources, Palm Beach Post, Progress-Index, and several other publications, and another op-ed targeted to jurists, which was published by bar associations, including those in Washington, Colorado, New Jersey, New Hampshire, and D.C. Additionally, President Klein disseminated a CMR-produced audio news release to explain the significance of the annual observance. Heard by more than 26.3 million Americans, Klein’s message aired on more than 1,619 radio stations nationwide. For CMR coverage of Law Day events hosted by the ABA in Washington, D.C., view summaries of the annual Leon Jaworski Public Program Series and a civics discussion with high school students sponsored by the Association and the Close Up Foundation.

When the White House released its budget proposal which eliminates funding for the LSC, ABA President Klein expressed “outrage” in a statement and called on every member of Congress to restore full funding in a media statement distributed by CMR. Several outlets published the statement, including the Huffington Post, National Law Journal, Bloomberg, and BuzzFeed. President Klein continued to rally for continued funding of LSC in a March 21 op-ed published in the Florida Sun Sentinel.

With the U.S. Senate preparing for its confirmation hearing of Supreme Court nominee Neil Gorsuch, CMR issued a March 9 press release on the Standing Committee on the Federal Judiciary’s evaluation and “well-qualified” rating of the judge, which was published by several news outlets nationwide, including mainstream media such as the Washington Post, Columbus Dispatch, Denver Post, The Hill, and Politico, as well as legal media, such as Law360 and the National Law Review. Preceding the ABA committee’s rating, President Klein explained the Association’s practice of rating judges and the data involved in the process in an interview with the Wall Street Journal published on February 25.

Following a late December news release issued by CMR on the ABA’s lawsuit against the Education Department for retroactively refusing to honor commitments made under the PSLF program, several major news outlets, such as the Huffington Post, Bloomberg, and the Wall Street Journal, interviewed President Klein on the topic. Dozens of others published stories on the Association’s efforts, including mainstream outlets such as the New York Times, Pittsburgh Post-Gazette, Daily Progress, and Inside Higher Ed, as well as legal media such as the National Law Journal, Chicago Daily Law Bulletin, Indiana Lawyer, Above the Law, and the Washington Post.
Professional Services

Health Law Section

The Section coordinated with the Center for Professional Development to offer an ABA Free CLE Series webinar on March 20, titled “The Opioid Epidemic: Impact on Public Health, Regulatory and Private Practice Lawyers.” Over 800 individuals attended the event. The webinar provided information about the opioid epidemic, one of the most threatening public health crises in recent decades.

The Section’s recently-created Health Reform Task Force met to discuss organizing content around any forthcoming change to repeal and replace the Affordable Care Act. With over 200 members, the Task Force has written weekly updates for members, and developed two articles for publication in the Section’s monthly ABA Health eSource, and the bi-monthly The Health Lawyer.

Judicial Division (JD)

On May 2, the Judicial Division Council voted by conference call to cosponsor a resolution from the Young Lawyers Division urging law firms to give new lawyers more courtroom experience and to support a resolution by the Standing Committee on the American Judicial System opposing the 9th Circuit split. The new Judicial Division Strategic Plan presented by Judge Judson Scott was adopted by the JD Council.

Judicial Division Lawyers Conference (LC)

The LC presented a complimentary CLE program, “The Presidential Nomination Process and the Steps to Confirmation -- A View from Different Perspectives,” on February 3, in Miami. Approximately 140 people attended the program, which C-SPAN recorded for a later airing. LC Executive Committee member Karen A. Popp moderated the program. Panelists included Hon. Beryl A. Howell, Chief Judge, US District Court for the District of Columbia; Hon. Andre M. Davis, US Court of Appeals for the Fourth Circuit; Harriet Miers, Former White House Counsel to President George W. Bush; and Spencer Hsu of the Washington Post.

Law Student Division

This year, 182 teams from 107 ABA-approved law schools competed in the National Appellate Advocacy Competition (NAAC). One of the most prestigious moot court competitions in the country, NAAC requires competitors to submit a brief and compete in multiple rounds of oral arguments. Over 1,000 attorneys volunteered to judge oral argument rounds and grade briefs. Twenty-four teams were invited to compete at the National Finals, April 6 to 8, hosted by the ABA at the Dirksen Federal Building in Chicago. The University of Oklahoma College of Law and St. Mary’s University School of Law teams advanced to the championship rounds to argue in front of six local federal judges with the team from St. Mary’s winning for the second year in a row.

17
Section of Antitrust Law

On June 1 and 2, the fourth “Antitrust in the Americas Conference” was held in Mexico City. The conference is jointly sponsored by the Section of Antitrust Law and the Barra Mexicana, and included interactive discussions with experts around the region on the impact of cartels on the judicial system and other cutting-edge topics. Ildefonso Guajardo Villarreal, Mexico’s Minister of Economy, was the keynote speaker at the conference. Guajardo has overseen sweeping reforms to Mexico’s competition law and agencies that formed a capstone of President Enrique Peña Nieto’s economic reforms.

Section of Intellectual Property Law (IPL)

The Section sent a letter to the Chair and ranking members of the House Judiciary Committee to provide input on the Committee’s proposal to reform the U.S. Copyright Office. In its letter, the Section encouraged Congress to draft legislation to provide the Copyright Office with an adequate budget and sufficient authority to develop its own IT system to support the unique needs of its users, to provide the Office with autonomy from the Library, and to make the Register of Copyrights position Senate confirmed. Noting the abrupt removal of the Register of Copyrights by the new Librarian, the Section called on Congress for renewed oversight and Office autonomy.

The Section successfully finalized, and the ABA filed the Section’s amicus brief in February in the U.S. Supreme Court in the TC Heartland, LLC v. Kraft Foods, Inc. (No. 16-341) case. The ABA’s brief advocates that the special patent venue statute limits venue for a corporate defendant to either where it resides or where it has committed acts of infringement and has a regular and established place of business.

Solo, Small Firm and General Practice Division (GPSolo)

At the ABA Midyear Meeting, GPSolo held a free session, “Present and Powerful,” with Joann Lublin, a Pulitzer Prize winning author and Wall Street Journal’s management news editor. This first-ever event had 85 attendees and was held by GPSolo’s recently formed Women’s Initiative Network (WIN). The purpose of WIN is to advance, promote and educate members of the Division about issues facing women attorneys in solo and small firm settings and to foster an environment of support for women in the Division by creating networking opportunities, mentoring relationships and educational programming.

Governance, Public Services, and Miscellaneous

This year’s BLI in March included attendees from all 50 states, the Virgin Islands and Canada, representing 159 organizations, including 41 state bar associations, 93 local bar associations, four national bars of color, five state and local women’s bars, 10 state and local special interest bars, and six bar foundations. Among the BLI speakers were President Klein, President-Elect Bass, House of Delegates Chair Deborah Enix-Ross, and Deputy Executive Director Jim Dimos. Treasurer-Elect Michelle Behnke facilitated a communications plenary. Twenty-six ABA entities and five affiliated organizations participated in the “Taste of ABA
Resources” exhibit. Members of the Standing Committee on Bar Activities and Services served as moderators, and in some cases, presenters, for the various programs. ABA staff members Tom Susman, GAO, and Julie Brown, Media Relations, presented workshops.

The Law Practice Division conducted ABA TECHSHOW 2017 from March 15 - 18, setting record highs in total attendance and booth sales. This year’s conference featured a keynote panel with the CEOs of Legal Zoom, Avvo, and Rocket Lawyer that drew substantial media coverage. ABA TECHSHOW also hosted a hackathon focused on providing solutions to veterans in need of legal assistance. ABA TECHSHOW has outgrown its long-time location and will relocate to the Hyatt Regency Chicago in 2018.

The Standing Committee on Legal Aid and Indigent Defendants (SCLAID) launched www.HelpLegalAid.org. The site provides clear guidance on simple steps that lawyers can take to support the legal aid system across the nation. It includes information on how lawyers can advocate for the LSC, can donate to support legal aid organizations, and can volunteer to provide pro bono service through a variety of channels.

The Standing Committee on Gavel Awards, a part of the Division for Public Education, held its final judging meeting at the ABA offices in Chicago, May 5 to 6, to complete the review process and select four Silver Gavels and two Honorable Mentions among nine eligible categories. ABA President Klein will present the 2017 Silver Gavel Awards on July 18 at the National Press Club in Washington, DC. Brooke Gladstone, managing editor and co-host of public radio’s “On the Media,” has accepted President Klein’s invitation to be the featured speaker.

Special congratulations go to the ABA’s design staff and their respective editors and clients on winning a record 12 design awards in the 2017 American In-House Design Competition. The awards are the original and largest showcase for outstanding work by in-house designers.

Conclusion

Today, the ABA is engaged in a great variety of important initiatives aimed at driving technology and innovation within the Association and profession. The Center for Innovation is leading efforts to find new ways to easily and effectively deliver legal services to the public. Our redesign of the ABA website will help us better interact with our members, and advocate on behalf of the profession. We are also expanding membership opportunities, such as ABA Blueprint, that deliver state-of-the-art assistance to help lawyers enhance their careers and professional success.

Steve Jobs once said “innovation distinguishes between a leader and a follower.” The ABA cannot remain an effective voice for the legal profession and its members by ignoring rapidly changing technology that impacts everything from how we deliver law to those in need to how we communicate and deliver value to our members. Ensuring both the Association and profession are adapting and embracing the latest technology and legal trends will keep the ABA a strong, growing, and relevant organization well into the future.
I look forward to seeing you at the Annual Meeting in New York. I encourage you to let me know of your questions, thoughts, and concerns at any time.

Respectfully submitted,

Jack L. Rives
Executive Director and
Chief Operating Officer
The following are the activities in which the Committee on Scope and Correlation of Work ("Scope") has engaged since its last report to the House of Delegates at the American Bar Association's 2017 Midyear Meeting. Scope has continued to fulfill its constitutional mandate as a Committee of the House of Delegates, and the only one elected by it. It has carried forward its review of the structure, function and activities of Association committees and commissions to evaluate the effectiveness of their functioning and determine if overlapping functions exist.

Scope held its last meeting Saturday, April 22, 2017 in Washington, DC. Scope will meet again in conjunction with the ABA’s Annual Meeting on Saturday, August 12, 2017, in New York, NY.

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

- **Bar Activities and Services, Standing Committee on** - Scope commended the Standing Committee on Bar Activities and Services (Standing Committee) for its excellent work. In its review, Scope questioned the extent to which the Standing Committee was providing oversight of the operation of the Division for Bar Services and suggested that it consider how that function could be incorporated further in the Standing Committee’s ongoing operations.

- **Continuing Legal Education, Standing Committee on** - Scope commended the Standing Committee on Continuing Legal Education for its good work.

- **Cybersecurity Legal Task Force** - Scope commended the Cybersecurity Legal Task Force for its good work.

- **Gatekeeper Regulation and the Profession, Task Force on** - Scope commended the Task Force on Gatekeeper Regulation and the Profession for its excellent work.

- **Gavel Awards, Standing Committee on** - Scope commended the Standing Committee on Gavel Awards for its excellent work.

- **ABA Journal Board of Editors** - Scope commended the Journal Board of Editors (Board) for its excellent work. Scope recommended the Board continue discussions with its ex officio members and other ABA Leadership about the need to determine the total cost for producing the Journal, particularly the print magazine, and give the Board/Journal some sort of accounting credit for providing a principal member benefit: a monthly magazine to 300,000 plus members.
By doing so, Scope believes a more nuanced financial picture of Journal operations will emerge and be useful.

In order to increase participation of _ex officio_ members, Scope also recommended the Board continue to hold its meetings in conjunction with the ABA Board of Governors meetings or other events where the _ex officio_ members will be present.

**Legal Opportunity Scholarship Committee** - Scope commended the Legal Opportunity Scholarship Committee for its good work.

**Legal Opportunity Scholarship Fundraising Committee** - Scope commended the Legal Opportunity Scholarship Fundraising Committee (Committee) for its good work. It is Scope's understanding that the ABA Board of Governors (Board) recently approved a reorganization of the structure relating to diversity following a recommendation from Scope regarding that. The full details of what the Board approved are now being circulated and there may be some additional changes. It is also Scope's understanding that during the reorganization of the Goal III entities, the Board created a Diversity and Inclusion Advisory Council (Council). Scope recommended to the Board that if it was going to create such a Council, that the Chair of the Legal Opportunity Scholarship Fundraising Committee serve as a member of that Council. It is Scope's understanding of the Board's actions that such a Council was created with a slot designated for the Chair of the Legal Opportunity Scholarship Fundraising Committee; and, the Council is being created to ensure communication, connection, collaboration and coordination between diversity entities in the ABA and sections and divisions, as well as with the national bars of color. Scope hopes that having a representative on the Council will help keep focus on the Scholarship program and possibly assist with fundraising efforts.

Scope understands Fund for Justice and Education (FJE) is committed to its work and if better coordinated with the diversity entities there is a possibility outside funding could increase for both the Scholarship fund and diversity efforts. Therefore, Scope has also recommended that when revised jurisdictional statements are completed for the newly configured diversity entities and structure, those statements should include language on coordinating fundraising efforts, including scholarships. If fundraising could increase, Scope also encourages the Committee to establish an endowment fund with FJE to support the Scholarship program.

**Publishing Oversight, Standing Committee on** - Scope commended the Standing Committee on Publishing Oversight (Standing Committee) for working hard to address the issues caused by the new approach the Association decided to take in regard to publishing. The Standing Committee is a hard working committee that appears to have gotten back on track during the past year. Scope recognized in the previous two years the Standing Committee was struggling and not working at optimal level.

To avoid having vacant positions, during the appointment process, should the President-Elect not accept the Section Officers Conference's (SOC) recommendations and an agreement cannot be reached on appointees, SOC should inform the Standing Committee's Board Liaison and Chair.
Additionally, given the ongoing publication challenges, recent staff changes, and the Standing Committee's work on developing a comprehensive mission, vision and strategic plan, Scope will continue to monitor the Standing Committee with a follow-up review Spring 2018.

**Working Group on Unaccompanied Minor Immigrants** - Scope commended the Working Group on Unaccompanied Minor Immigrants (Working Group) for its excellent work. Scope also encourages the Working Group to consider identifying ABA entities that can incorporate its work after this legal crisis has ended and the Working Group has discontinued. Scope suggests potential entities, such as the Commission on Immigration's ProBar Children's Project or other entities with pro bono efforts.

**Scope recommend the following entities discontinue at the conclusion of the 2017 Annual meeting:**

**American Jury, Commission on** - Scope commended the Commission on American Jury (Commission) for its good work and collaboration with other ABA entities. Scope understands the Commission's report will be completed by the 2017 Annual Meeting. Therefore, Scope recommended the Commission complete its work and discontinue at the conclusion of the 2017 Annual Meeting and the work of the Commission be subsumed as appropriate within the entities that currently support the work of the Commission.

**Bioethics and the Law, Special Committee on** - Scope began its review of the Special Committee on Bioethics and the Law (Special Committee) at its 2016 Annual Meeting. As a result of that review, Scope determined that the Special Committee should discontinue at the conclusion of the 2017 Annual Meeting and the work of the Special Committee should be subsumed within another ABA entity as appropriate. Before finalizing any recommendation, Scope agreed to hear from the Special Committee on its current operations, potential future plans and its views regarding alternative forms for the entity during its 2017 Midyear Meeting. Again, we thank you and the others who attended this meeting for your time and interest and input. Scope also met with the Health Law Section regarding its interest in making the Special Committee a formal part of the Section.

During Scope's deliberations on February 4, 2017, it concluded that although the Special Committee is doing interesting work on cutting edge bioethics and the ABA should have a voice on bioethics issues, the Special Committee's present structure is not optimal. There are other alternatives, the work could be carried on within other existing entities, and the Special Committee could benefit by becoming a committee of a section or another entity within the ABA where people interested in the field could more easily participate. Scope agreed the Special Committee should not continue in its current form and decided to proceed with its original recommendation. On February 21, 2017, Scope invited the Special Committee on Bioethics and the Law and the Health Law Section to share their written comments on the proposed recommendation with the entire Scope Committee by Friday, March 17, 2017.

After reading the comments, Scope met by teleconference on March 27, 2017 and concluded there was insufficient reason to change their original recommendation, which calls for discontinuation of the Special Committee at the conclusion of the 2017 Annual Meeting with the work being subsumed into the Health Law Section. The Health Law Section is willing to establish
the Special Committee as a Coordinating Committee of the Section and believe they can support the work of the Special Committee while sustaining the interdisciplinary nature of the group through coordination with their substantive Interest Groups, as well as other ABA entities.

**Working Group on Potential Emerging Member Benefits** – Scope commended the Working Group on Potential Emerging Member Benefits (Working Group) for its good work and supports its recommendation to sunset at the conclusion of the 2017 Annual Meeting, as the Working Group’s jurisdictional statement provides.

**Scope 2017 Annual Agenda will include:**
ABA Rule of Law Initiative (ROLI); Africa Law Initiative Council; Asia Law Initiative Council; Central European and Eurasian Law Initiative Council (CEELI); Latin American and Caribbean Law Initiative Council; and Middle East and North Africa Initiative Council | SpC on Annual Meeting Program | StC on Audit

Respectfully Submitted,

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

/ al

Thursday, June 08, 2017
The Committee on Scope and Correlation of Work ("Scope") consists of five members of the Association, one of whom is elected each year by the House of Delegates to serve a full (5 years) term beginning with the adjournment of the Annual Meeting during which he or she is elected.

Association policy provides that 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 Improving the Profession Committee Chair, the member of Scope with the longest continuous service on the Committee who is not the chair, and the Section Officers Conference Chair.

The Nominating Committee was fortunate to have the difficult task of selecting from thirteen (13) exceptional applicants with impressive credentials. However, only one nominee could be selected, the Nominating Committee voted to nominate José C. Feliciano of Cleveland, Ohio to fill the vacancy that will occur at the conclusion of the 2017 Annual Meeting.

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

Respectfully Submitted,

Deborah Enix-Ross, Chair
Pamela A. Bresnahan
Thomas M. Fitzpatrick
Richard A. Soden
Michael W. Drumke

Dated: June 2017
SPONSOR: Edward Haskins Jacobs

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

Amends §1.2 of the Constitution to read as follows:

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

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

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

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

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

For consideration at the August 14 and 15, 2017 Annual Meeting

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

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

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

Once again, God willing, I will move for the adoption of this proposal at the House of Delegates in New York City in August 2017. I made the same motion before the House of Delegates the last sixteen years in a row. My hope continues that some day our culture of death will be overcome. We lawyers must not turn a blind eye to our children being poisoned to death and torn apart in our midst. I may be crying in the wilderness, but the cry - and the thirst for justice it represents - will never die.
If adopted, the proposal would require the American Bar Association to stand up for the God-given right to life of all innocent human beings, a right that must be protected in the man-made law of all just societies. As Alexander Hamilton wrote, "Hence, in a state of nature, no man had any moral power to deprive another of his life, limbs, property or liberty; nor the least authority to command, or exact obedience from him; except that which arose from the ties of consanguinity. ... The principal aim of society is to protect individuals, in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature; but which could not be preserved, in peace, without that mutual assistance, and intercourse, which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws, is to maintain and regulate these absolute rights of individuals. Blackstone. ... The sacred rights of mankind are not to be rummaged for, among old parchments, or musty records. They are written, as with a sun beam in the whole volume of human nature, by the hand of the divinity itself, and can never be erased or obscured by mortal power."

In none of the meetings of the House of Delegates where this proposal was considered was there an actual vote on the proposal. The first ten times, after the presentation of the proposal, the Standing Committee on Constitution and Bylaws reported to the House that the proposal is inconsistent with another purpose of the ABA - to uphold and defend the Constitution of the United States - and that therefore the proposal was "out of order." Each time the Committee made that bold assertion without explaining why it is so (despite my explicit written request to the Committee in each of the last several years to explain in writing why this position is taken). And in each of those ten meetings, then a motion was made that the House postpone indefinitely action on my proposal. In 2010, Robert L. Weinberg from Washington, D.C., who disagrees with this proposal, nevertheless tried to get the House to vote directly on the proposal, but his motion was rejected. Bob made the same effort twice more, in 2013 and 2015.

In 2011, the Committee chairperson reported to the House that the Committee took no position on the merits of the proposal that the ABA defend the right to life of all innocent human beings, including those conceived but not yet born, but stated that the Committee disagreed that this subject should be addressed in the purposes section of the ABA constitution, since the constitution does not adopt policy "beyond the basics"; and as a result, clearly by arrangement with the Committee, another member of the


2 Of course, even if the proposal were voted upon and rejected, it could continue to be made year after year, into the future.

3 In 2001 by a non-committee member of the House, and in each time thereafter by the Committee representative himself or herself until 2016, when the motion to postpone indefinitely was made by a member of the ABA Board of Governors.
House rose to move that the proposal be postponed indefinitely, and this was overwhelmingly approved by voice vote, with maybe only about five or so "nays" as far as I could tell.

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

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

In 2014, the Chair of the Standing Committee on Constitution and Bylaws said the proposal is “out of order and inappropriate” and a non-committee member of the House moved to postpone the proposal indefinitely. Although a House member rose to “bark at the moon,” seeking a vote on the proposal instead of postponing it; postponed it was, with maybe ten voice votes against. In 2015, three speakers raised the red herrings that the proposal asks the House to address not a legal issue, but rather a medical, theological, or a philosophical issue; or simply an issue of legal privacy, as reasons to postpone the issue indefinitely; or in Bob’s case, to reject it on its merits. In 2016, the chair of the Standing Committee again asserted the proposal is inconsistent with ABA purposes to uphold and defend the Constitution of the United States and representative government, and said the proposal should be proposed as a ABA policy position only, and a member of the ABA Board of Governors moved that the proposal be postponed indefinitely.4

4 If the proposal to defend the right to life of all innocent human beings is inconsistent with the ABA purposes (1) to uphold and defend the Constitution of the United States, and (2) to uphold and defend representative government, as the ABA Standing Committee on Constitution and Bylaws has repeatedly claimed, why does it make any sense to downgrade the proposal and make it as simply a proposed policy position of the ABA, instead of an ABA constitutional provision? If defending the right to life of all innocent human beings is inconsistent with the ABA purposes of upholding and defending the Constitution of the United States and upholding and defending representative government, as the
In 2001 the vote on the motion to postpone action indefinitely was 209 to 39, but you will never find the precise vote in the record of proceedings of that meeting, because even though the vote was displayed electronically on a large screen in the front of the room, the precise vote itself was not recorded. In 2002 through 2016 the vote on the motion to postpone indefinitely was taken by voice vote. In 2002 through 2015, with the noted exception of 2013, many uncounted voices intoned “yes,” and perhaps a handful of people said “no,” except 2005, when I thought I heard maybe ten “no”s.

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

Even if I have no chance short of a miracle for passage of the proposal, if we can just “get the ball rolling” with a little bit of courage from members who agree, who knows? The ABA House of Delegates is a speck, but an important speck in the process.

Standing Committee keeps claiming, then how can the proposal possibly be appropriate as an ABA policy on a national issue? Shouldn’t the proposal be postponed indefinitely as a proposed policy position also if the Committee is right? So why should I seek its approval as a mere policy proposal? Of course, the Committee is wrong about this claimed inconsistency, and this is explained later in this report.

Although the ABA has an annual budget of over $200 million, the House of Delegates is not willing to commit the relatively minor sum it would take in order to bring transparency and accountability to the actions of the House by having every member’s vote electronically recorded when it deals with the most important matters, such as amendments to the ABA constitution or bylaws, and the adoption, amendment, or rescission of ABA policy positions. In 2001, I presented to the ABA House of Delegates a proposal to bring that transparency and accountability to the House and to have the results posted for a year on the ABA website. It failed miserably, with only about ten of the 500 or so in attendance voting in favor (based upon my guesstimate at the time of the voice vote). Transparency in actions of the House of Delegates should be pressed for every year until it is reached, but for now at least I leave that to others. In 2005 the chairperson of the House mentioned in his remarks that he, too, thinks the House should have electronic voting. And it would not take much money to bring accountability to the House of Delegates.

At a CLE program in the Virgin Islands several years ago, hand-held voting devices were given to the attendees to make part of the program interactive, so it cannot be very expense, even if the individual votes, tied to specific members, are permanently recorded as part of the process. It is amazing in this day and age that the ABA House of Delegates is utterly opaque. The House intentionally refuses to put in place systems to reveal the votes of its members on the many important issues upon which it takes positions. No doubt the members of the House demand transparency of others in other contexts. The opaque nature of the House is indefensible. Amazing, really.
Maybe before too many more years baby-killing-in-the-womb (or upon emergence from the womb) will go the way of slavery. It could happen.

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

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

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

Or 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’etre for the United States of America as a separate nation. The Declaration asserted that it is self-evident that all men are
endowed by their Creator with the unalienable right to life; and that governments are instituted among men to secure the rights to life, liberty, and the pursuit of happiness. This insistence upon governmental protection of the right to life of all innocent human beings must be a fundamental function of any legitimate government.

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

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

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

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

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

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

---

6 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.]
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: 14-15, attesting to this love. Motherly love is the foundation for a culture of life. Abortion is the foundation for our culture of death. Speaking of being bamboozled, recall the serpent in the Garden of Eden, enticing Eve to eat the forbidden fruit on the promise that she would become like God. Now mothers are enticed into abortion with the lie that they can become like men, and needn't be burdened with child in the womb or that child after birth. Eat the fruit of hatred of the life of your child and abandonment of your child and freedom is yours. A Faustian bargain if ever there were one.

The United States of America fails in its fundamental mission if it refuses to secure for the weakest and most vulnerable innocent people amongst us the rights to life, liberty, and the pursuit of happiness. The ABA fails in its mission if it fails to stand up for the rights of the powerless. If we deny the right to life for children in the womb because they are developmentally immature (and therefore, in the eyes of some, not "persons"), then we not only tragically deny these children their rights - we open the door to infanticide and the killing of other weak and infirm people. There is a crisis in the United States over the loss of our moral roots. The ABA, which claims to be the voice of the legal profession, and to be an advocate of the protection of fundamental rights, should become a strong voice for all the weak and vulnerable innocents who so desperately need champions now.

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

At the 2001 Annual Meeting, the Chair of the Standing Committee on Constitution and Bylaws reported that the Committee "voted to recommend to the House that the proposal be considered out of order, in that it is inconsistent with the first purpose clause of Association’s Constitution, which is ... 'To uphold and defend the Constitution of the United States and maintain representative government.'" The same claim was made in subsequent years, until 2011, when the Committee took no position "on the merits of the proposal," but asserted the proposed language does not merit inclusion in the purposes section of the ABA constitution. Then in 2012 the Committee said the proposal should be rejected due to unexplained inconsistencies with other Association purposes.

Although the Committee changed its position in 2011, it went back to the earlier position in later years, so I hereafter explain again why defending the right to life of all innocent

---

7 It is good that the Committee's position in the first ten years and then each year after 2011, implicitly admitted that the children being killed in their mother's wombs are in fact innocent human beings, not just blobs of tissue that are part of the mother's body. That realization is step number one
human beings, including all those conceived but not yet born, is consistent with supporting and defending the Constitution of the United States. Later in this report I explain why the language I propose does belong in the purposes section of the ABA constitution, which positioning has also been opposed by the Standing Committee on Constitution and Bylaws.

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

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

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

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

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

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

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

Based on the faulty contention that the child in the womb cannot properly be legislatively determined to be a human being, the Supreme Court denigrated the child to the status “potential life,” stripping the child of her rightful status under the law as a human being. The Court then set up a false dichotomy of competing rights: the mother’s “right to privacy” right to kill the non-human blob in her womb verses the State’s interest in protecting the “potential life” in the womb and the health of the mother. (Referring to a living being with its own DNA as “potential life” is doublespeak

---

9 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.”

10 Nor does basing a supposed constitutional right to abortion upon the Equal Protection Clause of the Fourteenth Amendment (… nor shall any State … deny to any person within its jurisdiction the equal protection of the laws.) to the United States Constitution, as advocated by Justice Ginsburg and three other Justices in the Ginsburg dissent in *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) make any more sense. The child in the womb is still a human being, a child, and her right to life trumps the mother’s interest in having her killed, whether based on a supposed right to privacy or upon the Equal Protection
at its best.) The hand dealt the child in the womb by the Supreme Court was dealt from a stacked deck - based upon the lie that the child in the womb is not really a child. As a “potential life” rather than a real, live human being, the child’s real rights get pushed aside by the Supreme Court. The rationale of Roe v. Wade is not indisputable (and thus, one might argue, the Constitution itself); rather, the rationale of Roe v. Wade is fatuous.

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

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

Remember the argument over the propriety of amending the U.S. Constitution with the Bill of Rights shortly after the approval of the Constitution itself? There were those who argued that it is unnecessary and inappropriate to articulate in the Constitution these rights of the people and of the States against intrusion by the federal government, since the federal government was permitted to exercise only those powers granted to it in the

Constitution anyway. But those rights articulated in those first ten amendments were considered so fundamental that they should be explicitly set forth in the Constitution itself.

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

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

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

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

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

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

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

Feel free to email me at edwardjacobs@yahoo.com.
Amends §6.8 of the Constitution to provide for representation of the National Creditors Bar Association as an affiliated organization in the House of Delegates.

Amend §6.8 of the Constitution to read as follows:

§6.8 Delegates from Affiliated Organizations. (a) The following organizations are entitled to be represented in the House of Delegates as affiliated organizations: The American Immigration Lawyers Association, The American Judicature Society, the American Law Institute, the Association of American Law Schools, the Association of Life Insurance Counsel, the Conference of Chief Justices, the Federal Bar Association, the Federal Circuit Bar Association, the Federal Communications Bar Association, the Federal Energy Bar Association, the Hispanic National Bar Association, the Judge Advocates Association, the Maritime Law Association of the United States, the National Asian Pacific American Bar Association, the National Association of Attorneys General, the National Association of Bar Executives, the National Association of College and University Attorneys, the National Association of Criminal Defense Lawyers, the National Association of Women Judges, the National Association of Women Lawyers, the National Bar Association, the National Conference of Bar Examiners, the National Conference of Commissioners on Uniform State Laws, the National Conference of Women's Bar Associations, the National Creditors Bar Association, the National District Attorneys Association, the National Legal Aid and Defender Association, the National Lesbian and Gay Law Association, the National Organization of Bar Counsel and the Native American Bar Association.

(b) Proposals may be made to amend this section to add any national organization of the legal profession as an affiliated organization. Any proposals seeking representation shall be considered initially by the committee of the House of Delegates having jurisdiction over credentials and admission, which shall make appropriate recommendations. An applicant for affiliation shall:

1. Have no fewer than 2,000 members of which no fewer than 50 percent shall be members of the American Bar Association, unless the provisions of this subsection (b)(1) are waived by a vote of two-thirds or 150, whichever is greater, of the members present and voting in the House of Delegates;

2. Not duplicate the objectives and activities of entities that are separately represented in the House of Delegates; and

3. By its affiliation enhance the effectiveness of the House of Delegates or the goals of the Association.

(c) The delegate from an affiliated organization shall be selected as that organization determines and shall be a member of the Association. Each delegate's term shall be two Association years, ending with the adjournment of the annual meeting in an odd-numbered year. If a vacancy occurs, the affiliated organization concerned
shall select and certify a successor to serve for the unexpired term. If there is no delegate registered from an affiliated organization for three consecutive meetings of the House, that organization is no longer entitled to be represented in the House of Delegates as an affiliated organization.

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

§6.8 Delegates from Affiliated Organizations. (a) The following organizations are entitled to be represented in the House of Delegates as affiliated organizations: The American Immigration Lawyers Association, The American Judicature Society, the American Law Institute, the Association of American Law Schools, the Association of Life Insurance Counsel, the Conference of Chief Justices, the Federal Bar Association, the Federal Circuit Bar Association, the Federal Communications Bar Association, the Federal Energy Bar Association, the Hispanic National Bar Association, the Judge Advocates Association, the Maritime Law Association of the United States, the National Asian Pacific American Bar Association, the National Association of Attorneys General, the National Association of Bar Executives, the National Association of College and University Attorneys, the National Association of Criminal Defense Lawyers, the National Association of Women Judges, the National Association of Women Lawyers, the National Bar Association, the National Conference of Bar Examiners, the National Conference of Commissioners on Uniform State Laws, the National Conference of Women's Bar Associations, the National Creditors Bar Association, the National District Attorneys Association, the National Legal Aid and Defender Association, the National Lesbian and Gay Law Association, the National Organization of Bar Counsel and the Native American Bar Association.

(b) Proposals may be made to amend this section to add any national organization of the legal profession as an affiliated organization. Any proposals seeking representation shall be considered initially by the committee of the House of Delegates having jurisdiction over credentials and admission, which shall make appropriate recommendations. An applicant for affiliation shall:

(1) Have no fewer than 2,000 members of which no fewer than 50 percent shall be members of the American Bar Association, unless the provisions of this subsection (b)(1) are waived by a vote of two-thirds or 150, whichever is greater, of the members present and voting in the House of Delegates;

(2) Not duplicate the objectives and activities of entities that are separately represented in the House of Delegates; and

(3) By its affiliation enhance the effectiveness of the House of Delegates or the goals of the Association.

(c) The delegate from an affiliated organization shall be selected as that organization determines and shall be a member of the Association. Each delegate's term shall
be two Association years, ending with the adjournment of the annual meeting in an odd-numbered year. If a vacancy occurs, the affiliated organization concerned shall select and certify a successor to serve for the unexpired term. If there is no delegate registered from an affiliated organization for three consecutive meetings of the House, that organization is no longer entitled to be represented in the House of Delegates as an affiliated organization.
The effect of this proposed amendment to §8.8 of the ABA Constitution would be to include The National Creditors Bar Association as an affiliated organization with representation in the House of Delegates. The National Creditors Bar Association would thereby join the other unique national specialty bar associations as an affiliated organization, thus furthering the American Bar Association's commitment to encourage greater access to and participation for the national bar associations in the ABA.

Background

The National Creditors Bar Association is a non-profit voluntary association established in 1993 by creditors rights attorneys primarily practicing in the field creditors rights law. The National Creditors Bar Association serves as the voice and the education specific source for creditors rights attorneys and other attorneys practicing creditors rights law in sixteen (16) different areas of the law on issues affecting any form of creditor currently throughout the nation, Canada, Puerto Rico and the United Kingdom. The National Creditors Bar Association facilitates communication among many creditors rights attorneys. The National Creditors Bar Association has filed numerous amicus curiae briefs in significant creditors rights law cases before United States Federal District Courts, United States Federal Circuit Courts, and the United States Supreme Court.

The National Creditors Bar Association is currently comprised of approximately 1,609 attorneys in just over 580 law firms. Through our membership expansion model created in 2015, the Association has increased new members by 62% from 2015 to 2016 and we are on track to continue with the same rapid growth in new members in 2017.

The National Creditors Bar Association meets semi-annually for a national Conference.

The Practice of Law

Like The National Creditors Bar Association, the ABA has long taken the position that "primary regulation and oversight of the legal profession should continue to be vested in the court of highest appellate authority of the state in which the attorney is licensed, not federal agencies or Congress, and...the courts are in the best position to fulfill that important function." (See the ABA's Legislative and Governmental Priorities web page titled "Independence of the Legal Profession, http://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_legal_profession.html). Towards that end, the ABA has consistently opposed "federal legislation or rules that would undermine traditional state court regulation of lawyers, interfere with the confidential attorney-client
relationship, or otherwise impose excessive new federal regulations on lawyers engaged in the practice of law." *Id.*

The National Creditors Bar Association shares the ABA’s commitment to preserving the independence of the legal profession and has worked closely with the ABA Governmental Affairs Office to advance this important goal. For example, in recent months The National Creditors Bar Association and the ABA have met repeatedly to discuss strategies for advancing federal legislation known as the "Practice of Law Technical Clarification Act of 2017. (HR 1849)"

This important legislation, which was reintroduced in the 115th Congress on April 3, 2017, reinforces the principle that state courts and their state bar agencies—not federal agencies—are in the best position to regulate lawyers engaged in the practice of law and that laws to the contrary threaten the delicate balance in our judicial system. Attorneys are already supervised and regulated by the judicial branch and must adhere to the applicable rules of professional conduct, strictly follow federal and state laws and rules of procedure, and conduct themselves in a manner consistent with their responsibilities as officers of the court. Therefore, the legislation would clarify that the Fair Debt Collection Practices Act (FDCPA) does not apply to creditor lawyers engaged in litigation activities. In addition, the bill would expand the existing practice of law exemption in Section 1027(e) of the Dodd-Frank Act (which the ABA played a significant role in securing prior to final passage in 2010) to include both consumer lawyers and creditor lawyers.

**Additional Supporting Collaborative Activities with the ABA**

In the past 18 months, The National Creditors Bar Association:

- Worked closely with the ABA Governmental Affairs Office to oppose harmful federal legislation that would require many law firms and other personal service businesses to switch from the cash method of accounting to the accrual method and thus pay taxes on "phantom income" long before it is actually received (See the ABA’s Legislative and Governmental Priorities web page on “Mandatory Accrual Accounting for Law Firms,” [http://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_legal_profession/mandatory-accrual-accounting-for-law-firms.html](http://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_legal_profession/mandatory-accrual-accounting-for-law-firms.html));

- Continues to work closely with the ABA Membership Department to offer non-ABA members at our bar association a special membership package which benefits both organizations through additional member alliances and to encourage our members’ law firms to join the ABA’s Full Firm Membership Program;

- Participated as a Sponsor at the Summer 2016 ABA Business Law Section Meeting and Fall Business Law Section Meeting; and
• Promotes relevant ABA educational webinars to members of The National Creditors Bar Association.

Summary

For some time, The National Creditors Bar Association has desired affiliation with the American Bar Association. The National Creditors Bar Association recognizes the challenge of qualification under Section 6.8 of the ABA Constitution because it includes slightly less than 2,000 members. However, The National Creditors Bar Association is the largest bar association representing the universe of creditors rights attorneys, a legal specialty that mirrors the size of numerous other Affiliated Members. In addition, The National Creditors Bar Association does not duplicate the objectives and activities of any of the other entities that are separately represented in the House of Delegates. Therefore, it is important that this community of attorneys be a part of the ABA community consistent with the ABA's "Goal IV - ADVANCE THE RULE OF LAW. Objective 5. Preserve the independence of the legal profession and the judiciary."

The National Creditors Bar Association and the ABA would both benefit from a closer relationship. It will ensure that the interests of both associations are advanced and that issues of common concern are addressed. The National Creditors Bar Association has many active members and leaders in a number of important ABA entities, including the Business Law Section and its Committees, as well as the ABA Senior Lawyers Division. A stronger bridge between the ABA and The National Creditors Bar Association will also increase the participation by Native American attorneys in the ABA by availing them of the myriad opportunities offered by ABA membership and involvement. It also will expose the ABA to the wealth of talent in The National Creditors Bar Association and create greater awareness of the issues creditors—from "mom and pop" small businesses to major corporations—face, while also helping the ABA to increase its number of dues-paying members.

Thank you for considering The National Creditors Bar Association's application for Affiliated Organization status. If you have any questions or need more information, please do not hesitate to contact us.

Respectfully Submitted,

Mark Groves and Michael Glasser
PROPOSAL: Amends §6.5(a) of the Association's Constitution to indicate that if only six or fewer nominating petitions are filed for Delegates-at-Large to the House of Delegates, and no two are from the same state, territory or possession, no election shall be conducted and the Secretary shall certify to the Chair of the House that the nominees are elected. In addition, if a vacancy occurs and only one nominating petition is filed to fill the vacancy, no election shall be conducted and the Secretary shall certify to the Chair of the House that the nominee is elected.

Amends §6.5(a) of the Association's Constitution to read as follows:

(Legislative draft: additions underlined; deletions struck through)

§6.5 Delegates-at-Large. (a) At each annual meeting the members of the Association registered for the annual meeting shall elect by ballot six members of the Association as Delegates-at-Large to the House of Delegates, no two of whom are accredited to the same state, territory or possession. A ballot on which the number of votes cast is more or less than six is void. Election is by a plurality of the votes cast. If only six or fewer nominating petitions are filed for Delegates-at-Large to the House of Delegates, and no two are from the same state, territory or possession, no election shall be conducted and the Secretary shall certify to the Chair of the House that the nominees are elected. In addition, if a vacancy occurs and only one nominating petition is filed to fill the vacancy, no election shall be conducted and the Secretary shall certify to the Chair of the House that the nominee is elected.

(b) The term of a Delegate-at-Large is three Association years, beginning with the adjournment of the meeting during which elected.

(c) If a Delegate-at-Large resigns or dies, the members of the Association registered for the annual meeting shall elect at the next annual meeting a successor for the unexpired term.

(d) A Delegate-at-Large who fails to sign the House roster on or before the opening day of a meeting of the House at two successive sessions, shall no longer serve as delegate-at-large unless he/she provides a written statement of good cause for his/her absences to the House Committee of Credentials and Admissions and that Committee determines the absences should be excused. In the event the office becomes vacant, a successor shall be elected at the next annual meeting for the unexpired term.
REPORT

This housekeeping amendment proposes to amend §6.5(a) of the Constitution to state that if only six or fewer nominating petitions are filed for Delegates-at-Large to the House of Delegates, and no two are from the same state, territory or possession, no election shall be conducted and the Secretary shall certify to the Chair of the House that the nominees are elected. In addition, if a vacancy occurs and only one nominating petition is filed to fill the vacancy, no election shall be conducted and the Secretary shall certify to the Chair of the House that the nominee is elected.

This amendment will result in savings to the Association as no election will be necessary. Currently, the delegate-at-large election is conducted by a third party vendor which we will not be required to hire if no election is necessary if only six or fewer nominating petitions are filed. In addition, if there is a vacancy and only one nominating petition is filed to fill the vacancy, no election will be necessary.

Respectfully submitted,

Carlos A. Rodriguez-Vidal, Chair, Standing Committee on
_constitution and Bylaws
Hon. John Preston Bailey
Sidney Butcher
M. Joe Crosthwait, Jr.
Janet Green-Marbley
Eileen M. Letts
Ethan Tidmore
Mary L. Smith, Board Liaison
Mary T. Torres, Board Liaison

August 2017
Amends §44.1(a) of the Association's Constitution to include a "commission" as having the privileges of the floor of the House of Delegates.

Amends §44.1(a) of the Association's Constitution to read as follows:

(Legislative draft: additions underlined; deletions struck through)

§44.1 Privileges of the Floor. The privileges of the floor of the House of Delegates, without vote, are extended to nondelegates as follows:

(a) the chair of a section, or-committee or commission, who may make a motion and who may speak relating to a resolution of that section, or-committee or commission or any other matter within the jurisdiction of that section, or committee or commission;

(b) if a minority report is filed in connection with a resolution, a representative selected by the minority, who may speak on the resolution to present the view set forth in the minority report;

(c) any member of the Association, who may speak relating to a resolution filed by an Association member who is not a delegate;

(d) if the Chair approves, the administrative officer appointed by the Board of Governors may speak; and

(e) any person for whom the privilege is requested by a member of the House that is approved by two-thirds of the delegates voting may speak.

The Committee on Rules and Calendar shall make a recommendation on each such request.
This housekeeping amendment proposes to amend to §44.1(a) to clarify that commissions, along with sections and committees, also have privileges of the floor and have standing to bring resolutions with reports to the House of Delegates, since they are appointed by the ABA President.

Respectfully submitted,

Carlos A. Rodriguez-Vidal, Chair, Standing Committee on Constitution and Bylaws
Hon. John Preston Bailey
Sidney Butcher
M. Joe Crosthwait, Jr.
Janet Green-Marbley
Eileen M. Letts
Ethan Tidmore
Mary L. Smith, Board Liaison
Mary T. Torres, Board Liaison

August 2017
The Standing Committee on Constitution and Bylaws is directed by the Bylaws to study and make appropriate recommendations on all proposals to amend the Constitution and Bylaws, except for certain specified proposals that are submitted by the Committee on Scope and Correlation of Work.

Since its last report at the 2016 Annual Meeting, the Committee has received two proposals and recommended two housekeeping amendments to the Association's Constitution and Bylaws and House Rules of Procedure. The Committee met during the Midyear Meeting on February 4, 2017, in Miami, Florida, and on April 27, 2017, via telephone conference call, and herewith makes its recommendations on the proposed amendments as follows:

Proposal 1

The Committee considered a proposal to amend §1.2 of the Constitution to include the following language as one of the purposes of the Association: "to defend the right to life of all innocent human beings, including all those conceived but not yet born." The Committee voted to recommend to the House that the proposal is out of order in that it is inconsistent with the purposes of the Association's Constitution and that it not be approved.

Proposal 2

The Committee considered a proposal to amend §6.8 of the Association's Constitution to provide representation for the National Creditors Bar Association as an affiliated organization in the ABA House of Delegates. The Committee approved the proposal as to form. However, the Committee took no position on the substance of the proposal.

Proposal 3

The Committee voted to recommend that the proposal to amend §6.5(a) of the Constitution to state that if only six or fewer nominating petitions are filed for Delegates-at-Large to the House of Delegates, and no two are from the same state, territory or possession, no election shall be conducted and the Secretary shall certify to the Chair of the House that the nominees are elected, be approved. In addition, if a vacancy occurs and only one nominating petition is filed to fill the vacancy, no election shall be conducted and the Secretary shall certify to the Chair of the House that the nominee is elected.

Proposal 4

The Committee voted to recommend that the proposal to amend §44.1(a) of the Constitution to clarify that commissions, along with sections and committees, also have privileges of the floor and have standing to bring resolutions with reports to the House of Delegates since they are appointed by the ABA President, be approved.

Respectfully submitted,
Carlos A. Rodriguez-Vidal, Chair
Hon. John Preston Bailey
Sidney Butcher
M. Joe Crosthwait, Jr.
Janet Green-Marbley
Eileen M. Letts
Ethan Tidmore
Mary L. Smith and Mary T. Torres,
Board of Governors Liaisons
RESOLUTION

RESOLVED, That the American Bar Association approves the following programs: City College of San Francisco, Paralegal Studies Program, San Francisco, CA; Atlanta Technical College, Paralegal Studies Program, Atlanta, GA; Lewis University, Paralegal Studies Program, Romeoville, IL and Tulsa Community College, Legal Assisting/Paralegal Program, Tulsa, OK.

FURTHER RESOLVED, That the American Bar Association reapproves the following paralegal education programs: Cuyamaca College, Paralegal Studies Program, El Cajon, CA; San Francisco State University, College of Extended Learning Paralegal Program, San Francisco, CA; West Valley College, Paralegal Program, Saratoga, CA; Norwalk Community College, Legal Assistant Program, Norwalk, CT; Florida SouthWestern State College, Paralegal Studies Program, Fort Myers, FL; San Francisco State College at Jacksonville, Paralegal Studies Program, Jacksonville, FL; Morehead State University, Paralegal Studies Program, Morehead, KY; Oakland Community College, Paralegal Program, Farmington Hills, MI; Oakland University, Paralegal Program, Rochester, MI; Mississippi University for Women, Legal Studies Program, Columbus, MS; Mount St. Joseph University, Paralegal Studies Program, Cincinnati OH; University of Cincinnati—Clermont College, Paralegal Studies Program, Batavia, OH; Pellissippi State Community College, Paralegal Studies Program, Knoxville, TN; South College, Legal/Paralegal Studies and Paralegal Certificate Programs, Knoxville, TN; Texas State University, Legal Studies Program, San Marcos, TX; and Laramie County Community College, Paralegal Program, Cheyenne, WY.

FURTHER RESOLVED, That the American Bar Association withdraws the approval of the following paralegal education programs: Georgetown University, Paralegal Studies Program, Washington, DC; and Northern Essex Community College, Paralegal Studies Program, Lawrence, MA, at the requests of the institutions.

FURTHER RESOLVED, That the American Bar Association extends the terms of approval until the February 2018 Midyear Meeting of the House of Delegates for the following programs:
University of Alaska Anchorage, Paralegal Certificate Program, Anchorage, AK; South University, Legal/Paralegal Studies Programs, Montgomery, AL; Pima Community College, Paralegal Program, Tucson, AZ; College of the Canyons, Paralegal Studies Program, Santa Clarita, CA; John F. Kennedy University, Legal Studies Program, Pleasant Hill, CA; Miramar College, Legal Assistant Program, San Diego, CA; MTI College, Paralegal Studies Program, Sacramento, CA; Arapahoe Community College, Paralegal Program, Littleton, CO; University of New Haven Legal Studies Program, West Haven, CT; Wilmington University, Legal Studies
Program, New Castle, DE; South University, Legal/Paralegal Studies Programs, Royal Palm Beach, FL; Athens Technical College, Paralegal Studies Program, Athens, GA; Herzing University, Paralegal Studies Program, Atlanta, GA; South University, Legal/Paralegal Studies Programs, Savannah, GA; College of DuPage, Paralegal Studies Program, Glen Ellyn, IL; Illinois State University, Legal Studies Program, Normal, IL; Loyola University Chicago, Institute for Paralegal Studies, Chicago, IL; Southern Illinois University Carbondale, Paralegal Studies Program, Carbondale, IL; Bowling Green Community College of Western Kentucky University, Paralegal Studies Program, Bowling Green, KY; Sullivan University, Institute for Paralegal Studies, Lexington, KY; Herzing University, Legal Assisting/Paralegal Studies Program, Kenner, LA; Elms College, Legal Studies Program, Chicopee, MA; Middlesex Community College, Paralegal Studies Program, Bedford, MA; Grand Valley State University, Legal Studies Program, Grand Rapids, MI; Montclair State University, Paralegal Studies Program, Montclair, NJ; Finger Lakes Community College, Paralegal Program, Canandaigua, NY; Fayetteville Technical Community College, Paralegal Technology Program, Fayetteville, NC; Columbus State Community College, Paralegal Studies Program, Columbus, OH; Edison Community College, Paralegal Studies Program, Piqua, OH; Rose State College, Paralegal Studies Program, Midwest City, OK; Portland Community College, Paralegal Program, Portland, OR; Bucks County Community College, Paralegal Studies Program, Newtown, PA; Community College of Philadelphia, Paralegal Studies Program, Philadelphia, PA; Northampton Community College, Paralegal Program, Bethlehem, PA; South University, Legal Studies/Paralegal Studies Programs, Columbia, SC; Brightwood College, fka Kaplan Career College, Paralegal Studies Program, Nashville, TN; Salt Lake Community College, Paralegal Studies Program, Salt Lake City, UT; Edmonds Community College, Paralegal Program, Lynnwood, WA; and Western Technical College, Paralegal Program, LaCrosse, WI.
REPORT

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

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

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

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

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

City College of San Francisco, Paralegal Studies Program, San Francisco, CA
City College of San Francisco is a two-year public community college accredited by the Accrediting Commission for Community and Junior Colleges, Western Association of Colleges and Schools. The college offers an Associate in Science Degree in Paralegal/Legal Studies and a Certificate in Paralegal Studies.
Atlanta Technical College, Paralegal Studies Program, Atlanta, GA
Atlanta Technical College is a two-year public college accredited by the Southern Association of Colleges and Schools Commission on Colleges. The college offers an Associate of Applied Science Degree in Paralegal Studies.

Lewis University, Paralegal Studies Program, Romeoville, IL
Lewis University is a four-year private university accredited by the Higher Learning Commission. The university offers a Bachelor of Arts Degree in Paralegal Studies and a Bachelor of Arts Degree Minor in Paralegal Studies.

Tulsa Community College, Paralegal Studies Program, Tulsa, OK
Tulsa Community College is a two-year public community college accredited by the Higher Learning Commission. The college offers an Associate of Arts Degree in Paralegal Studies and an Associate in Applied Science Degree in Paralegal Studies.

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

Cuyamaca College, Paralegal Studies Program, El Cajon, CA
Cuyamaca College is a two-year public community college accredited by the Accrediting Commission for Community and Junior Colleges, Western Association of Schools and Colleges. The college offers an Associate in Science Degree in Paralegal Studies.

San Francisco State University, College of Extended Learning, Paralegal Studies Program, San Francisco CA
San Francisco State University, College of Extended Learning is one of nine independent colleges of San Francisco State University, part of the public California State University system, accredited by the Accrediting Commission for Senior Colleges and Universities, Western Association of Schools and Colleges. The college offers a Post-Baccalaureate Certificate in Paralegal Studies.

West Valley College, Paralegal Program, Saratoga, CA
West Valley College is a two-year public community college accredited by the Accrediting Commission for Community and Junior Colleges, Western Association of Schools and Colleges. The college offers an Associate of Science Degree in Paralegal and a Certificate.

Norwalk Community College, Legal Assistant Program, Norwalk, CT
Norwalk Community College is a two-year public community college accredited by the New England Association of Schools and Colleges. The college offers an Associate in Science Degree
Florida SouthWestern State College, Paralegal Studies Program, Fort Myers, FL
Florida SouthWestern State College is a four-year public college accredited by the Southern Association of Colleges and Schools Commission on Colleges. The college offers an Associate in Science Degree in Paralegal Studies.

Florida State College at Jacksonville, Paralegal Studies Program, Jacksonville, FL
Florida State College at Jacksonville is a four-year university accredited by the Southern Association of Schools and Colleges Commission on Colleges. The college offers an Associate in Science in Paralegal Studies Degree and an Advanced Technical Certificate.

Morehead State University, Legal Studies Program, Morehead, KY
Morehead State University is a four-year public university accredited by the Southern Association of Colleges and Schools Commission on Colleges. The university offers a Bachelor of Arts Degree with a Major in Legal Studies and a Bachelor of Arts Degree with an Area of Concentration in Legal Studies.

Oakland Community College, Paralegal Program, Farmington Hills, MI
Oakland Community College is a two-year public community college accredited by the Higher Learning Commission. The college offers an Associate in Applied Science Degree in Paralegal and a Post-Baccalaureate Certificate.

Oakland University, Paralegal Program, Rochester, MI
Oakland University is a four-year public university accredited by the Higher Learning Commission. The university offers a Certificate.

Mississippi University for Women, Legal Studies Program, Columbus, MS
Mississippi University is a four-year public university accredited by the Southern Association of Colleges and Schools Commission on Colleges. The university offers a Bachelor of Arts Degree in Legal Studies and a Bachelor of Science Degree in Legal Studies.

Mount St. Joseph University, Paralegal Studies Program, Cincinnati, OH
Mount St. Joseph University is a four-year private university accredited by the Higher Learning Commission. The university offers a Bachelor of Arts Degree in Paralegal Studies, an Associate in Arts Degree in Paralegal Studies and a Certificate in Paralegal Studies.

University of Cincinnati – Clermont College, Paralegal Studies Program, Batavia, OH
University of Cincinnati – Clermont is a four-year public university accredited by the Higher Learning Commission. The university offers an Associate of Applied Business degree in Paralegal Studies and a Post-Baccalaureate Certificate in Paralegal Studies.
Pellissippi State Community College, Paralegal Studies Program, Knoxville, TN
Pellissippi State Community College is a two-year public community college accredited by the Southern Association of Colleges and Schools Commission on Colleges. The college offers an Associate of Applied Science Degree.

South College, Legal/Paralegal Studies and Paralegal Certificate Programs, Knoxville, TN
South College is a private four-year college accredited by the Southern Association of Colleges and Schools Commission on Colleges. The college offers a Bachelor of Science Degree in Legal Studies, a Postsecondary Certificate in Paralegal Studies and an Associate of Science Degree in Paralegal Studies.

Texas State University, Legal Studies Program, San Marcos, TX
Texas State University is a four-year public university accredited by the Southern Association of Colleges and Schools Commission on Colleges. The university offers a Master of Arts Degree in Legal Studies and a post-baccalaureate Certificate in Paralegal Studies.

Laramie County Community College, Paralegal Program, Cheyenne, WY
Laramie County Community College is a two-year public community college accredited by the Higher Learning Commission. The college offers an Associate of Applied Science Degree in Paralegal and a post-baccalaureate Certificate in Paralegal.

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

Georgetown University, Paralegal Studies Program, Washington, DC
Georgetown University is a four-year private university accredited by the Middle States Commission on Higher Education. The university offers a Certificate in Paralegal Studies.

Northern Essex Community College, Paralegal Studies Program, Lawrence, MA
Northern Essex Community College is a two-year public community college accredited by the New England Association of Colleges and Schools. The college offers an Associate of Science Degree in Paralegal Studies, with a Transfer Option, an Associate of Science Degree, with a Career Option, and a Certificate in Paralegal Studies.

Applications for reapproval have been filed by the following schools and are currently being evaluated. Until the evaluation process has been completed, the Committee recommends that the term of approval for each program be extended until the 2018 Midyear Meeting of the American Bar Association House of Delegates.

University of Alaska Anchorage, Paralegal Certificate Program, Anchorage, AK;
South University, Legal/Paralegal Studies Programs, Montgomery, AL;
Pima Community College, Paralegal Program, Tucson, AZ;
College of the Canyons, Paralegal Studies Program, Santa Clarita, CA;
John F. Kennedy University, Legal Studies Program, Pleasant Hill, CA;
Miramar College, Legal Assistant Program, San Diego, CA;
MTI College, Paralegal Studies Program, Sacramento, CA;
Arapahoe Community College, Paralegal Program, Littleton, CO;
University of New Haven Legal Studies Program, West Haven, CT;
Wilmington University, Legal Studies Program, New Castle, DE;
South University, Legal/Paralegal Studies Programs, Royal Palm Beach, FL;
Athens Technical College, Paralegal Studies Program, Athens, GA;
Herzing University, Paralegal Studies Program, Athens, GA;
South University, Legal/Paralegal Studies Programs, Savannah, GA;
College of DuPage, Paralegal Studies Program, Glen Ellyn, IL;
Illinois State University, Legal Studies Program, Normal, IL;
Loyola University Chicago, Institute for Paralegal Studies, Chicago, IL;
Southern Illinois University Carbondale, Paralegal Studies Program, Carbondale, IL;
Bowling Green Community College of Western Kentucky University, Paralegal Studies Program, Bowling Green, KY;
Sullivan University, Institute for Paralegal Studies, Lexington, KY;
Herzing University, Legal Assisting/Paralegal Studies Program, Kenner, LA;
Elms College, Legal Studies Program, Chicopee, MA;
Middlesex Community College, Paralegal Studies Program, Bedford, MA;
Grand Valley State University, Legal Studies Program, Grand Rapids, MI;
Montclair State University, Paralegal Studies Program, Montclair, NJ;
Finger Lakes Community College, Paralegal Program, Canandaigua, NY;
Fayetteville Technical Community College, Paralegal Technology Program, Fayetteville, NC;
Columbus State Community College, Paralegal Studies Program, Columbus, OH;
Edison Community College, Paralegal Studies Program, Piqua, OH;
Rose State College, Paralegal Studies Program, Midwest City, OK;
Portland Community College, Paralegal Program, Portland, OR;
Bucks County Community College, Paralegal Studies Program, Newtown, PA;
Community College of Philadelphia, Paralegal Studies Program, Philadelphia, PA;
Northampton Community College, Paralegal Program, Bethlehem, PA;
South University, Legal Studies/Paralegal Studies Programs, Columbia, SC;
Brightwood College, fka Kaplan Career College, Paralegal Studies Program, Nashville, TN;
Salt Lake Community College, Paralegal Studies Program, Salt Lake City, UT;
Edmonds Community College, Paralegal Program, Lynnwood, WA; and
Western Technical College, Paralegal Program, LaCrosse, WI.

Respectfully submitted,
Laura Barnard, Chair
Standing Committee on Paralegals
August 2017
GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Paralegals
Submitted By: Laura C. Barnard, Chair

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

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

2. **Approval by Submitting Entity.**

   May 1, 2017

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

   This resolution has not been previously submitted.

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

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

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

   Action is timely.

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

   N/A

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

   Approved programs are notified of the action of the House of Delegates by the Standing Committee on Paralegals. The programs are monitored for compliance during the approval term by the Standing Committee.
8. Cost to the Association. (Both direct and indirect costs.)

None

9. Disclosure of Interest. (If applicable.)

N/A

10. Referrals.

None

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

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

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

Laura C. Barnard
Executive Vice President and Provost
Director, Paralegal Program
Lakeland Community College
7700 Clocktower Drive
Kirtland, OH 44094
(440) 525-7096
Cell: (517) 485-3232
E-Mail: lbarnard@lakelandcc.edu
EXECUTIVE SUMMARY

1. Summary of the Resolution

The Standing Committee on Paralegals resolve(s) that the House of Delegates grant(s) approval to four programs, grants reapproval to sixteen programs, withdraws the approval of two programs, and extends the term of approval of thirty-nine programs.

2. Summary of the issue which the Resolution Addresses

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

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

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

4. Summary of Minority Views

No other positions on this resolution have been taken by other Association entities, affiliated organizations or other interested group.
RESOLVED, That the American Bar Association urges Congress to require that any works of the U.S. government that are published privately—that is, by parties other than the government—also be deposited with the Government Publishing Office and subsequently distributed on the Internet, to the member libraries of the Federal Depository Library System, to the Library of Congress, and to the National Archives.

FURTHER RESOLVED, That the American Bar Association urges the Office of Government Ethics to develop a legal advisory for employees and officers of the executive branch to determine when a privately published work is a work of the U.S. government.

FURTHER RESOLVED, That the American Bar Association encourages publishers to inquire of authors who are employed by the U.S. government if their work is a work of the U.S. government and, if so, to clearly label such work upon publication and make it freely and broadly available to the public.
REPORT

Introduction

The U.S. Constitution gives Congress the power “to promote the progress of science and the useful arts,” a power that Congress quickly exercised with passage of the Copyright Act of 1790. Our system of copyright is one of limited rights, both in the terms under which copyright is granted but also in excluding from copyright a number of key areas. In *Wheaton v. Peters*, the Supreme Court’s first major copyright case, the Court defined an exclusion for edicts of government, in that case the opinions issued by the federal courts.

General principles, such as the doctrine of edicts of government, evolve over time. The *Wheaton v. Peters* case arose out of advances in printing technology, which led Richard Peters, the new court reporter, to come out with cheaper editions of Supreme Court reports, making them more accessible to rural lawyers in the new republic. Similarly, as the growth of the Internet has made it possible to provide people everywhere with ready access to the law, the ABA House of Delegates at the 2016 Annual Meeting passed Resolution 112, which urged greater public availability of public safety standards incorporated by reference into the Code of Federal Regulations and other statutes and rules.

A related exception to copyright is the works of government doctrine, which excludes from copyright works authored by federal employees and officers in the course of their official duties. Over the last 100 years, a large number of scholarly articles have been authored by federal employees and officers and published in privately run publications. In many cases, these scholarly articles bear copyright assertions by the publishers, and are not available to the public without paying a fee and agreeing to stringent terms of use as a condition of access.

This resolution and report examines the availability of works of government in the scholarly literature, including the legal background of the doctrine, an empirical study of the extent of the practice, and proposes a series of concrete steps to increase availability. This inquiry is part of a

---

1 U.S. Const. art 1, § 8, cl. 8.
2 1 Stat. 124 (1790).
larger concern, the preservation of and access to works created by our governments, including
government databases, edicts of governments, and public information generally.

In recent times, government employees and those who use government data have raised alarms
over the deliberate destruction of government databases, especially data that runs counter to par-
tisan beliefs. Even when data is not deliberately removed, concerns have been raised about the
government’s ability to properly archive and preserve important information over the long term
because it was stored and deleted on government or private servers, or because of the inade-
quacy of government electronic archiving systems.

History of the Works of Government Doctrine

The idea that works by federal employees are not eligible for copyright stems in early cases from
an application of the work-for-hire doctrine: a work created in the course of employment generally belongs to the employer and not the employee. For example, from 1852-1854, the artist
William Heine accompanied Commodore Matthew C. Perry on his expedition to Japan, creating
drawings that were subsequently published by the government. Heine registered copyright in
those drawings, then sued William H. Appleton when he published the same report. The court
ruled that Heine’s copyright registration was invalid because Heine was not the author for pur-
poses of copyright and the work had already been given to the public by the Navy.

---

8 See, e.g., Brady Dennis, Scientists are frantically copying U.S. climate data, fearing it might vanish under Trump, Washington Post, December 13, 2016.
Before the 20th century, most of the judicial focus on the issue of copyright in government publications was devoted to the question of whether edicts of government could be registered for copyright. The courts started with judicial opinions, then considered statutes, and finally the copyrightability of compilations and their components, such as page numbers or headnotes.

Congressional attention to the question of copyright in government works dates back to the Printing Law of 1895, which provides for the sale by the Public Printer of “duplicate stereotype or electrotype plates from which any government publication is printed” and included an additional clause that “no publication reprinted from such stereotype or electrotype plates and no other Government publication shall be copyrighted.”

The clause was inserted as a convenience for Representative James D. Richardson, the chairman of the Joint Committee on Printing who had, on his own volition, compiled the Messages and Papers of the Presidents of the United States, and wished to come out with his own private edition. During a heated floor debate opposing the measure, the proviso that no copyright would vest in any publication was added to satisfy opponents who were worried that private claims of copyright over government publications would be exercised.

After Representative Richardson secured passage of the Printing Act of 1895, his actions received continued attention. Richardson was forced to defend on the House floor his belief that he could properly assert copyright with respect to private individuals but not with respect to the government. After Richardson issued several volumes of the Presidential Messages, accompanied by assertions of copyright, a Senate committee was appointed to review the affair. It concluded that:

“If the services of any author or compiler employed by the Government require to be compensated, payment should be made in money frankly and properly appropriated for that purpose and the resulting book or other publication in whole and as to any part

---

14 *Banks v. Manchester*, 128 U.S. 244 (1888) (Copyright in state court opinions).
15 See *Davidson v. Wheelock*, 27 F. 61 (Cir. Ct., D. Minn., 1866) (no copyright in Minnesota’s Constitution or statutes); *Howell v. Miller*, 91 F. 129 (6th Cir. 1898) (no copyright in statutes of Michigan).
16 *Gould v. Banks*, 53 Conn. 415, 2 A. 886 (1885) (“a copyright of a volume does not necessarily include a copyright of the opinions”).
17 *Banks Law Pub. Co. v. Lawyers’ Cooperative Pub. Co.*, 169 F. 386 (2d Cir. 1909) (“paging and distribution into volumes, are not features of such importance as to entitle the reporter to copyright protection of such details”).
18 *Callaghan v. Myers*, 128 U.S. 617 (1888) (Synopsis created by the reporter may be copyrighted). But see *Chase v. Sanborn*, 4 Cliff. 306, 6 O.G. 932, 5 Fed. Cas. 521 (Cir. Ct. D. N.H. 1874) (Headnotes created by the judge are not copyrightable because authored in the course of official duties).
19 28 Stat. 601 (1895), § 52.
should be always at the free use of the people, and this, without doubt, was what Congress intended.\textsuperscript{22}

Congress further extended this legislative prohibition against copyright in government publications in the Copyright Act of 1909, stating no "publication of the United States Government, or any reprint, in whole or in part" is eligible for copyright.\textsuperscript{23} That provision was maintained into the Copyright Act of 1976, and the term "work" was substituted for "publication" to clarify that all creative work, whether published or unpublished, in whatever form, were covered.\textsuperscript{24}

Since the 1909 Act, there have been only a few interpretations by the courts of the works of government clause. One of the first cases was \textit{Sherrill v. Grieves}, in which Sherrill, an Army officer, prepared a textbook on military topography in his spare time, the text of which was then printed by the Government and used in an army school.\textsuperscript{25} Sherrill subsequently published the book on his own and was able to successfully defend his copyright. The case underscores the principle that the government may use copyrighted works in government publications, but such use does not invalidate an underlying copyright.

In \textit{Sawyer v. Crowell Publishing Co.}, the plaintiff accompanied the Secretary of the Interior on a mission to Alaska and on the trip gathered data for a map.\textsuperscript{26} Although Sawyer gathered the data on his own time, he had a subordinate prepare the map on government time and directed the U.S. Geological Survey to engrave the map. Sawyer subsequently filed for copyright and asserted his right and the court ruled that because the map was closely related to the plaintiff's official duties, and that government resources were used to create the work, his copyright was thus invalid.

Finally, in \textit{Public Affairs Associates, Inc. v. Rickover}, Vice Admiral Hyman G. Rickover asserted copyright over two speeches he had delivered to a university and an education group in his spare time. He had written the speeches at home, where they were typed by his wife.\textsuperscript{27} Despite the fact that the speech's final form was typed by his office secretary and printed by the Navy as a news release, the court ruled Rickover retained copyright over its contents.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{23} 35 Stat. 1075 (1909).
\item \textsuperscript{24} H.R. Rep. 94-1476, at 58 (1976). \textit{See also Sherr v. Universal Match Corporation}, 297 F. Supp. 107 (S.D.N.Y. 1967), aff'd, 417 F. 2d 497 (2d Cir. 1969), \textit{cert. denied}, 397 U.S. 936 (1970) (Holding that a statue of soldier in battle gear created by soldiers on active duty is not entitled to copyright protection even when subsequently used on a matchbook cover).
\item \textsuperscript{26} \textit{Sawyer v. Crowell Publishing Co.}, 46 F. Supp. 471 (S.D.N.Y. 1942), aff'd, 142 F. 2d 497 (2d Cir. 1944), \textit{cert. denied}, 323 U.S. 735 (1944).
\end{itemize}
\end{footnotesize}
Works of Government and the Private Publication of Works

Since the 1930s, “the practice grew of having scientific and technical works produced by and for the Government published in private journals.” 28 This practice is important not only for the dissemination of information, but as the Rickover court held, “it is in the public interest for the Government to encourage intellectual development of its officers and employees, and to look with favor upon their making literary and scientific contributions.” 29 In fact, this practice was advocated by the Bureau of the Budget in 1943 as a cost-saving measure to save the government the cost of printing these works. 30

The first requirement for the works clause is that the author be an employee or officer of the federal government. There has been considerable discussion in the literature about when a task performed by a contractor becomes a work of the government. 31 Whether copyright (or lack of copyright) vests in the government is a different issue from the question of works of government and is analyzed as a question of whether this was a work for hire. 32 The current report focuses only on works of government, not on works for hire. 33

The key issue if whether a work was produced in the course of the employee or officer’s official duties. The House Report accompanying the 1976 Copyright Act clearly stated that even if the subject matter of a writing overlapped those duties, it was not necessarily a work of government:

“Under this definition, a Government official or employee would not be prevented from securing copyright in a work written at that person’s own volition and outside his or her duties, even though the subject matter involves the Government work or professional field of the official or employee.” 34

Courts and executive branch agencies have looked with disfavor on any claim of copyright over government works, since copyright in those instances would frustrate the primary purpose of this clause, which was promoting the “free dissemination of valuable government information.” 35

This has been particularly true in the case of misrepresentation. For example, the Federal Trade Commission successfully forced two private parties to cease and desist from selling How to Win Success in the Mail-Order Business as a new work when it was in fact a Department of Com-

28 Berger, op. cit. note 20 at 34.
merce publication, and held that they must "clearly disclose the title under which it was previously sold." Likewise, when William B. Schulte sold a booklet entitled *Establishing and Operating a Real Estate and Insurance Brokerage Business* and falsely claimed that the information was from previously confidential sources and could not be obtained for less than the sale price of $2, the FTC forced him to cease and desist as well.

Under the Copyright Act, if a work of government is included in a private publication, then the copyright notice must clearly identify "either affirmatively or negatively, those portions of the copies or phonorecords embodying any work or works protected." The House Report accompanying the Act stated that this clause was the result of a "publishing practice that, while technically justified under the present law, has been the object of considerable criticism" and requires that the notice should be "meaningful rather than misleading."

Assertion of copyright over works of government is a widespread practice in private publishing. In 1963, a sitting president published a book called *To Turn the Tide* with the subtitle "A selection from President Kennedy's public statements from his election through the 1961 adjournment of Congress." Two pages after the title page the book contained the notice "Copyright © by John F. Kennedy" and the admonition "No part of this book may be used or reproduced in any manner whatsoever without written permission except in the case of brief quotations embodied in critical articles and reviews." It is difficult to argue that any speeches given by the President of the United States are not given in the course of his or her official duties. As a result, the text of these speeches should not be given copyright protection.

Additional guidance on the external publication of works of government is provided in departmental-issued guidance and regulations. For example, the U.S. Army policy on intellectual property explains that official duties may be "expressed or implied" and involve work "necessary for the proper performance and accomplishment of an employee's duties" or works "requested, directed, instructed, or otherwise ordered by an appropriate official."

---

39 H. Rep. 94-1476 op. cit. note 34 at 145.
41 Drew Harwell and Amy Brittain, *Secret Service asked for $60 million extra for Trump-era travel and protection, documents show*, Washington Post, March 22, 2017 (Quoting White House press secretary Sean Spicer: "The president is very clear that he works seven days a week.... This is part of being president").
Nevertheless, the Army recognizes that “even though the subject matter of [a] work may be directly related to the author-employee’s official duties,” it may in fact be a private work, but that if government facilities were used, the government is entitled to a royalty-free license to use the work “and to have others do so for its benefit.” Finally, important to the subject of this report, the law requires “affirmative or negative identification of the sections which are actually copyrighted, thereby indicating which portions are works of the United States Government.”

Another example of such guidance is the Federal Judicial Center’s Outside Publications Policy. The Center asserts that for any work produced on official duty time or using government resources, the Center has the first right to publish, but if the work was prepared on the employee’s own time and “with no or very minimal use of government resources,” it may be published externally. An important caveat, one which applies to other branches of government, is that if any “honoraria or outside income” is received, the matter should be cleared with appropriate ethics officials.

The Federal Judicial Center is clear that when materials are a work of government “they should be made widely available and at no cost to the public,” but the Center recognizes that such outside publication may reach “interested audiences more directly” as well as call attention to the Center. As with many government agencies, the Center is also subject to the Government Printing and Binding Regulations, which governs works created using appropriated funds and states that no work shall “be made available to a private publisher for initial publication without the prior approval of the Joint Committee on Printing.” When the Center was found in breach of that requirement, it reached an agreement with the Joint Committee to make reprints of any such privately published articles available to the Federal Depository Library System.

One final issue to consider is what the nature of a “work” is when it is published as part of a larger compilation, such as when an article by a federal employee is part of a journal that contains non-governmental works. This was the nature of the 19th-century controversies over edicts of government, where some parties maintained that while court opinions were in the public domain, page numbers were a creative enterprise deserving of protection.

When a journal publishes an article authored by an employee or officer acting in his or her official capacity, in some cases the publisher will simply mark that article with an explicit disclaimer.

---

43 AR 27-60, § 4-3(c).
44 id., § 4-3(d).
45 id., § 4-3(f).
49 Letter from John C. Godbold, Director, Federal Judicial Center to Hon. Frank Annunzio, Chairman, Joint Committee on Printing, October 5, 1988.
of copyright. However, in many cases no such disclaimer is provided and in some, the issue becomes even murkier. An example is the recent publication by President Obama in the Harvard Law Review. The article contains a disclaimer at that reads:

“Disclaimer: The journal’s copyright notice applies to the distinctive display of this Harvard Law Review Commentary, in both print and online forms, and not the President’s work or words.”

Perhaps the Harvard Law Review is attempting to distinguish the work the President originally submitted from the “final” work as published, but it is clear that the writing of the President, in the final fixed form as published by the Harvard Law Review Association, is also a work of government. The article as published has been “fixed in any tangible medium of expression, now known or later developed, from which [it] can be perceived, reproduced, or otherwise communicated, either directly or indirectly with the aid of a machine or device” and was done so “by or under the authority of the author.” It is a work and it is a work by an officer of the U.S. government, hence it is a work of government and no copyright may vest in its final form.

Audits of Publication Practices

In order to quantify the extent of the practice of employees or officers of the United States publishing their work in private publications, a series of audits have been conducted. We examine first the results from American Bar Association publications, then law reviews, and finally more generally the full scholarly literature.

Most ABA publications are not freely available on the Internet, and must be accessed through commercial services such as electronic databases from companies such as William S. Hein & Co.’s HeinOnline service. Because author affiliation is not part of the searchable metadata, examining the literature for potential works requires examining the title page and reading the author-provided information, which typically includes information such as the author’s education.

51 See, e.g., Stephen W. Preston, CIA and the Rule of Law, 6 J. of Natl. Security Law & Policy 1, (2012) (“No copyright is claimed in the content of this article, which was prepared by a federal officer in his official capacity.”); Mullins et. al., Description of Bartonella ancashensis sp. nov., isolated from the blood of two patients with verruga peruana, Intl. J. of Systematic and Evolutionary Microbiology, 65, 3339-3343 (2015), (Authors are affiliated with the U.S. Naval Medical Research Center, the Walter Reed Army Institute of Research, and the U.S. Naval Medical Research and a Disclaimer indicates that 4 of the 5 authors “are military service members or employees of the US Government and this work was prepared as part of their official duties (17 U.S.C. § 105 provides that ‘Copyright protection under this title is not available for any work of the United States Government’ ).


and professional affiliations. In the case of government employees, the footnote often includes a disclaimer that the work does not represent the official views of the government.

The audit of ABA publications is a partial one in that not all publications and issues were examined. Included are articles in which the author self-describes as an employee or officer of the U.S. government. Not included were articles in which the author included a disclaimer indicating the work was done on personal time. 55

The results are presented in Table 1. 56

<table>
<thead>
<tr>
<th>Publication Name</th>
<th>Period Examined</th>
<th>Works Found</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABA Journal of Labor and Employment Law</td>
<td>2011-2016</td>
<td>8</td>
</tr>
<tr>
<td>Administrative Law Review</td>
<td>1949-2015</td>
<td>255</td>
</tr>
<tr>
<td>Air and Space Lawyer</td>
<td>2014-2015</td>
<td>4</td>
</tr>
<tr>
<td>Antitrust Law Journal</td>
<td>2000-2015</td>
<td>75</td>
</tr>
<tr>
<td>ABA Institutes</td>
<td>2012-2015</td>
<td>27</td>
</tr>
<tr>
<td>Criminal Justice</td>
<td>2012-2016</td>
<td>10</td>
</tr>
<tr>
<td>Insights on Law and Society</td>
<td>2010-2015</td>
<td>4</td>
</tr>
<tr>
<td>International Lawyer</td>
<td>2015-2016</td>
<td>2</td>
</tr>
<tr>
<td>Journal of Affordable Housing and Community Development Law</td>
<td>1993-2016</td>
<td>19</td>
</tr>
<tr>
<td>Judges' Journal</td>
<td>2006-2016</td>
<td>25</td>
</tr>
<tr>
<td>Jurimetrics</td>
<td>2014-2015</td>
<td>3</td>
</tr>
</tbody>
</table>

55 See, e.g., Allan Jonathan Stein, FOIA and FACA: Freedom of Information in the Fifth Branch?, 27 Admin. L. Rev. 31 (1975) (“Presently with the office Hearings and Appeals, United States Department of the Interior. This article was originally written for Professor Roy A. Schotland at the Georgetown University Law Center.”); Nathan I. Finklestein and Collister Johnson, Jr., Public Counsel Revised: The Evolution of a Concept for Promoting Public Participation in Regulatory Decision-Making, 29 Admin. L. Rev. 167 (1977) (Both authors self-identify as former federal employees and note “This article was written in consultation of the entire staff of the office of Public Counsel of the Rail Services Planning Office, Interstate Commerce Commission. Mr. A. Grey Staples, Jr., Director of the Office of Public Counsel, is particularly responsible for assisting the authors in developing the concepts and ideas discussed herein.”); Lawrence M. Frankel, Rethinking the Tunney Act: A Model for Judicial Review of Antitrust Consent Decrees, 75 Antitrust L.J. 549 (2008-2009) (“Attorney, U.S. Department of Justice ... The article was written while the author was visiting the University of Chicago Law School as the ’06-’07 Victor Kramer Fellow”).

56 ABA members are encouraged to notify the author of any audited articles that they feel are not properly works of government because they were not conducted in the course of an author’s official duties. The full listing may be viewed at https://law.resource.org/pub/us/works/aba/aba.audit.listing.pdf
In no case were articles accompanied by a disclaimer that no copyright applied to works of government or by any indication that the article was in fact such a work, although in a large number of articles a disclaimer was inserted that indicated that the views presented in the article did not necessarily reflect the official views of the employing agency.

In many cases, the articles are clearly explanations of an official about the workings of their department.\(^{57}\) Another set of audits were conducted by volunteer law students across the country of law reviews based in law schools. Those results are presented in Table 2. Without clear indications if an article is in fact written in the course of official duties, the reader is forced to examine the runes of the footnote describing the author to try and make that determination.

![Table 2: Partial Audit of Selected Law Reviews](image)

---

\(^{57}\) See, e.g., Steven D. Poulin, *The U.S. Coast Guard Office of the Judge Advocate General: What We’re All About*, 24 Pub. Law. 14 (2016) (The author is a Rear Admiral with the U.S. Coast Guard); John C. Truesdale, *Battling Case Backlogs at the NLRB: The Continuing Problem of Delays in Decision Making and the Clinton Board’s Response*, 16 Lab. Law. 1 (2000-2001) (The author is Chairman, National Labor Relations Board); Aaron E. Woodward, *The Perverse Effect of the Multiple Award Schedules’ Price Reductions Clause*, 41 Pub Cont. L.J. 527 (2011-2012) (Author is on active duty in the U.S. Air Force and the article was submitted to satisfy requirements for a Master of Laws degree).
Table 2: Partial Audit of Selected Law Reviews

<table>
<thead>
<tr>
<th>Journal Name</th>
<th>Period Examined</th>
<th>Works Found</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stanford Law Review</td>
<td>1948-2004</td>
<td>58</td>
</tr>
<tr>
<td>Yale Law Journal</td>
<td>1923-2017</td>
<td>274</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td><strong>772</strong></td>
</tr>
</tbody>
</table>

In one article, the results seem not to be a work when an ensign serving on active duty in the U.S. Naval Reserve published a piece on tax policy. In another, the author was a Professor at Harvard Law School who served as the official reporter to the Advisory Committee on Civil Rules and his article described that work. In a third, the author is Counsel to the President of the United States, but states that the article "was drafted before he became associated with the federal government." In a fourth article, a sitting justice of the Supreme Court clearly marks the article "© 1989 Antonin Scalia" which certainly serves as an indicator that this is perhaps not a work of government. In a fifth, a Federal Trade Commissioner describes how the agency is structured and selects cases. If the extent of the practice was only a few thousand law review articles, this issue would not necessarily deserve attention. However, legal publishing is one of many fields in which government officials publish prolifically. In fields such as medicine, agencies such as the Centers for Disease Control, the Veterans' Administration hospital system, and the National Institutes of Health all play a dominant role. In economics, organizations such as the Bureau of Labor Statistics, the U.S. Census, the Board of Governors of the Federal Reserve, and the Federal Trade Commission all play an active role. In the field of agriculture, the U.S. Department of Agriculture is one of the premier research institutions. In the field of transportation engineering, organizations such as the Federal Aviation Administration and the Federal Highway Administration make key contributions.

To help determine the extent of works of government, a series of searches have been conducted in major bibliographic database systems such as ProQuest and EBSCO. The process consists of working through the U.S. Government Manual and other sources on the structure of government and entering resulting agency names into the search services.

Table 3 shows preliminary results for select agencies listing the number of potential works of government found through bibliographic searchers. Note that these lists are based on raw results and post-processing steps such as elimination of duplicates and quality assurance to make sure each entry is in fact authored by a federal employee will reduce the totals. Because databases such as ProQuest have a limited scope, additional results are being retrieved using specialized search services. For example, ProQuest has cataloging information for 1 million articles from the IEEE, but the IEEE has over 4 million articles published, so a supplementary search of computer science is needed to complement the initial results.

---

Table 3: Works of Government for Major Agencies

<table>
<thead>
<tr>
<th>Agency</th>
<th>Works Found</th>
</tr>
</thead>
<tbody>
<tr>
<td>Army Corps of Engineers</td>
<td>20,027</td>
</tr>
<tr>
<td>Board of Governors of the Federal Reserve</td>
<td>17,483</td>
</tr>
<tr>
<td>Centers for Disease Control</td>
<td>11,904</td>
</tr>
<tr>
<td>Central Intelligence Agency</td>
<td>5,185</td>
</tr>
<tr>
<td>Dept. of Agriculture</td>
<td>40,298</td>
</tr>
<tr>
<td>Dept. of Commerce</td>
<td>38,352</td>
</tr>
<tr>
<td>Dept. of Defense Graduate Schools</td>
<td>5,569</td>
</tr>
<tr>
<td>Dept. of Defense Intelligence Agencies</td>
<td>11,594</td>
</tr>
<tr>
<td>Dept. of Education</td>
<td>4,713</td>
</tr>
<tr>
<td>Dept. of Energy (excluding National Labs)</td>
<td>6,943</td>
</tr>
<tr>
<td>Dept. of Health and Human Services (excluding CDC and NIH)</td>
<td>24,720</td>
</tr>
<tr>
<td>Dept. of Homeland Security (excluding Coast Guard and ICE)</td>
<td>44,070</td>
</tr>
<tr>
<td>Dept. of Interior</td>
<td>13,520</td>
</tr>
<tr>
<td>Dept. of Labor</td>
<td>7,243</td>
</tr>
<tr>
<td>Dept. of State</td>
<td>7,848</td>
</tr>
<tr>
<td>Environmental Protection Agency</td>
<td>23,297</td>
</tr>
<tr>
<td>Legislative Branch and Associated Agencies</td>
<td>53,931</td>
</tr>
<tr>
<td>National Aeronautics and Space Administration</td>
<td>41,745</td>
</tr>
<tr>
<td>National Institutes of Health</td>
<td>45,301</td>
</tr>
<tr>
<td>Nuclear Regulatory Commission</td>
<td>9,156</td>
</tr>
<tr>
<td>Smithsonian Institution</td>
<td>14,651</td>
</tr>
<tr>
<td>U.S. Army (Generally)</td>
<td>14,899</td>
</tr>
<tr>
<td>U.S. Courts</td>
<td>4,792</td>
</tr>
<tr>
<td>U.S. Navy</td>
<td>6,667</td>
</tr>
<tr>
<td>Veteran's Administration</td>
<td>6,981</td>
</tr>
<tr>
<td>White House and Executive Office of the President</td>
<td>3,092</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>483,981</strong></td>
</tr>
</tbody>
</table>
Opportunities for Broader Availability

There are several steps that can be taken to promote broader availability of works of government. First and foremost is better adherence to the terms of existing laws for articles that will be published in the future. When an article is submitted to a publication, most require completion of a copyright release form. Some publications that deal with government employees provide an option that indicates there is no copyright to be transferred because the employee works for the federal government. In other cases, conscientious federal employees simply scratch out the release and pen some form of the phrase "I will not sign this statement."

It would be a straightforward best current practice for publishers to provide a simple indicator on the form that allows a federal employee to make clear when a submission is a work of government. Likewise, it would be equally straightforward for all publishers to clearly indicate, as the law requires, when a published article is a work of government.

One mechanism that would help provide broader availability of works of government in the future would be legislation mandating that a copy of any externally published works of government be submitted to the Government Printing Office, which would make those works available on the Federal Digital System web site it operates and also provide copies to the members of the Federal Depository Library System.

A second area where guidance would be useful would be formal policies from the Office of Government Ethics and the Judicial Conference of the United States to provide guidelines across government for external publication, in particular guidance on when such a publication is a work of government and when it is the personal publication. Such guidelines could spell out any departmental approvals or other ethics safeguards that agencies should put in place.

While government can make such articles more broadly available on government web sites, private publishers can also take steps to make these materials much more broadly available. In the case of articles published in the future, publishers could provide free access to these articles in addition to clearly marking them as works of government. Conclusion: Keeping America Informed

The works of government doctrine developed in the late 19th century as part of a broader focus on making government information more broadly available. In 1861, on the same day that Abraham Lincoln was inaugurated, the Government Printing Office opened its doors with a mission of "keeping America informed."64 On the other side of Capitol Hill, the newly formed Smithsonian Institution was working to promote the "increase and diffusion of knowledge."65 This was a period when all three branches grappled with who owns edicts of government and other works of government, a period that culminated in the Printing Act and then the Copyright Act and a clear policy that works of the U.S. Government are owned by the people and have no copyright. That

65 9 Stat. 102 (1846).
policy emerged from dramatic changes in printing technology, changes that made possible private works such as the National Reporter System of John B. West.66

A subsequent dramatic change in technology in the 1930s and 1940s accompanied an explosion of government activity,67 and instituted formal procedures such as the creation of Official Journals of Government such as the Federal Register and the establishment of a National Archives and Records Agency to preserve the materials of government. By the end of World War II, agencies such as the Government Printing Office had greatly expanded their activities, consuming 250,000 tons of paper per year at the world’s largest printing plant.68

External publication of works of government is a practice that has grown over time. We should continue to adapt our basic principles to meet the realities of our modern Internet era. We can encourage the continued publication in prestigious scholarly journals and still maintain our belief that government information has a special role because it is owned by the people.

An informed citizenry is at the core of our democracy and a federal government that informs and instructs plays a valuable role in our modern, information-rich society. John Adams said if our democracy is to work, we must arm our citizens with knowledge, letting “the public disputations become researches into the grounds and natures and ends of government” and encouraging us to “let every sluice of knowledge be open’d and set a flowing.”69 Works of government are just one small sluice, but one that we can readily open and set a flowing. With adoption of this resolution, the ABA can take a concrete and meaningful step to promote greater access to knowledge.

Respectfully submitted,

Timothy Stanley
Edward J. Walters

---

GENERAL INFORMATION FORM

Submitting Entity: Individual submission by Timothy Stanley and Edward J. Walters (ABA Members)

Submitted By: Timothy Stanley and Edward J. Walters joined by Nathan Cardozo, David Greene, Vincent Polley, Nina Mendelson

1) Summary of Resolution(s).

The resolution proposes legislation that would require works authored by federal employees or officers in the course of their official duties and subsequently published privately in journals or other publications to furnish those works to the Government Printing Office for subsequent distribution. The resolution encourages publishers to properly identify works of the U.S. government and to make them more broadly available to the public. The resolution identifies actions that may be taken by the Judicial Conference, the Office of Government Ethics, and the Federal Trade Commission to promote better labeling and availability of works of the U.S. government.

2) Approval by Submitting Entity.

This is a submission by individual members comprising the Ad Hoc Committee on Promulgation.

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?

Copyright release forms used for acceptance of articles.

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

N/A

6) Status of Legislation. (If applicable)

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

Policy could be implemented by legislative action and agency action and through voluntary steps by publishers.

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

None (excepting a minor change in procedures for receiving submissions from authors).

9) Disclosure of Interest. (If applicable)

N/A

10) Referrals.

The Resolution and report have been referred to all ABA Section Chairs, Section Delegates, and their staff directors.

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

Carl Malamud
1005 Gravenstein Highway North
Sebastopol, CA 95472
(707) 827-7290
carl@media.org

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

Carl Malamud
1005 Gravenstein Highway North
Sebastopol, CA 95472
(707) 217-2934
carl@media.org
EXECUTIVE SUMMARY

Works of the U.S. government are writings and other publications authored by an employee or officer of the federal government in the course of his or her official duties. These works of government are not eligible for copyright based on long-standing public policy and legislative enactments going back to the Printing Act of 1895 and the Copyright Act of 1909.

1. Summary of the Resolution

This report and resolution outlines a number of steps that governmental authorities and private publishers (including the ABA) could take to encourage broader availability of Works of the U.S. Government. This resolution recommends that Congress mandates a deposit of all externally published works of government with the Government Printing Office for subsequent distribution on government websites and through the Federal Depository Library System. In addition, this resolution recommends that the Office of Government Ethics develop guidelines instructing federal employees and officers on the proper contours of the works of government clause.

This resolution also recommends that publishers more determine on submission which articles are works of government and more clearly mark them upon publication.

2. Summary of the Issue that the Resolution Addresses

In the 20th century, a large number of scholarly and technical articles began to be published in journals run by professional associations or by private publishers. This report documents 552 articles in publications of the ABA which are potentially works of government and thus not eligible for copyright. This report also demonstrates that the problem is not confined to the legal literature, and includes several hundred thousand journal articles authored by federal employees or officers and privately published. The fields of endeavor include law, economics, medicine, engineering, agriculture, and many other disciplines.

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

The law requires that works of government be clearly identified. However, many such articles are not properly identified and in any case, many of them are not available except by subscribing to commercial services and adhering to stringent terms of use. By more clearly labelling Works of the U.S. Government and by requiring mandatory deposit of such works to the Government Printing Office, this literature will become more broadly available as is the intent of the Works of the U.S. Government clause of the Copyright Act. By urging formal guidance from the Office of Government Ethics, employees and officers of the government will be able to identify when a work is conducted in the course of their official duties.

4. Summary of Minority Views

None as of this writing.
RESOLVED, That the American Bar Association opposes the use of mandatory, binding, pre-dispute arbitration agreements in private student loan contracts; and

FURTHER RESOLVED, That the American Bar Association supports enactment of legislation and regulations that would prohibit or invalidate such arbitration agreements and opposes legislation and regulations that would authorize, encourage, or enforce such agreements.
REPORT

Reasons for the Resolution

Lenders in the private student loan market have come under increasing scrutiny for predatory practices that include (1) charging high interest rates and penalties in violation of state consumer protection laws, (2) providing high-cost loans to borrowers who are likely unable to repay their debts, and (3) misrepresenting the quality of educational institutions that they finance.\(^1\) Borrowers harmed by these practices have sought relief through civil actions, often by way of class action lawsuits, but have been forced to arbitrate their claims due to a pre-dispute arbitration provision in the original loan documents.\(^2\)

While arbitration and other mechanisms for alternative dispute resolution provide substantial benefits in the civil justice system and should be encouraged, the widespread use of pre-dispute arbitration provisions in a variety of consumer contracts has been criticized.\(^3\) Consumers often unknowingly waive their right to a civil jury or non-jury trial. Moreover, because the cost of arbitration often exceeds the amount of an individual’s damages, consumers are unable to bring their claims and potentially illegal predatory practices cannot be challenged. These concerns are particularly acute in the private student loan market, where young individuals saddled with debt while in the infancy of their careers have no meaningful way to challenge potentially predatory lending practices.

On November 1, 2016, The U.S. Department of Education promulgated final rules that amend the William D. Ford Federal Direct Loan regulations to prohibit participating schools from using certain contractual provisions regarding dispute resolution processes, such as pre-dispute arbitration agreement or class action waivers. The regulations further require certain notifications and disclosures by schools regarding their use of arbitration.\(^4\) The position set forth in this resolution is consistent with the Department of Education regulations from the borrowers’ perspective. Moreover, unlike many private student loan agreements, loans made under the federal student loan program do not contain pre-dispute arbitration provisions on account of the Seventh Amendment’s prohibition on the government’s denial of trial by jury.\(^5\)

The Consumer Financial Protection Bureau (“CFPB”) has recently taken action demonstrating the increasing concern for binding pre-suit arbitration provisions in consumer contracts. The CFPB was created pursuant to the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act. The Act required the CFPB to study the use of mandatory arbitration clauses in consumer financial markets. Congress also gave the Bureau the power to issue regulations that are in the public interest, for the protection of consumers, and consistent with the study. The CFPB’s March 2015 study showed individuals rarely bring actions against financial service providers either in court or in arbitration. The study found that class actions provide a

---

\(^1\) Between a Rock and a Hard Place; Courthouse Doors Shut for Aggrieved Private Student Loan Borrowers, Public Citizen, July 2012.

\(^2\) Id.


more effective means for consumers to challenge problematic practices by these companies. In May 2016, the CFPB proposed rules that would require mandatory arbitration clauses to state explicitly that they cannot prevent consumers from being part of a class action.

It should be emphasized that the concern here is the inability of students to meaningfully challenge potentially predatory lending practices. That is not to say that lenders are in fact engaging in predatory lending practices. Support for this resolution does not require a determination that a student borrower’s allegation of a predatory lending practice should or should not prevail on the merits. Rather, the concern presented here is that student borrowers bringing such claims are often denied meaningful access to the courts. Arbitration may in some instances be an appropriate means of resolving these disputes. But that determination is best made after the parameters of a dispute are understood and a student’s waiver of his or her constitutional right to a civil jury trial can be made knowingly and intelligently.

_Fensterstock v. Educ. Fin. Partners_, 2012 U.S. Dist. Lexis 124571 (S.D.N.Y. Aug. 30, 2012) illustrates the inability of private student loan borrowers to obtain their day in court. Joshua Fensterstock filed a claim on behalf of a class, alleging that the manner in which his student loan lender applied his payments toward principal amounted to a penalty. His individual damages were two hundred dollars and would increase over the life of the loan. The original loan documents he signed contained extensive arbitration provisions, including a requirement that any class claims be arbitrated on an individual basis. The lender filed a motion to stay the proceedings and compel arbitration. The court originally denied the lender’s motion based on California law declaring such provisions unconscionable. Following the United States Supreme Court’s decision in _AT&T Mobility LLC v. Concepcion_, 563 U.S. 333 (2011), which held that the Federal Arbitration Act preempts California’s law declaring such provisions unconscionable, the Fensterstock Court granted the lender’s motion to compel arbitration.

_In Kilgore v. KeyBank, N.A.,_ 718 F.3d 1052 (9th Cir. 2016), former students of a failed flight training school filed a putative class action against the bank and loan servicer that provided loans to finance the students’ tuition. The students claimed that the defendants were identified as preferred lenders in marketing materials, encouraged students to borrow from the defendants, and loaned students tuition money knowing that the flight school was financially volatile. The students sought to enjoin the defendants from reporting loan defaults to credit agencies and from enforcing the notes for the loans. Because the notes signed by the students contained an arbitration clause that waived their right to litigate in court and prohibited arbitration on a class basis, the Court granted a defense motion to compel arbitration. In light of the students’ assertion that they could not afford arbitration fees, the Court’s ruling likely left the students saddled with debt and poor credit ratings yet without the education they were promised.

**Current ABA Policy**

The proposed resolution is consistent with existing Association policies, but expands upon them. Prior policies demonstrate a distinction between business contracts that essentially bind the parties to contracts and those involving individuals. For example, in August 2009 the ABA House of Delegates adopted Resolution 114, which opposed efforts to invalidate pre-dispute agreements to arbitrate international commercial disputes. When the ABA has opposed pre-dispute arbitration
agreements, as discussed below, the contracts have involved individuals. The proposed resolution is consistent with this distinction in that it opposes binding arbitration in contracts involving individuals.

In February 2009, the ABA House of Delegates adopted Resolution 111B, which opposes pre-dispute arbitration provisions in agreements between a long-term care facility and residents of such a facility. The Report accompanying Resolution 111B summarized existing ABA policy at that time as follows:

The ABA has consistently promoted the greater use of alternative dispute resolution, including arbitration, to resolve disputes short of litigation, "so long as every disputant's constitutional and other legal rights and remedies are protected (Report No. 114, approved by the ABA House of Delegates in August 1989). The ABA also has adopted a series of resolutions that, in specified circumstances, endorses the use of voluntary, but not mandatory, arbitration. In the context of court-annexed ADR, the ABA has repeatedly stated that only voluntary arbitration should be used by the courts (See, e.g., Report 10F, approved in Aug. 1994; Report 305 approved in Aug. 1995; and Report 112, approved in Feb. 1997). Also, the ABA has supported the use of arbitration by federal agencies, but only when "all parties to the dispute ... knowingly consent to use arbitration procedures ..." (See Report 103A, approved in Aug. 1988).

In August 2011, The ABA House of Delegates adopted Resolution 120, which urged Congress to amend the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA") to make unenforceable any clause of any agreement between an employer and an employee that requires arbitration of a dispute under the Act.

In February 2016, the ABA House of Delegates adopted Resolution 100, which encouraged the informed and voluntary use of alternative dispute resolution (ADR) processes as an effective, efficient and appropriate means to resolve health care disputes, but opposed the use of binding forms of alternative dispute resolution involving patients in medical malpractice disputes, disputes with private managed health care organizations, or involving residents in disputes with long-term care facilities or similar health care institutions, unless the parties agree to do so voluntarily and knowingly after a dispute arises.

In August 2014, the ABA House of Delegates adopted Resolution 105A, which recognized that the right to a civil jury trial is a fundamental right.

Conclusion

The American Bar Association should establish policy opposing the use of mandatory, binding, pre-dispute arbitration agreements in private student loan contracts. Moreover, the
American Bar Association should support the enactment of legislation and regulations that would invalidate such arbitration agreements and oppose legislation and regulations that would authorize encourage or enforce such agreements.

Respectfully submitted,

Sam H. Poteet, Jr., Chair
Tort Trial and Insurance Practice Section
August 2017
The American Bar Association opposes the use of mandatory, binding, pre-dispute arbitration agreements in private student loan contracts. Further, the American Bar Association supports enactment of legislation and regulations that would prohibit or invalidate such arbitration agreements and opposes legislation and regulations that would authorize, encourage or enforce such agreements.

2. Approval by Submitting Entity.

Approved by the Council of the Tort Trial and Insurance Practice Section on Saturday, February 4, 2017.

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

No

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

The proposed resolution is consistent with existing Association policies, but expands upon them. Prior policies demonstrate a distinction between business contracts that essentially bind the parties to contracts and those involving individuals. For example, in August 2009 the ABA House of Delegates adopted Resolution 114, which opposed efforts to invalidate pre-dispute agreements to arbitrate international commercial disputes. When the ABA has opposed pre-dispute arbitration agreements, as discussed below, the contracts have involved individuals. The proposed resolution is consistent with this distinction in that it opposes binding arbitration in contracts involving individuals.

In February 2009, the ABA House of Delegates adopted Resolution 111B, which opposes pre-dispute arbitration provisions in agreements between a long-term care facility and residents of such a facility. The Report accompanying Resolution 111B summarized existing ABA policy at that time as follows:

The ABA has consistently promoted the greater use of alternative dispute resolution, including arbitration, to resolve disputes short of litigation, "so long as every disputant's constitutional and other legal rights and remedies are protected (Report No. 114, approved by the ABA House of Delegates in August 1989). The ABA also has adopted a series of resolutions that, in specified circumstances,
endorses the use of voluntary, but not mandatory, arbitration. In the context of
court-annexed ADR, the ABA has repeatedly stated that only voluntary
arbitration should be used by the courts (See, e.g., Report 10F, approved in Aug.
1997). Also, the ABA has supported the use of arbitration by federal agencies,
but only when “all parties to the dispute . . . knowingly consent to use arbitration

In August 2011, the ABA House of Delegates adopted Resolution 120, which
urged Congress to amend the Uniformed Services Employment and Reemployment
Rights Act of 1994 (“USERRA”) to make unenforceable any clause of any agreement
between an employer and an employee that requires arbitration of a dispute under the
Act.

In February 2016, the ABA House of Delegates adopted Resolution 100, which
encouraged the informed and voluntary use of alternative dispute resolution (ADR)
processes as an effective, efficient and appropriate means to resolve health care disputes,
but opposed the use of binding forms of alternative dispute resolution involving patients
in medical malpractice disputes, disputes with private managed health care organizations,
or involving residents in disputes with long-term care facilities or similar health care
institutions, unless the parties agree to do so voluntarily and knowingly after a dispute
arises.

In August 2014, the ABA House of Delegates adopted Resolution 105A, which
recognized that the right to a civil jury trial is a fundamental right.

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

N/A

6. Status of Legislation. (If applicable)

Not applicable

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

Appropriate notice to relevant policymakers and state and local bar associations would be
made.

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

None
9. Disclosure of Interest. (If applicable)

None

10. Referrals.

Section of Dispute Resolution
Law Student Division
Young Lawyers Division
Section of Litigation
Business Law Section

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

James A. Wells  
Meyerson & O'Neill  
1700 Market St. Suite 3025  
Philadelphia, PA 19103  
215/972-1376  
FAX: 215/972-0277  
jwells@meyersonlawfirm.com

Robert S. Peck  
Center for Constitutional Litigation, PC  
7916 Bressingham Drive  
Fairfax Station, VA 22039  
202/944-2874  
FAX: 202/965-0920  
E-mail: Robert.peck@ccfirm.com

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

Robert S. Peck  
Delegate, TIPS  
202/944-2874  
E-mail: Robert.peck@ccfirm.com

Timothy W. Bouch  
Delegate, TIPS  
843/513-1072  
E-Mail: tbouch@leathbouchlaw.com
Michael W. Drumke
Delegate, TIPS
312/222-8523
E-mail: mdrumke@smbtrials.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution places the American Bar Association on record opposing the use of mandatory, binding, pre-dispute arbitration agreements in private student loan contracts. The resolution also places the American Bar Association on record supporting the enactment of legislation and regulations that would prohibit or invalidate such arbitration agreements and opposes legislation and regulations that would authorize, encourage, or enforce such agreements.

2. Summary of the Issue that the Resolution Addresses

Lenders in the private student loan market have come under increasing scrutiny for predatory practices that include (1) charging high interest rates and penalties in violation of state consumer protection laws, (2) providing high-cost loans to borrowers who are likely unable to repay their debts, and (3) misrepresenting the quality of educational institutions that they finance. Borrowers harmed by these practices have sought relief through civil actions, often by way of class action lawsuits, but have been forced to arbitrate their claims due to a pre-dispute arbitration provision in the original loan documents. These borrowers often unknowingly waive their right to a civil jury or non-jury trial. Moreover, because the cost of arbitration often exceeds the amount of an individual’s damages, they are unable to bring their claims and potentially illegal predatory practices cannot be challenged.

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

The resolution reaffirms the ABA’s longstanding support for the concept that the right to a trial by jury is a fundamental right and that any waiver of this right should be knowing and voluntary. It reaffirms the ABA’s support for access to the courts and for alternative dispute resolution, such as arbitration, when it is voluntary. The resolution specifically extends existing policy to cases involving private student loans.

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

Minority views were presented within the Section to the effect that the resolution is not consistent with the ABA’s support for alternative dispute resolution. The majority view was that opposition to pre-dispute arbitration provisions in private student loans is not inconsistent with the ABA’s longstanding support for voluntary alternative dispute resolution.
RESOLVED, That the American Bar Association urges state, local, territorial, and tribal legislative bodies and governmental agencies to interpret existing laws and policies, and adopt laws and policies, to allow the implementation and administration of trap-neuter-vaccinate-return programs for community cats within their jurisdictions so as to promote their effective, efficient, and humane management.
REPORT

Introduction

It is estimated that there are 74-96 million owned cats1 and 30-40 million free-roaming2 ("community") cats living in the United States. Jurisdictions have struggled to manage the community cat population for decades using a traditional trap-and-remove technique that typically results in killing the cats.3 This technique has proven inefficient, ineffective, and inhumane. Trap-neuter-vaccinate-return4 ("TNVR") is a management technique, introduced in the U.S. in the 1990s, by which community cats are humanely trapped, evaluated, sterilized, by a licensed veterinarian, vaccinated against rabies, ear-tipped to designate they have been sterilized and vaccinated, and returned to their original habitat. Kittens and socialized adults are removed and placed for adoption when possible.5 In some situations, the returned cats are under the care of a volunteer who feeds, waters, and monitors the cats for illness or injury and for any new arrivals so that they may be trapped, neutered, vaccinated, and returned to their original habitat. TNVR has been recognized as one of the most effective and efficient methods of reducing and controlling the population of community cats, as well as potential disease control.6 Moreover, there is widespread public support for the use of TNVR to manage community cats.7 In these times of limited budgets for local animal control shelters, TNVR provides a humane, effective, cost-saving alternative for shelters seeking to limit the intake of community cats into their facilities, protect public health, and reduce the number of free-roaming cats in the neighborhoods they serve.

---

2 Humane Soc'y of the U.S., Managing Community Cats: A Guide for Municipal Leaders 4, https://www.animalsheltering.org/sites/default/files/content/ca_community_cat_guide_updates_6_15_lowres_final.pdf (last visited Feb. 19, 2017). Free-roaming, or community cats, are cats whose home is outdoors. Many are unsocialized to humans, while others may be stray, lost or abandoned. Id. at 1.
4 Some, primarily opponents, use the term “Release” instead of “Return.” Most TNVR programs are designed to return the cats to their original location. What is TNVR?, SPAYING CAP. REGION UNOWNED FERAL FELINES, http://scruffcatts.org/what-is-tnvr/ (last visited Sept. 26, 2016). However, in the event it is impossible to return the cats to their original location, perhaps because of construction or other external threats to the lives of the cats or if the cats pose a serious and actual threat to an endangered species living in the original location, many advocates will opt for “releasing” them to another available location, taking the health of the cats and new environment into account, rather than killing them because they are not able to be “returned.” See id.
5 See, e.g., Julie Levy et al., Evaluation of the effect of a long-term trap-neuter-return and adoption program on a free-roaming cat population, 222(1) JAVMA 42, 44 (2003) (noting 47% of the 155 cats involved in the TNVR study were adopted over the course of the study).
Nevertheless, legal challenges to TNVR programs have been raised in various areas of the country due to the inconsistent legal treatment of community cats and TNVR programs by state statutes and local ordinances and policies. While some jurisdictions expressly recognize TNVR in their laws, most do not. In fact, aspects of TNVR programs have been found to violate many traditional criminal and civil statutes creating unnecessary obstacles for the implementation and administration of TNVR programs for private individuals and localities that may find their programs in violation of state law. Consistent interpretation and/or adoption of laws throughout the country that allow for TNVR programs would provide much-needed guidance to state, local, territorial, and tribal government entities, as well as for private entities and individuals, as they seek to manage community cat populations effectively and humanely. By urging support for legal recognition of a community cat management technique that saves government resources, protects public health, respects the lives of community cats as supported by a large majority of the public, and protects wildlife by reducing over time the number of free-roaming cats, the ABA promotes just laws that benefit public and private interests.

TNVR programs are not without opposition. Some avid birders, conservationists, and others oppose TNVR as a management tool for community cats. These stakeholders claim that free-roaming cats have an adverse impact on birds and other wildlife and pose a threat to public health, and that TNVR programs are ineffective. However, the studies upon which they rely generally are flawed. In fact, there is considerable empirical evidence showing that TNVR is more effective, efficient, and humane than trap-and-remove programs for the management of community cats.

Effectiveness of TNVR Programs

While there is no official count of the number of cats removed from neighborhoods each year, the American Society for the Prevention of Cruelty to Animals (“ASPCA”) estimates that 3.4 million cats enter shelters annually and, of those, 1.4 million are killed. Given the massive numbers of community cats brought into shelters, the method of trapping and killing community cats should be reviewed. Studies have estimated that at least 50% of all community cats must be
killed to have any impact on the population and potential subsequent intake into shelters. Since it has been proven to be impossible to catch all community cats in a population, the cats that are not caught and killed continue to reproduce and other cats enter the area vacated by those removed. The trapping and killing of community cats therefore must be sustained on an ongoing basis to simply prevent the population from growing. The more effective, efficient, and humane solution to manage community cats is TNVR.

TNVR has been shown to reduce the number of community cats in areas targeted by these programs. A study conducted in Randolph County, North Carolina, showed a 36% average decrease in population of six community cat colonies due to targeted TNVR efforts. By contrast, three unsterilized colonies involved in the study experienced an average 47% increase over the same period. Once spayed and neutered, the community cats in these targeted colonies no longer reproduce, which effectively curtails the number of community cats in the population.

Additionally, TNVR has been shown to significantly decrease the intake of community cats into local animal shelters and can save the jurisdiction significant expense. For example, one study in Alachua County, Florida documented a 66% decrease in animal shelter intake of community cats from a TNVR program in a targeted ZIP code compared to a 12% decrease elsewhere in the county. Another study, in Orange County, Florida, showed the average cost of impounding and killing a cat was $139; while the average cost of surgery was $56. The study also noted that the program in Orange County was a long-term program that spayed and neutered 7,903 community cats over a 6-year period, saving the county an estimated $656,000. Further, because TNVR, through the sterilization of cats, reduces certain nuisance behaviors by cats, such as roaming for mates, fighting, and urine-spraying, TNVR case studies have documented a significant reduction in nuisance complaint calls to animal control. Thus, TNVR is more efficient, effective, and humane than lethal methods of control.

Finally, TNVR has been increasing in popularity nationwide and worldwide. Further, most all national animal welfare organizations endorse the use of TNVR programs to reduce the

---

14 Kate Hurley, For Community Cats, a Change is Gonna Come, ANIMAL SHELTERING MAG., Sept.-Oct. 2013, at 27.
15 See generally Nutter, supra note 12; Levy et al., supra note 12.
16 See generally Nutter, supra note 12.
17 See generally Levy et al., supra note 12.
18 Kathy L. Hughes et al., The Effects of Implementing a Feral Cat Spay/Neuter Program in a Florida County Animal Control Service, 5(4) J. APPLIED ANIMAL WELFARE SCI. 285-98 (2002).
populations of community cats. These organizations include the ASPCA,\textsuperscript{22} The American Humane Association,\textsuperscript{23} Best Friends Animal Society,\textsuperscript{24} and the Humane Society of the United States.\textsuperscript{25} Also in support are the Association of Shelter Veterinarians\textsuperscript{26} and the Tufts Center for Animals and Public Policy.\textsuperscript{27}

**Community Cats, TNVR and Traditional Animal Control Laws**

Domestic cats exist on a wide spectrum of socialization to humans from feral cats, those cats born outdoors with no socialization to humans,\textsuperscript{28} to stray cats who once lived in a home but find themselves lost or abandoned by their owner and who are well-socialized, friendly cats. Accurately determining if a free-roaming cat is “feral” or a lost or abandoned pet, however, is full of uncertainty.\textsuperscript{29} There is currently no universal method available to accurately categorize any cat as feral or tame.\textsuperscript{30} Based upon these uncertainties, this report refers to all free-roaming cats living outdoors as community cats.\textsuperscript{31}

Regardless of differing categories of socialization and ownership status, all cats are defined in the Code of Federal Regulations as domestic cats of the species Felis domesticus.\textsuperscript{32} This domesticated status provides certain legal protection to cats through many state and local animal cruelty provisions.\textsuperscript{33}
Moreover, under common and statutory law, pets—including cats—are considered personal property. Local animal control laws define ownership of cats and impose obligations on all owners. Issues arise when governmental agencies attempt to define cats as "feral" for management or control purposes while disregarding ownership status, anti-cruelty provisions, and public opinion. State laws often authorize local governments to enact laws relative to community cats. This approach has led to drastically disparate treatment of community cats under the law even within the same state.

Traditional ordinances for local animal control departments vary widely in jurisdictions across the country and create problems for community cats. Community cats, as free-roaming cats, frequently are considered "stray" or "at-large" and subject to impoundment by animal control. Many jurisdictions require that an impounded animal be held for a specified period of time—the "stray hold" period—to allow the owner to reclaim the animal. Since the national average of owners reclaiming their cats at the animal control facility is approximately 2%, and most community cats are not, in fact, owned, these cats are very rarely claimed. After the stray hold has expired, unclaimed community cats often are killed by the shelter. Not only does the impoundment of community cats harm the cats, but it is expensive for the jurisdiction to trap, hold and kill the cats, and then dispose of the bodies.

Traditional animal control laws also create serious obstacles for TNVR participants as they may find themselves unwittingly in violation of a number of laws. Specifically, if the TNVR participant is deemed the legal "owner" of the cat, they could be subject to several obligations which may include licensing, pet limits, and at-large or leash laws, making it virtually impossible to perform TNVR activities. Even if not deemed an owner, feeding bans, nuisance laws, and laws prohibiting abandonment, may subject them to civil and/or criminal prosecution. In addition, they may be held liable to third parties if community cats cause such parties harm. Legal recognition of TNVR is needed to protect participants in TNVR programs. These protections should extend to both government and private entities and individuals participating in these programs.

Ownership and Legal Obligations that Attach

Animal ownership is legally defined in many ways, but a common definition involves keeping or harboring an animal which typically means feeding the animal over a period of time. Such a definition has the mostly unintended consequences of targeting community cat caregivers, as they regularly monitor and feed community cats. The ownership issue becomes even more complex when one considers the number of owned cats who are allowed to roam outdoors and

---

36 See e.g. "Owner — A person . . . who keeps or harbors a dog or cat or knowingly permits a dog or cat to remain on or about any premises occupied by that person." Am. Veterinary Med. Ass'n, AVMA Model Dog and Cat Control Ordinance, https://www.avma.org/KB/Policies/Documents/avma-model-dog-and-cat-control-ordinance.pdf (last visited Feb. 19, 2017). Jurisdictions typically define "keeps or harbors" to mean "the act of, or the permitting or sufferance by, an owner or occupant of real property either of feeding or sheltering any domesticated animal on the premises of the occupant or owner thereof." PRINCE GEORGE'S COUNTY, MD., CODE OF ORDINANCES § 3-101(50)
receive handouts from generous neighbors. Under some statutory interpretations, the same cat could be legally owned by several individuals, many of them most likely unaware of their legal ownership status.

Community cat caregivers, who often care for several cats residing together in colonies, if deemed owners, could be criminally and/or civilly liable for violations of a number of laws. For example, some jurisdictions require owners to license their cats and/or limit the number of cats one may own. The community cat caregiver would be seriously burdened to have to license each cat annually, and/or might find herself in violation of a pet limit law. Additionally, some jurisdictions prohibit owners from allowing their cats to run at-large. Because community cats are, by definition, at-large, the community cat caregiver is in violation of this law as well. While these laws may serve useful purposes for true cat owners, they unnecessarily burden community cat caregivers and prohibit the implementation of TNVR programs. Because of these concerns, laws defining owner should exempt community cat caregivers, and at-large laws, stray-hold periods, and licensing requirements should exempt ear-tipped community cats.

**Abandonment and Feeding Bans**

Even if TNVR participants are not deemed owners, traditional laws still may prohibit TNVR programs. State statutes and often local ordinances contain criminal provisions for "abandonment" of an animal. These provisions create myriad legal issues for administrators of TNVR programs; specifically when jurisdictions interpret the "return" aspect of TNVR to be abandonment. The anti-cruelty laws proscribe conduct, including abandonment, "under circumstances reasonably likely to result in the infliction of unjustifiable pain, or suffering, or cruelty upon [the animal]." A typical definition of "abandon" is "to desert, forsake, or absolutely give up an animal without having secured another owner or custodian for the animal or by failing to provide the elements of basic care..." TNVR programs that return cats to their original location should not be deemed "abandonment." TNVR programs are deliberately designed to improve the cat's overall health and well-being thus there is no intent to harm the cats. First, only cats determined to be healthy are returned to where they were found. Further, if the cats were healthy at the time they were trapped there is no reason to believe that returning them to where they were originally found would subject them to pain, suffering, or cruelty. Moreover, the cats' health and well-being is enhanced after sterilization and vaccination for rabies. Thus, these laws should not be interpreted by government agencies to prevent the "return" portion of TNVR. In fact, for clarity, the abandonment law should expressly exempt TNVR "return" of ear-tipped community cats. The potential of criminal penalties due to varying

---

38 See VA. CODE ANN. §3.2-6524(B), §3.2-6587(A)(2).
39 See, e.g., PRINCE GEORGE'S COUNTY, MD. CODE § 3-148.01 ("No person may keep or harbor five (5) or more animals larger than a guinea pig or over the age of four months, without first obtaining an animal hobby permit.").
40 See, e.g., PRINCE GEORGE'S COUNTY, MD. CODE § 3-135 ("It shall be unlawful for the owner... of any animal... to permit the animal to run at large.").
43 VA. CODE § 3.2-6500.
44 Note that many TNVR programs provide care to the cats after they are returned. Clearly, under these programs, the cats have not been abandoned.
interpretations of statutory schemes serve as a significant factor deterring potential caregivers from becoming involved in TNVR programs, thereby worsening a community's "feral cat problem."

Additionally, ordinances are commonly enacted which provide sanctions for the feeding of community cats.\textsuperscript{45} Feeding bans cause a real dilemma legally for caregivers. By feeding the community cats they care for, caregivers could be violating such an ordinance, but by adhering to the ordinance they could conceivably find themselves in violation of a cruelty provision, by failing to provide care to those same animals. Further, for those cats who have become dependent on food provided by a caregiver, a feeding ban is inhumane, usually forcing cats to subsist on insufficient resources and/or create a nuisance by rummaging through dumpsters for food. To rectify this, feeding ban laws should be interpreted to exempt ear-tipped community cats.

\textit{Liability to Third-parties}

Liability to third-parties also is a concern for most governmental entities, private organizations, and individuals involved in administering and participating in TNVR programs. Under common law, cat owners have no legal duty to keep their cat confined. Thus, if a cat caused harm to another, an owner was held responsible only if they knew the cat was dangerous and was likely to cause harm or damage to another.\textsuperscript{46} However, some courts have held a person (whether an owner or not) liable for damages if they did something that caused the cats to be attracted to an area owned by another and the cats did damage to and/or caused a private nuisance that affected the landowner's enjoyment of their property.\textsuperscript{47} Moreover, some jurisdictionsoverride the common law and hold owners strictly liable if their cat is "at-large" and causes any damage to a third-party.\textsuperscript{48} Potential liability to any TNVR participant may hinge on how active a role they play in the TNVR process and interpretation of applicable statutes and ordinances and may affect their willingness to participate.\textsuperscript{49} However, if a TNVR participant is not considered an owner, most third-party claims will fail. Moreover, even in a jurisdiction that may hold a non-owner liable if they find the TNVR participant caused the cats to be present, the TNVR participant may use the jurisdiction's allowance of TNVR as a defense to third-party liability.\textsuperscript{50} For third-party

\textsuperscript{45} ANAHEIM MUNICIPAL CODE §6.44.1301 (stating that "It shall be unlawful for any person to intentionally provide food, water, or other forms of sustenance to a feral cat or feral cat colony within the boundaries of the City. It is not a violation of this section for any person to feed or shelter feral cats while working with an animal control agency under contract with the City of Anaheim.").

\textsuperscript{46} McElroy v. Carter, 2006 WL 2805141 at *5 (Tenn. Ct. App. 2006) (holding that there is no common law legal duty to confine cat generally regarded as domestic animals unlikely to do harm if left to themselves and incapable of constant control).

\textsuperscript{47} Kyles v. Great Oaks Interests, 2007 WL 495897 (Cal. Ct. App. 2007) (finding that an apartment manager may be liable to landowner for overflowing garbage bins that attracted cats).

\textsuperscript{48} See, e.g., PRINCE GEORGE'S COUNTY, MD CODE § 3-135.1.

\textsuperscript{49} In conducting TNVR an "owned" free-roaming cat may be trapped "accidentally." TNVR participants initially check for a microchip delineating the owner of the cat when brought to the clinic so as to sterilizing an "owned" cat without the owner's permission. However, if the cat is not microchipped the cat will likely be vaccinated, sterilized and returned. In this instance TNVR participants should not be held liable to the owner for sterilizing the cat.

\textsuperscript{50} See Judgment at 4, Baker v. Kuchler, No. 29D05-0605-SC-1055 (Ind. Super. Ct., Mar. 2, 2007) (the existence of a Community Cat Ordinance may be used as a "defense" against claims of nuisance or negligence for the damage to property caused by community cats).
claims against municipalities that conduct TNVR, the municipality may demonstrate that the TNVR program was adopted for the stated purpose of stabilizing and reducing community cat populations, protecting public health through vaccination efforts, and/or resolving nuisance behaviors and corresponding complaints. As such the municipality may argue that the TNVR program is promoting a legitimate government purpose and thus it should not be held liable to third-parties.

In sum, properly implemented TNVR programs serve multiple purposes, including stabilizing and reducing community cat populations, protecting public health through vaccination efforts, and/or resolving nuisance behaviors and corresponding complaints. These are all goals worthy of government involvement, and the governmental agency should make these interests and intents clear and remove any unintended legal obstacles that result from a misapplication of traditional animal control laws. Promoting the consistent interpretation and/or drafting of laws related to aspects of TNVR programs will serve to further these interests.

Opposition to TNVR

TNVR is not without opposition.51 Certain wildlife and bird advocacy organizations primarily (or solely) concerned with the sustainability of native species and the ecosystem and a small minority of animal welfare organizations52 oppose the use of TNVR. The conservation groups have attacked its use citing a lack of scientific proof that it works and insisting that lethal methods be used to protect wildlife and public health.53 Some have argued that feral cats are exotic or invasive species and do not fill an existing niche in the environment and that even well-fed cats significantly impact wildlife.54 These opponents of TNVR vilify community cats for killing native birds, some of whom are threatened or endangered, citing predation estimates and economic impacts that are derived from flawed science.55 For example, one widely publicized paper estimates that "cats in the contiguous United States annually kill between 1.3 and 4.0 billion birds."56 However, the total number of land birds in the U.S. (not including Hawaii) is estimated at just 3.2 billion,57 less than the authors’ high-end estimate. The estimates are exaggerated as a result of inaccurate assumptions used in the model from which the estimates are

51 In September 2016, a book entitled Cat Wars: The Devastating Consequences of a Cuddly Killer was released by Dr. Peter Marra and Chris Santella. Marra & Santella, supra note 10. In this book, the authors call for the removal of community cats from the outdoors “by any means necessary.” The book has caused a considerable amount of controversy and has received criticism for its failure to recognize the flaws in the reasoning and methods for control of the community cat population. See Katie Lisnik, Cat Wars? Let’s call a ceasefire, Animal Sheltering (Sept. 13, 2016), https://www.animalsheltering.org/blog/cat-wars-lets-call-ceasefire.
53 See, e.g., Barrows, supra note 10, at 1367-8.
generated.\textsuperscript{58} In fact, The Royal Society for the Protection of Birds in the United Kingdom has stated there is no scientific evidence that cat predation has any impact on bird populations in the U.K.\textsuperscript{59} They explain that many millions of birds die naturally every year, mainly through starvation, disease, or other forms of predation. There is evidence that cats tend to take weak or sickly birds\textsuperscript{60} who would have died in any event thus causing little additional predation. Further, research has shown that declines in bird populations are most commonly caused by habitat change or loss, particularly on farmland.\textsuperscript{61}

Although it is true that some cats kill birds and other small mammals, TNVR is designed to reduce the number of community cats and thus protect birds and other wildlife. Traditional trap-and-remove techniques have failed to effectively manage the population of community cats. In fact, the only cases where lethal methods of control of community cats have successfully eradicated the population of free-roaming cats are those on small oceanic islands using cruel and hazardous methods. For example, on Marion Island, 115 square miles, it “took 19 years to exterminate approximately 2200 cats—using feline distemper, poisoning, hunting and trapping, and dogs. . . . On Ascension Island, roughly one-third the size of Marion Island, it cost approximately $1732 per cat to eradicate an estimated 635 cats over 27 months.”\textsuperscript{62} However, as noted above, studies of targeted TNVR programs have shown success in reducing the numbers of free-roaming cats, humanely, and at a savings to local jurisdictions.

Opponents also claim that the presence of free-roaming cats creates a public health hazard given the potential for cats to transmit rabies and other diseases.\textsuperscript{63} However, these claims too are exaggerated. “Since 1960 only two cases of human rabies have been attributed to cats.”\textsuperscript{64} In 2014, 272 cases of rabid cats were reported to the CDC, representing 4.51\% of all reported cases, with the number of rabid cats remaining largely unchanged over the past 25 years despite the

\textsuperscript{58}For example, identifying just a few of the problems, the model (1) inflates the estimate of unowned cats in the U.S. by using the frequently cited values which are not grounded in empirical data; (2) inflates the predation rate of unowned cats by relying on decades-old studies that did not use random-sampling of free-roaming cats but instead focused on hunting cats; (3) uses unproven methods for converting stomach contents of cats to annual predation rates, and (4) assumes that 80-100\% of unowned cats successfully hunt birds, again inflated because of a heavy reliance on studies of rural cats, when in fact most unowned cats live in urban areas where they are less reliant on prey. See Written testimony of Peter J. Wolf, supra note 11.


\textsuperscript{60}Id.

\textsuperscript{61}Id.

\textsuperscript{62}Vox Felina, Fact Sheet No. 1: Trap-Neuter-Return (Aug. 2012)
http://voxfelina.com/voxfelina/Vox_Felina_Fact_Sheet_TNR_v_1_1.pdf


\textsuperscript{64}Vox Felina, TNR Fact Sheet No. 3, Rabies (Aug. 2013), http://voxfelina.com/voxfelina/Vox_Felina_Fact_Sheet_Rabies_v_1_1.pdf (citing CDC, Recovery of a Patient from Clinical Rabies—California, 2011, 61 MORBIDITY & MORTALITY WKL. REP. 61-64 (2012)).
increasing popularity of TNVR. In fact, TNVR programs evaluate cats and return only healthy cats after vaccinating them for rabies, thereby reducing, for years, the risk of rabies in the returned cats. Finally, community cats, many unsocialized to humans, rarely have contact with humans, making disease transmission highly unlikely. 

Opponents of TNVR have recently resorted to legal avenues to discredit TNVR. In early 2016, the American Bird Conservancy (“ABC”) filed a lawsuit against the New York Commissioner of Parks, Recreation and Historic Preservation (“Parks”) for violations of the Federal Endangered Species Act (“ESA”). In a case of first impression, ABC claims that Parks is responsible for facilitating and maintaining of community cat colonies on Jones Beach State Park by allowing volunteers to perform TNVR and that these colonies are in close proximity to the nesting areas of piping plovers, which results in the “take” of the piping plovers. Piping plovers are listed as “threatened” under the ESA. Although the amended complaint filed by ABC fails to allege directly that any of the community cats at Jones Beach have harmed any piping plovers in the area, they claim that the mere presence of the cats is a threat to the nesting birds. This lawsuit is currently pending in the Eastern District of New York after the court denied Parks’ motion to dismiss.

Conclusion

The Tort Trial and Insurance Practice Section urges the adoption of this resolution seeking support for the legal recognition of TNVR as a population management tool for community cats which are humanely trapped, evaluated, sterilized by a licensed veterinarian, vaccinated against rabies, ear-tipped, and returned to their original location and urging state, territorial, and local municipal legislative bodies and governmental agencies to adopt and/or interpret existing laws and policies that allow the implementation and administration of such programs for community cats within their jurisdictions. TNVR programs use humane methods to decrease community cat populations and increase public health through increased vaccination at a savings to local jurisdictions.

Respectfully submitted,
Sam H. Poteet, Jr., Chair
Tort Trial and Insurance Practice Section
August 2017

---

66 Vox Felina, Rabies, supra note 64 (citing veterinarian and community cat expert Dr. Julie Levy).
67 Feral Cats and the Public, supra note 63, at 1 (citing Jeffrey Kravetz and Daniel G. Federman, Cat Associated Zoonoses, 162 ARCH. INTERN. MED. 1945-52 (2002)).
69 American Bird Conservancy v. Harvey, Memorandum of Decision & Order, Case 2:16-cv-01582-ADS-AKT (E.D.N.Y. Feb. 6, 2017) (the decision does not address the legality or effectiveness of TNVR).
GENERAL INFORMATION FORM

Submitting Entity: Tort Trial and Insurance Practice Section

Submitted By: Sam Poteet, Chair, Tort Trial and Insurance Practice Section

1. Summary of Recommendation.

This recommendation urges state, local, territorial and tribal legislative bodies and governmental agencies to interpret existing laws and/or adopt laws and policies that allow the implementation and administration of trap-neuter-vaccinate-return (TNVR) programs for free-roaming ("community") cats within their jurisdictions. TNVR is a population management technique for reducing the population of free-roaming community cats by which such cats are humanely trapped, evaluated, sterilized by a licensed veterinarian, vaccinated against rabies, ear-tipped, and returned to their original location from which they were found. The legality of TNVR programs have been challenged in areas of the country due to the inconsistent legal treatment of community cats and TNVR by state statutes and local ordinances and policies. Consistent legal treatment that allows TNVR programs promotes the effective, efficient, and humane management of community cats, promotes conservation efforts, and protects public health.

2. Approval by Submitting Entity.

Approved by the Tort Trial and Insurance Practice Section on April 29, 2017.

3. Has This or a Similar Recommendation Been Submitted to the House or Board Previously?

No.

4. What Existing Association Policies Are Relevant to This Recommendation and How Would They Be Affected by Its Adoption?

Not applicable.

5. What Urgency Exists Which Requires Action at This Meeting of the House?

Not applicable.

6. Status of Legislation. (If applicable.)

Not applicable.

7. Cost to the Association. (Both Direct and Indirect Costs)

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

Not applicable.


This Report and Resolution is referred to the Chairs and Staff Directors of all ABA Sections and Divisions.

10. Contact Persons. (Prior to the Meeting)

Joan Schaffner
Associate Professor of Law
The George Washington University Law School
2000 H Street, NW
Washington, DC 20052
202-494-0354
jschaf@law.gwu.edu

Richard Angelo, Jr.
Legislative Attorney
Best Friends Animal Society
10271 Irish Road
Goodrich, MI 48438
(248) 202-3152
richarda@bestfriends.org

11. Contact Person. (Who Will Present the Report to the House.)

Robert S. Peck
Delegate, TIPS
202/944-2874
E-mail: Robert.peck@ccfirm.com

Timothy W. Bouch
Delegate, TIPS
843/513-1072
E-Mail: tbouch@leathbouchlaw.com

Michael W. Drumke
Delegate, TIPS
312/222-8523
E-mail: mdrumke@smbtrials.com
EXECUTIVE SUMMARY

1. Summary of the Recommendation

This recommendation urges state, local, territorial and tribal legislative bodies and governmental agencies to interpret existing laws and/or adopt laws and policies that allow the implementation and administration of trap-neuter-vaccinate-return (TNVR) programs for free-roaming ("community") cats within their jurisdictions. TNVR is a population management technique for reducing the population of free-roaming community cats by which such cats are humanely trapped, evaluated, sterilized by a licensed veterinarian, vaccinated against rabies, eartipped, and returned to their original location from which they were found. The legality of TNVR programs have been challenged in areas of the country due to the inconsistent legal treatment of community cats by state statutes and local ordinances and policies. Consistent legal treatment that allows TNVR promotes the effective, efficient, and humane management of community cats, promotes conservation efforts, and protects public health.

2. Summary of the Issue that the Recommendation Addresses

It is estimated that there are 30-40 million community cats living in the United States. Jurisdictions have struggled to manage the community cat population for many years using a traditional trap-and-removal technique that typically results in killing the cats. This technique has proven ineffective and costly. TNVR is a more effective, efficient, and humane method of control shown to reduce the populations of community cats, reduce the intake of community cats to shelters, reduce the chances of transmission of disease in the communities through vaccination efforts, and reduce complaints to local police and animal control departments regarding nuisance and property destruction. Traditional criminal and civil statutes create unnecessary obstacles for the implementation and administration of TNVR programs.

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

If jurisdictions interpret existing laws and policies and/or adopt laws and policies to allow the implementation and administration of TNVR programs, local governments and private entities and individuals will be able to implement such programs without the possible threat of sanction and, in turn, provide a humane, effective, cost-saving alternative for shelters seeking to limit the intake of community cats into their facilities, protect public health, and reduce the number of free-roaming cats in the neighborhoods they serve.

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

Certain wildlife and bird conservation groups and a very small minority of animal welfare organizations have opposed the use of TNVR programs for the control of community cats. These stakeholders claim that free-roaming cats have an adverse impact on birds and other wildlife and pose a threat to public health. Moreover, free-roaming cats are subjected to threats such that their lives outdoors result in their pain and suffering. They argue that TNVR is ineffective and all free-roaming cats must be eradicated through trap and remove, e.g. kill,
programs. However, the studies upon which they rely generally are flawed. In fact, there is considerable empirical evidence showing that TNVR is more effective, efficient, and humane than trap-and-remove programs for the management of community cats.
RESOLVED, That the American Bar Association urges all federal, state, local, territorial, and tribal legislative, judicial and other governmental bodies to support the principles that:

(1) the holder of the attorney-client privilege does not waive the privilege or protection by sharing communications or materials with another person (not jointly represented by the same counsel) who,

(a) having common legal interests with the holder in some litigated, potentially litigated, or nonlitigated matter or in related matters (such as parallel lawsuits),

(b) has agreed with the holder of the privilege or protection

(i) to cooperate with one another to develop and pursue a joint legal strategy with respect to some aspect of the matter or matters in which the parties have common interests, and

(ii) to maintain the confidentiality of any privileged or protected communications or materials shared in pursuit of such cooperation;

provided that the communications or materials shared relate to the parties' common interests;

(2) no party to such a common-interest arrangement can unilaterally waive privilege or protection with respect to communications or materials other than the waiving party's own communications or materials;

(3) in the event of later adverse proceedings between or among the parties to the common-interest, any party may use communications or materials shared against any other party;

(4) existence of a common-interest or agreement to a common-interest arrangement is not a basis to compel the holder of a privilege or protection
to disclose to others having that common interest any communications or materials that the holder does not voluntarily share;

(5) while some authorities condition protection of common-interest sharing on each party to the common-interest arrangement being separately represented, no such requirement should be applied when the parties to the common-interest arrangement have a preexisting relationship (including, without limitation, indemnitor-indemnitee, insurer-insured, patent holder-licensee, or lead lender and participants in the loan) that

(a) binds them to a common outcome on the issue(s) as to which they have a common interest,

(b) creates duties to respect one another’s interests, and

(c) creates rights to participate in decision making regarding the common interest.

(Paragraph (5) has no application in criminal litigation.)
REPORT

I. The ABA should support strengthening the attorney-client privilege by advocating in favor of the common-interest doctrine, which prevents waiver resulting from sharing of privileged communications among parties of common interest (but not jointly represented).

Sharing of privileged communications with persons not part of the attorney-client relationship ordinarily waives the privilege.\(^1\) Almost all American jurisdictions recognize an exception to that rule for sharing in connection with the joint defense or joint prosecution of litigation.\(^2\) Most federal courts and many state courts have generalized this exception to apply to parties of common interest in matters not involving anticipation of any particular litigation.\(^3\) But some courts, notably the New York Court of Appeals\(^4\) and the Fifth Circuit,\(^5\) have limited it to matters where litigation is pending or reasonably anticipated. Moreover, some commentators appear to advocate rejection of the doctrine entirely.\(^6\) The ABA should advocate for continued recognition of the doctrine and against any limitation to specific anticipated litigation. (Paragraph (1))

In any form of common-interest arrangement, there must be an agreement among the parties, but that agreement need not be express.\(^7\) The parties also must actually pursue some joint strategy, to which the communications related.\(^8\) (Paragraph (1))

It is generally agreed that (a) no party to a common-interest arrangement can unilaterally waive privilege regarding communications other than the party's own communications\(^9\) and (b) in the event of later adverse proceedings between or among the parties to the common-interest, any party may use shared communications against any other party.\(^10\) These principles are

\(^1\) See RESTATEMENT OF THE LAW GOVERNING LAWYERS ("RESTATMENT LGL") § 68 (2000).
\(^2\) No exception would be necessary were the parties seeking to cooperate jointly represented, as all communications within the joint representation would be privileged, though there would be no privilege in subsequent adverse proceedings between the co-clients. RESTATEMENT LGL, § 79. But joint representation cannot be used where the parties, though wishing to cooperate on some issues have conflicts of interest on other issues. MODEL RULES OF PROF'L CONDUCT, R. 1.7.
\(^3\) RESTATEMENT LGL, § 79 & cmt. f; Schaeffler v. United States, 806 F.3d 34, 40-43 (2nd Cir. 2015) (because of preexisting transaction, borrower and banks had common interests in restructuring borrower's business organization and refinancing transaction in a way that would receive favorable tax treatment, so sharing of privileged legal advice on tax issues did not waive privilege); United States v. BDO Seidman, LLP, 492 F.3d 806, 816 (7th Cir. 2007) ("The weight of authority favors our conclusion that litigation need not be actual or imminent for communications to be within the common interest doctrine"; citing cases in five other circuits agreeing on that point).
\(^5\) In re Santa Fe Int'l Corp., 272 F.3d 705, 711 (5th Cir. 2001) (requiring "palpable threat of litigation at the time of the communication.").
\(^6\) Grace M. Giesel, End the Experiment: the Attorney-Client Privilege Should Not Protect Communications in the Allied Lawyer Setting, 95 MARQ. L. REV. 475 (2012).
\(^7\) United States v. Gonzalez, 669 F.3d 974, 979-80 (9th Cir. 2012); Hunton & Williams v. United States Dept. of Justice, 590 F.3d 272, 284-85 (4th Cir. 2010); United States v. BDO Seidman, LLP, 492 F.3d 806, 816 (7th Cir. 2007); In re Grand Jury Subpoenas, 89-3 & 89-4, 902 F.2d 244, 246-47 (4th Cir.1990).
\(^8\) Schaeffler v. United States, 806 F.3d 34, 40 (2nd Cir. 2015); Pac. Pictures Corp. v. United States District Court, 679 F.3d 1121, 1129 (9th Cir. 2012).
\(^9\) RESTATEMENT LGL, § 79, cmt. g.
\(^10\) RESTATEMENT LGL, § 79, cmt. f.
important to the doctrine, and the ABA should be in a position to advocate for them when addressing other issues. (Paragraphs (2) & (3))

Overwhelming authority holds that existence of a common-interest or agreement to a common-interest arrangement is not a basis to compel the holder of a privilege or protection to disclose any communications or materials not voluntarily shared. But the Illinois Supreme Court disagrees. The latter rule improperly impairs the efficacy of the privilege; the ABA should advocate against it. (Paragraph (4))

Some authorities require each party to the common-interest arrangement to be separately represented for sharing to be protected against waiver. There is little (and divided) authority on this. Most authorities deal with common-interest arrangements (e.g., for joint defense of litigation) constituting an ad hoc alliance against a common foe, with the potential that any party to the arrangement might defect and ally with the former foe. That potential supports a requirement that each party have its own lawyer.

Paragraph (5) addresses this emerging issue by pointing out a fact not yet considered in any of the common-interest cases: some common-interests (unlike ad hoc coalitions in typical joint litigation arrangements) arise from preexisting relationships that bind the parties together in a way that makes separate representation for every party unnecessary. (The sort of relationship binding parties to a common result cannot exist in criminal litigation, so the sort of common-interest arrangements addressed by Paragraph (5) could not exist in the criminal context.)

Relationships with such binding effects include indemnitor-indemnitee, insurer-insured, patent holder-licensee, and the relationship between a lead lender and participants in the loan. Parties to such a relationship normally have, either expressly or impliedly, duties to respect one another’s interests and rights to participate in decision making regarding the common interest (at least to the extent of being consulted, even if the right to make the decision is vested in one or more other parties to the arrangement). Where this is true, each party to the arrangement has a need for access to information bearing on the decisions to be made regarding the common interest.

Moreover, the alignment of interests created by the preexisting relationship can allow an unrepresented party to treat the advice of lawyers for other parties regarding the common interests as if those lawyers represented it, even though the lawyers owe the unrepresented party no special duties. The preexisting relationship removes the risk of defection to ally with the common adversary in litigating the common issue. Accordingly, there is no need to impose a requirement of separate representation in that context.

13 Defection is still possible. For example, a policyholder might decide to settle with the claimant and cooperate against the insurer. But the policyholder would be the holder of its own privilege and entitled to waive it, even though sharing information with the insurer did not constitute a waiver. Moreover, the settlement would terminate litigation of the claim against the policyholder, so the common-interest issue would disappear.
An example of this situation can be found in liability insurance, where the relevant rights and duties among the parties are most extensively developed in caselaw. If there is a conflict of interest between insurer and policyholder regarding defense of a suit, the policyholder has a right to independent counsel, not representing and not directed by the insurer. But the insurer still shares with the policyholder an interest in defeating or minimizing the claim, because the insurer may be obliged to pay some or all of any judgment. The insurer has a right to be consulted about defense decisions, even though the policyholder is entitled to make those decisions. The insurer needs and is entitled to information and advice about the claim in order to provide such input and to determine its own obligations regarding defense and settlement of the claim.

Under the rule in paragraph (5), if the insurer chooses to have an unrepresented adjuster participate in management of the defense, *sharing of defense information with the unrepresented insurer would not waive the privilege*. But the adjuster’s communications with counsel (and with the insured) would not be independently privileged (though likely be protected by work product immunity and possibly derivatively privileged to the extent that they would reveal the contents of the privileged communications shared with the adjuster). Nor would the insurer be a holder of the privilege for any communications between a represented party and its counsel, even if those communications have been shared with it.

This rule strengthens the privilege against the adversary of the parties with the preexisting relationship by preventing necessary sharing of information from waiving the privilege. A Texas statute has been construed to preclude common-interest sharing except among allied lawyers. But, where the issue is not controlled by statute or rule, the ABA should advocate against that rule and in favor of the one stated in the Resolution. The ABA should also advocate against statutes or rules that mandate the Texas result.

The Paragraph (5) issue has limited authority on either side. None of that authority considers the special needs of parties with the sort of preexisting relationship addressed by Paragraph (5). The ABA should take a leadership position in shaping the law on this issue, by advocating a rule that will properly strengthen the privilege.

II. Whether every party to a common-interest arrangement must be separately represented is unsettled.

The leading case supporting a requirement of separate representation is *In re: Teleglobe Communications Corp.*, construing the Delaware Rules of Evidence. *Teleglobe* was a dispute between subsidiaries (the “Debtors”) of a bankrupt corporation, Teleglobe, and its former parent, Bell Canada Enterprises (“BCE”) regarding BCE’s decision to cease funding projects of Teleglobe. That decision resulted from a review called “Project X.” BCE’s in-house counsel had represented Teleglobe on various matters where Teleglobe and BCE had common interests, but had advised BCE alone on Project X. Teleglobe now sought to discover communications about Project X.

*Teleglobe* explained that the common interest or community of interest rule “allows attorneys representing different clients with similar legal interests to share information without

---

14 *In re: Teleglobe Comm’nns Corp.*, 493 F.3d 345, 363-64 (3rd Cir. 2007).
having to disclose it to others." As Telelobe construed the rule, "to be eligible for continued protection, the communication must be shared with the attorney of the member of the community of interest."

The court concluded its discussion of the "community of interest rule" with two "points of caution," one relevant to the discussion here: "the privilege only applies when clients are represented by separate counsel. Thus, it is largely inapplicable to disputes like this one that revolve around corporate family members use of common counsel (namely, centralized in-house counsel)." The court concluded that "BCE's invocation of the 'common interest' privilege ... was out of place, as BCE has never asserted that the parties were represented by separate counsel who properly shared information."

Still, the privilege was properly asserted, because even a conflicted representation by a joint attorney would not have divested one client of its privilege against the other on matters where they had adverse interests. (Because BCE's privilege was preserved, the conclusion that the common interest doctrine was inapplicable was dictum; it did not support the no-waiver result.)

While the Telelobe discussion was dictum, it is the only appellate application (other than In re XL Specialty Insurance Co.,) of the putative separate representation requirement. A number of federal district and bankruptcy courts have stated that requirement based on Telelobe or other authority, but without relying on the putative separate representation requirement. Some state court cases have done likewise.

Prof. Rice states that "[t]his limitation ... has been lost in contemporary jurisprudence where distinctions between joint client, joint defense, common interests and community of

---

15 Id. at 364.
17 Telelobe, 493 F.3d at 365.
18 Id. n.22.
19 Id. at 368-73.
20 In re XL Specialty Ins. Co., 373 S.W.3d 46 (Tex. 2012), discussed in notes 52-64, infra.
interest appear to have been overlooked and forgotten." 23 A number of relevant cases have upheld the privilege without mentioning any requirement that each party have its own lawyer. 24

III. No requirement of separate representation requirement should apply when the common-interest parties are part of a network created by a preexisting relationship.

One can identify two different types of common-interest arrangements. One (exemplified by the typical joint-defense agreement) is a coalition among independent actors seeking to cooperate on one or more issues against one or more third parties. The other (exemplified by common insurance and indemnification relationships) is a network of parties whose preexisting relationship binds them together on one or more issues, creates duties to respect one another’s interests, and creates rights to participate in decision making. In a coalition, each party acts independently, but they seek to cooperate in areas where their interests align. In a network, the interests are aligned by the preexisting relationship that binds all parties to the results of decisions made on behalf of all, with decision makers obliged to consult with nondecisionmakers if the latter wish to provide input. At least as to the network type, the rule permitting information sharing without waiver, is strongly justified.

One situation in which common legal interests are widely recognized is that where one party is obligated under some preexisting arrangement to indemnify another against liability. If and when a claim subject to such an indemnification obligation is asserted, the indemnitor and indemnitee share a legal interest in defeating or minimizing the claim. The law regarding such interests is most extensively developed where the indemnitee is its insured, but commercial indemnity obligations and those arising as a matter of law can present analogous issues. 25

Even with insurance, there are many variations. The simplest is where one insurer insures one insured and, pursuant to contract, has a right and duty to defend the insured against covered claims. But the insured may be entitled to conduct its own defense or there may be multiple insurers, some of whom do not defend. To analyze any variation, one must understand the structure of typical insurance policies.

24 Many cases have formulated the common interest doctrine in ways that do not identify separate representation of all parties as a requirement. E.g., In re Bevill, Bresler & Schulman Asset Management Corp., 805 F.2d 120, 126 (3rd Cir. 1986) (“The joint defense privilege protects communications between an individual and an attorney for another when the communications are ‘part of an on-going and joint effort to set up a common defense strategy.’ In order to establish the existence of a joint defense privilege, the party asserting the privilege must show that (1) the communications were made in the course of a joint defense effort, (2) the statements were designed to further the effort, and (3) the privilege has not been waived.” (citations omitted)).
A. The most common network is that created by liability insurance.

1. The privilege universally applies where an insurer defends pursuant to a liability insurance policy.

The insuring agreement in liability policy typically promises the insured to defend against any covered claim. The law has long recognized that such an insurance policy ordinarily grants the insurer a right to select and direct defense counsel.\(^{26}\) Usually, where an insurer provides a defense pursuant to such a policy, the insurer is recognized as a co-client with the insured.\(^{27}\) Sharing of information among co-clients does not waive privilege, regardless of any requirements applicable to a common-interest arrangement.\(^{28}\)

Sharing of information is necessarily the default rule in co-client representations. Every client has a right to full information about the representation.\(^{29}\) Where there are two clients represented jointly, this right is inconsistent with a duty to one client to refrain from disclosures to the other. Thus, the normal rule is that (unless the clients agree otherwise) all information may be shared with both clients.\(^{30}\)

Even in jurisdictions and circumstances where a defending insurer is not recognized as a co-client, sharing of information with the insurer should not be a waiver. Among the privileged persons with whom information may be shared without waiver are agents of the client.\(^{31}\) The Restatement (Third) of the Law Governing Lawyers recognizes a carrier as such an agent for privilege purposes.\(^{32}\)

These specific statements are reinforced by broad rules permitting sharing of information among co-clients and among other parties of common interest.\(^{33}\) The relevant interest is one in the “matter” that is the subject of the representation.\(^{34}\) But their interests in the matter “need not be entirely congruent.”\(^{35}\) Joint representation or common-interest sharing is permissible for joint

\(^{27}\) WILLIAM T. BARKER & CHARLES SILVER, PROFESSIONAL RESPONSIBILITIES OF INSURANCE DEFENSE COUNSEL (hereinafter, “BARKER & SILVER”) § 4.04.
\(^{28}\) RESTATEMENT LGL, § 79.
\(^{29}\) MODEL RULES OF PROF’L CONDUCT, R. 1.4 (2012). See MODEL RULES OF PROF’L CONDUCT, R. 1.7 cmt. [31] (“As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client’s interests and the right to expect that the lawyer will use that information to that client’s benefit.” (emphasis added)).
\(^{30}\) RESTATEMENT LGL, § 60 cmt. 1 (“The common lawyer is required to keep each of the co-clients informed of all information reasonably necessary for the co-client to make decisions in connection with the matter... The lawyer’s duty extends to communicating information to other co-clients that is adverse to a co-client, whether learned from the lawyer’s own investigation or learned in confidence from that co-client.”).
\(^{31}\) RESTATEMENT LGL, § 70, cmt. f.
\(^{32}\) RESTATEMENT LGL §§ 70, cmts. e & f, and 134 cmt. f.
\(^{33}\) RESTATEMENT LGL, § 75 (2000).
\(^{34}\) RESTATEMENT LGL § 76(1).
\(^{35}\) RESTATEMENT LGL § 76 cmt. e.
defense or prosecution of a lawsuit, even if the parties may have divergent interests in allocating any resulting recovery or liability.\textsuperscript{36}

Thus, with or without the common-interest doctrine, a defending insurer may share the insured's privileged communications without waiver, even if not a co-client.

2. Nondefending insurers should also be permitted to share privileged information without waiver.

Primary insurers sometimes agree that the insured will be allowed to defend (typically using counsel approved by the insurer), with the insurer reimbursing defense costs and indemnifying any judgment or settlement, both subject to applicable limitations in the policy. The law generally deprives a primary insurer of the right to defend if there would be a conflict of interest between insurer and insured regarding the conduct of the defense; it sometimes does so whenever the insurer has reserved the right to refuse to indemnify.\textsuperscript{37} In those circumstances, the insured is said to have a right to independent counsel.\textsuperscript{38} In either situation, the contract typically requires the insurer's consent to any settlement to which it will be called upon to contribute.

An excess insurer is one that promises to indemnify against certain liabilities beyond the monetary limits of the primary insurance. The excess insurer typically has no right or duty to defend, because defense is the responsibility of the primary insurer. But the excess insurer generally must consent to any settlement that it will be asked to pay.

Nondefending insurers typically have, by contract or by operation of law, a right to "associate" in the defense.\textsuperscript{39} Under the Restatement of the Law of Liability Insurance that includes "[t]he right to receive from defense counsel and the insured, upon request, [non-coverage sensitive] information that is reasonably necessary to assess the insured's potential liability and to determine whether the defense is being conducted in a manner that is commensurate with that potential liability" and "[a] reasonable opportunity to be consulted regarding major decisions in the defense of the action."\textsuperscript{40}

Because the insurer(s) will or may be liable for all or portions of any judgment, they are entitled at least to have input into defense decisions, even if those decisions will be made by someone else. In order to do that and to themselves make informed decisions about approval of settlements calling for a contribution from them, they need access to privileged information about the defense, a need recognized by the right to associate.

\textsuperscript{36}See FDIC v. Ogden Corp. 202 F.3d 454 (1st Cir. 2000) (parties had joint attorney-client relationship for prosecution of insurance claim, despite potential disputes about allocation of proceeds among themselves; information shared was confidential against outsiders, but usable in dispute \textit{inter se}).

\textsuperscript{37}See BARKER \& SILVER, supra note 27, §§ 6.04-05.


\textsuperscript{39}Such a right is conferred by operation of law when an insured is given a right to independent counsel, depriving the insurer of contractually granted control of the defense, \textit{RESTATEMENT OF THE LAW OF LIABILITY INSURANCE} (hereinafter, "\textit{RESTATEMENT LLI}")\textsuperscript{\textregistered}, § 17(4) (Prop. Final Dr. Mar. 28, 2017).

\textsuperscript{40}RESTATEMENT LLI § 23(1).
Under the Restatement LLI, such sharing would not impair the privilege: "The provision of information to an insurer pursuant to the right to associate does not waive any confidentiality rights of the insured with respect to third parties."41

Comments to the Restatement LLI explain that:

An effective defense of an insured or potentially insured legal action requires the insurer, the insured, the defense lawyer, and their agents to share information on a confidential basis in a manner that is protected from disclosure to the claimant and other parties outside of the insurer-intermediary-insured relationship. All of these parties share a common interest in protecting the insured from the action. Moreover, insurance policies should properly be regarded as appointing insurers, including nondefending insurers, as the insured's agents for purposes of defending or considering whether to settle the legal action. With regard to parties outside of that liability insurance relationship, the confidentiality protection for information disclosed within that relationship should be as strong as if the parties to that relationship were a single entity.42

The analysis here indicates that a nondefending insurer should come within the scope of the common-interest rule whether or not represented by counsel with respect to the matter. Defense counsel must withhold any confidential information that might be used to support limitation of coverage.43 So, information shared with insurers, defending or otherwise, should be information regarding their common interest in defeating or minimizing the claim and not regarding their divergent interests as to coverage.

As a result, the nondefending insurers typically can consider defense counsel's advice on defense in the same way as if defense counsel represented all of the insurers.44 Separate counsel might be useful but ought not to be essential.

Privileged sharing would be supported if a network were conceptualized as an organization, entitled, without waiver, to share privileged information with its constituents who

41 RESTATEMENT LLI § 23(2).
42 RESTATEMENT LLI § 11, cmt. a.
43 See BARKER & SILVER, supra note 27, §§ 10.01-04.
44 Indeed, in upholding privileged sharing by one defendant with a co-defendant's attorney, it has been said that an "attorney who thus undertakes to serve his client's co-defendant for a limited purpose becomes the co-defendant's attorney for that purpose." United States v. McPartlin, 595 F.2d 1321, 1337 (7th Cir. 1979)

However, the lawyer representing one party does not owe any duty of loyalty to other parties (because of conflicts on other issues) and, presumably, owes them no duty of care, lest loyalty to the actual client be undermined. United States v. Stepney, 246 F. Supp. 2d 1069, 1082-83 (N.D. Cal. 2003); Howard M. Erichson, Informal Aggregation: Procedural and Ethical Implications of Coordination among Counsel in Related Lawsuits, 50 DUKE L.J. 381, 419-32 (2000) (lawyer engaged in coordination normally owes fiduciary duty of confidentiality to nonclient participants, but no duty of loyalty). Still, for reasons stated in the text, attorneys in a common-interest arrangement should be regarded, for purposes of privilege, in an insurance-defense context (and in other network-type common-interest arrangements) as effectively representing all participants.
need to know that information to participate in the network's deliberations regarding those aspects of the matter involving common interests.45

Use of common-interest analysis is supported by the Restatement L.L.I.'s provisions specifically regarding sharing with nondefending insurers. Thus, where an insurer's right to defend has been displaced by an insured's right to independent counsel,

[t]he grounds for protecting confidentiality in the independent-counsel context are at least as strong as those in the duty-to-defend context. The conflict of interest that lies behind the independent-counsel requirement does not eliminate the common interest of insurer and insured in defeating the third-party claim; it does not change the fact that the insurer serves as the insured's agent for purposes of settling; and it does not eliminate the need for the insurer and insured to share confidential information in a manner that is protected from disclosure to third parties. Moreover, because the insured may in the end be obligated to pay a settlement or judgment that is not covered, the risks to the insured from the potential loss of confidentiality are even greater.46

And, where an insurer otherwise associates in the defense, "information shared with a liability insurer pursuant to a right to associate should be subject to the same level of protection from third parties as information shared with a liability insurer exercising the right to defend."47

B. Common-interest sharing has been permitted, without separate representation, within a network created by a commercial loan participation.

Loan participations are extensively used by lenders to share the risks and benefits of loans. Certain characteristics are customary. A participation is a sale of an interest in a loan by a lender (the lead lender) to another institution (the participant) but the participant [1] is not a party to the loan, [2] does not have a contractual relationship ... with the borrower, and [3] cannot sue the borrower directly for breaches of the loan agreement.48 The participant only has a direct contractual relationship with the lead lender. The lead lender usually [a] retains partial interest in the loan, [b] retains record title to the loan, [c] remains liable for all obligations under the loan agreement (such as funding future borrowings), [d] retains the right to deal with the borrower, and [e] retains the right to enforce remedies against the borrower.49 Participants typically have limited ability to prevent the lead lender from waiving or modifying the borrower's obligations under the loan. They do have what are known as "RATS rights" to object to modifications to rate, amortization, term, and security.50

---

45 See RESTATEMENT LGL., § 73(4)(b).
46 RESTATEMENT LLI § 17, cmt. d.
47 RESTATEMENT LLI § 23, cmt. e.
48 Assignments and Participations of Loans, Practical Law Practice Note 8-381-8532.
49 Id.
50 Id.
The role of a participant is somewhat analogous to that of a nondefending insurer, because the participant's consent is required for loan "workouts" modifying key loan terms, just as a nondefending insurer's consent is required for settlements.

In *HSH Nordbank AG New York Branch v. Swerdlow*,\(^{51}\) Nordbank had originated loans guaranteed by Swerdlow. Nordbank acted on its own behalf and as Administrative Agent for five non-party lenders, all agreeing to enforce repayment solely through Nordbank. Nordbank received legal advice from its counsel, which counsel shared with the nonparty lenders. This was inadvertently produced to the guarantors; Nordbank sought to claw it back. The guarantors argued that the privilege was waived because the advice had been communicated to the nonparty banks, who were not represented by counsel at the time.\(^{52}\) The district court found this argument "meritless," reasoning that:

> it is immaterial that the confidential communications passed from Nordbank’s counsel directly to the non-party lenders, rather than passing from Nordbank or its counsel to the non-party lenders' attorneys. Nordbank and the non-party lenders are co-lenders of the Loan and thus share a common interest in enforcing defendants' obligations under the Guaranties. Any doubt regarding this identity of legal interests is resolved by the terms of the Loan itself. Not only does the Loan identify Nordbank as the only party capable of "enforce[ing] or exercis[ing] any of the ... rights or remedies of or under any of the Loan Documents," but it also contemplates that Nordbank's counsel will effectively represent the interests of the various lenders, which interests are presumed to be identical. When viewed in conjunction with the fact that the relevant communications involve development of the appropriate legal strategy for obtaining relief, and that the parties privy to the communication understood the communication to be confidential on account of attorney-client privilege, these facts bring the communications at issue squarely within the common interest doctrine.\(^{53}\)

C. Texas has required separate representation, but pursuant to a Texas statute, and ought not to be followed in the absence of such a mandate.

In *In re XL Specialty Ins. Co.*,\(^{54}\) the Texas Supreme Court found that lack of separate representation resulted in waiver. A worker had sued XL for workers’ compensation benefits. Under Texas law, XL alone was liable and the employer (Cintas) was not a party to the suit.\(^{55}\) But the insurance policy that provided coverage for those benefits had a $1 million deductible, requiring Cintas to reimburse any payments up to that amount.\(^{56}\) Cintas (which was

\(^{52}\) Id. at 71.
\(^{53}\) Id. at 72 (footnotes and citations omitted).
\(^{54}\) *In re XL Specialty Ins. Co.*, 373 S.W.3d 46 (Tex. 2012).
\(^{55}\) Id. at 54.
\(^{56}\) Id. at 48.
not separately represented) was consulted about the claim, and defense counsel shared reports with Cintas. After the workers compensation claim was resolved, the worker sued XL for bad faith in handling the claim. The worker sought defense counsel's reports, and the court held that sharing them with Cintas had waived the privilege.

Insofar as Texas Rule of Evidence permits sharing outside an attorney-client relationship, it does so only for communications "by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein." While Texas has not recognized a general insured-insured privilege, communications between insurer and insured can be shielded by the attorney-client privilege if they concern a potential suit and are predominantly intended to be transmitted to the attorney to be hired to defend the insured.

But the requirements of the rule were not met in XL:

Here, XL is the client, and the communications were between XL's lawyer and a third party, Cintas, who was not represented by XL's lawyer (or any other lawyer) and was not a party to the litigation or any other related pending action. We recognize that Cintas, having contracted for a substantial deductible, may have shared a joint interest with XL during the administrative proceedings in the outcome of the claim. But no matter how common XL's and Cintas's interests might have been, our rule requires that the communication be made to a lawyer or her representative representing another party in a pending action. Those requirements were not met here.

The situation presented in XL differed from the usual liability insurance case involving a defending insurer (where the privilege generally applies) because the insured was not a party and not represented by defense counsel. Here, there was neither argument nor evidence that XL and Cintas were joint clients nor that Cintas was a client and XL its representative. Because Cintas could not act on XL's behalf, the court thought it could not have been XL's representative. "[I]n a case in which the communications were not made to the insured's lawyer, and the insured is not a party to a pending action, as required by the rule, the allied litigant privilege does not apply."

Even if proper construction of the Texas Rule required the result reached by the court, the distinctions drawn by the court seem arbitrary in light of the analysis presented in this report.

57 Id.
58 Id.
59 Id. at 54.
60 TEX. R. EVID. 503(b)(1)(C).
61 XL, 373 S.W.3d at 53.
62 Id. at 53-54.
63 See discussion at notes 28-36, supra.
64 XL, 373 S.W.3d at 54-55.
65 Id. at 55.
66 Id. at 54.
Thus, common-law courts ought not to follow X.L. Moreover, even under rules with language parallel in some ways to that of the Texas rule, there may be room for courts to uphold the privilege for network-type common-interest arrangements without regard to the separate representation or pending-action requirements. Certainly, legislatures and courts should refrain from codifying privilege law in a way that mandates the result reach in X.L.

Respectfully submitted,

Sam H. Poteet, Jr.
Chair, Tort Trial & Insurance Practice Section
August 2017
GENERAL INFORMATION FORM

Submitting Entity: Tort Trial & Insurance Practice Section
Submitted By: Sam H. Poteet, Jr.
Chair, Tort Trial & Insurance Practice Section

1. **Summary of Resolution(s).** ABA supports common-interest doctrine, under which sharing of privileged communications with persons of common interest who have agreed to maintain confidentiality does not waive privilege. Terms for application of doctrine and consequences of doing so are specified.

2. **Approval by Submitting Entity.** Approved by TIPS Council, February 4, 2017

3. **Has this or a similar resolution been submitted to the House or Board previously?** No

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** No existing on this subject.

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

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

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** File amicus briefs or lobby rulemakers or legislatures when appropriate

8. **Cost to the Association.** (Both direct and indirect costs) Filing fees and printing costs for amicus briefs; staff time for lobbying

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

10. **Referrals.** This report and resolution is referred to the Chairs and Staff Directors of all ABA Sections and Divisions, Center for Professional Responsibility.
102C

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

William T. Barker  
312 876 8140  
william.barker@dentons.com

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

Robert S. Peck  
Delegate, TIPS  
202/944-2874  
E-mail: Robert.peck@cclfirm.com

Timothy W. Bouch  
Delegate, TIPS  
843/513-1072  
E-Mail: tbouch@leathbouchlaw.com

Michael W. Drumke  
Delegate, TIPS  
312/222-8523  
E-mail: jfmulliganesp@gmail.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

ABA supports common-interest doctrine, under which sharing of privileged communications with persons of common interest who have agreed to maintain confidentiality does not waive privilege. Terms for application of doctrine and consequences of doing so are specified.

2. Summary of the Issue that the Resolution Addresses

Questions have arisen in various cases regarding whether, and in what circumstances, sharing of privileged communications with persons of common interest will be protected from the waiver that normally results from disclosure of such communications outside of the attorney-client relationship where they occurred, and what consequences flow from such sharing.

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

Paragraph (1) supports the common-interest doctrine generally and states the requirements supported by the great weight of authority. It disapproves the minority view that common-interest sharing is proper only in connection with pending or specifically anticipated litigation.

Paragraphs (2) and (3) specify consequences of common-interest sharing supported by the overwhelming weight of authority: no party to a common interest arrangement can unilaterally waive privilege as to another party’s communications and any party can use shared information against any other party in later adverse proceedings between them.

Paragraph (4) provides, in accordance with the overwhelming weight of authority, that existence of a common interest provides a basis for voluntary sharing privileged communications without waiver but does not provide a basis for compelling a party to share information if it prefers not to do so. Contrary authority in Illinois and scattered cases elsewhere is disapproved.

Paragraph (5) addresses an emerging issue on which there is disagreement and little authority: can an unrepresented party participate in a common-interest arrangement in which privileged communications are shared. Specifically, Paragraph (5) identifies a limited type of arrangement, among parties with preexisting relationships that bind them to a common result, in which it would be permissible for an unrepresented party to participate without such participation resulting in waiver of privilege as to communications shared.

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

No known opposition. Some contrary authority, as identified in Report.
RESOLVED that the American Bar Association encourages greater use and development of ombuds programs that comply with generally recognized standards of practice, as an effective means of preventing, managing, and resolving individual and systemic conflicts and disputes.
1. INTRODUCTION

The number of “ombuds” or “ombudsman” programs continues to grow in both the public sector and in our private organizations. In the public sector, many bills have already been introduced in the 115th Congress that would establish or reform ombuds programs in various federal agencies, and several bills were also introduced in the last Congress to establish ombuds programs in various federal agencies. In addition, a comprehensive study of the role of ombuds in federal agencies was completed at the end of 2016 which documents the virtual explosion of ombuds programs of various types in the federal sector since the early 1990s. At the state and local level, ombuds roles have been widely used in many state and local governments and even at the level of local school districts. In non-governmental and other contexts, the ever-increasing need for mechanisms to help resolve individual and systemic conflicts has been recognized in such diverse sectors as the media, universities, leading non-profit agencies, companies, and multinational corporations.

While one of the most valuable aspects of the ombuds concept is the ability to adapt it to a wide variety of contexts, experience has shown that with this growth in usage, many ombuds programs have been proposed or created without incorporating the key principles generally viewed as essential to all types of ombuds programs. Moreover, programs have been created that are not compliant with any of the generally recognized professional standards of practice for the principal types of ombuds programs. Even more troubling is the fact that some programs labeled as “ombuds” incorporate functions that are completely incompatible with what would generally be expected of an ombuds.

---

1 During the 115th Congress, for example, bills have been introduced to: establish an Independence of Commission Ombudsman and an Enforcement Ombudsman within the Securities and Exchange Commission (H.R. 10); establish an Office of the Ombudsman for the public health insurance option within the Department of Health and Human Services (H.R. 635 and H.R. 1307); establish an Office of the Municipal Ombudsman within the Environmental Protection Agency (H.R. 1971, H.R. 2355, and S. 692); establish an Ombudsman Office within the Transportation Security Administration (H.R. 1986); require the Department of Health and Human Services to award grants to states enabling them to establish, expand, or provide support for behavioral health ombudsman programs that are independent of other state agencies (H.R. 2047); ensure that the Women Veteran Program Manager program in the Department of Veterans Affairs is supported at each medical center of the Department with a Women Veteran Program Ombudsman (H.R. 2452 and S. 681); establish an Immigration and Customs Enforcement Ombudsman within the Department of Homeland Security (S. 748); establish a Private Landowner Ombudsman within U.S. Customs and Border Protection (S. 757); require the Secretary of Health and Human Services to appoint a Medicare Reviews and Appeals Ombudsman within the Centers for Medicare & Medicaid Services (S. 794); and enhance the ability of the Small Business Administration Regulatory Enforcement Ombudsman to assist small businesses in meeting regulatory requirements (S. 1146). Additional ombuds bills are likely to be introduced later in the 115th Congress.

The proliferation of ombuds programs, both domestically and internationally, since 2004, the date of the last resolution on ombuds programs adopted by the American Bar Association (ABA), has prompted the Ombuds Committee of the ABA Dispute Resolution Section to develop the proposed resolution and this report. The proposed resolution—in keeping with previous ABA resolutions—encourages the expanded use of ombuds programs as an effective means of preventing, managing, and resolving individual and systemic conflicts and disputes. However, it also urges that ombuds programs comply with generally accepted principles and standards of practices.

Ombuds, also known as ombudspersons or ombudsmen, provide significant value to organizations and constituencies at all levels. The word “Ombudsman” is Scandinavian and means “representative” or “proxy.” As the term is generally used, an ombuds is a person who may make an inquiry into a complaint and who tries to help the inquirer have the problem addressed fairly by the organization. The term is used to describe roles in many different contexts, and the role varies widely from program to program. Ombuds can be found in a wide variety of organizations worldwide, including universities and colleges, governments at all levels, health-care institutions, corporations, financial institutions, for-profit and not-for-profit organizations, prison systems, the media, and even the United Nations system itself.

In previous resolutions, the ABA recognized that there are different types of ombuds and identified their essential characteristics. Two resolutions adopted by the ABA in 2001 and 2004 recommended standards for creating and operating ombuds programs, and described three main categories of ombuds: Classical (Executive and Legislative), Organizational, and Advocate. As the use of ombuds has increased in multiple sectors since the time of those resolutions, the categories articulated in those

---

1 In keeping with usage in earlier ABA reports, the term ombuds in this report is intended to encompass all other forms of the word such as ombudsperson, ombuds officers, and ombudsman, a Swedish word meaning agent or representative. The use of ombuds here is not intended to discourage the use of other terms.

2 In August 2001, the House of Delegates of the ABA adopted a Report and Recommendation to the House of Delegates that supported “...the greater use of ‘ombuds’ to receive, review, and resolve complaints involving public and private entities and endorsed the accompanying Standards for the Establishment and Operation of Ombuds Offices. See Resolution 01A 107D (2001 Resolution). The 2001 Resolution used the categorization of “Classical,” “Organizational,” and “Advocate” to describe the principal types of ombuds programs. On February 9, 2004, the House of Delegates adopted a policy revising the Standards for the Establishment and Operation of Ombuds Offices. See Resolution 04M 115 (2004 Resolution) which replaced the category of “Classical” ombuds with “Legislative” and “Executive,” but both of these types are generally understood to be variations of the classical ombuds model. See e.g., Charles L. Howard, The Organizational Ombudsman: Origins, Roles, and Operations - A Legal Guide, 1 (2010), Appendices 6 and 7, for the full text of 2001 and 2004 Resolutions and Reports.

resolutions have become unduly limiting and do not accurately reflect the current reality of ombuds practice, although they were an important step in working to articulate the principles of independence, impartiality, and confidentiality that are fundamental to successful ombuds programs.

Ombuds functions today vary widely with respect to the nature of their creation, their mandate and function, who they serve, and the standards that are followed. For example, there are many ombuds offices that practice what has typically been defined as the classical model of practice where an office is charged with impartially investigating complaints, formally or informally. These offices are in both the private sectors and in the government sector at the federal, state, and local levels of government. Such government offices are established by legislative enactment or a charter which sets forth the jurisdiction of the office and the span of its authority. Therefore, there is no single functional definition for an executive or federal ombudsman, just as there is no single definition for the role in other contexts.


While these standards are not the only canons that have achieved wide acceptance, they reflect adherence to the key principles of independence, confidentiality, and impartiality and thus underscore one of the primary purposes of the proposed resolution: that urging the creation of ombuds programs which are compliant with generally recognized standards will best serve both the programs themselves and the institutions and constituencies they serve. For this reason, the proposed resolution does not recommend one set of standards over another. Rather, it reiterates the ABA’s support of ombuds functions in multiple arenas and further encourages their use in a manner consistent with recognized ombuds standards that have been developed over many years for the different types of ombuds programs.

The goal of the proposed resolution is, therefore, to address the limitations created in the previous resolutions and to encourage the use of ombuds programs, thereby reinforcing administrative and organizational integrity, accountability, fairness, and equity, and upholding the greater societal interest of empowering people to surface good

---

6 This practice is consistent with the 2004 ABA Resolution.
faith concerns to the government or an organization without fear of retaliation or other adverse consequences. Further, this proposed resolution recognizes the growing variation in models, policies and procedures governing the differing roles played by ombuds in different sectors and, especially in view of this growth, urges adherence to best practices and recognized standards followed by the most effective ombuds and ombuds offices.

II. BACKGROUND

The ombuds concept was first introduced into the United States in the early 1960s as a means of improving public administration and serving as a check and balance on administrative processes. During the 1960s, ombuds programs were established in numerous governmental organizations, including states and municipalities.

The American Bar Association adopted a resolution in 1969, which was revised in another resolution adopted in 1971, recommending that “state and local governments should give consideration to the establishment of an Ombudsman authorized to inquire into administrative action and to make public criticism.” The 1969 Resolution also identified the twelve essential characteristics of a statute creating an ombuds program.

During the 1970s and 1980s, ombuds programs continued to develop beyond state and local governments to include programs at colleges and universities, corporations, the federal government and other organizations.

During this same time, ombuds practices also evolved based on the contexts in which they operated, including programs that were independent but advocated on behalf of a constituency (for example, prison ombuds and nursing home ombuds), those that followed the traditional public model of ombuds with an investigative function, and those within private organizations that often operated according to an organizational charter and standards of practice, rather than a legislative or government mandate.

III. OMBUDS AND ALTERNATIVE DISPUTE RESOLUTION (ADR)

The ombuds function has also emerged as a valuable form of alternative dispute resolution (ADR) given that ombuds act as third parties and address disputes outside of formal channels, such as litigation, grievances, equal employment opportunity (EEO) complaints and so forth.

In the United States, most ombuds are in fact third-party neutrals, with the exception of Advocate Ombudsmen who are often authorized to advocate on behalf of vulnerable populations. Generally, ombuds utilize ADR skills and processes, as well as other creative avenues, as a means to address disputes and concerns. Ombuds essentially stand for procedural justice, fundamental fairness, accountability and equity, thereby allowing inquirers, visitors, complainants, or customers to voice concerns that might not

---

otherwise be heard by an organization or entity. The USOA has referred to this as providing a means for "credible review." The ability of ombuds to help people informally – on a wide range of issues that might not otherwise be addressed due to the limitations of litigation or fear of retaliation – makes them an important component of a comprehensive conflict management system.

IV. THE PROPOSED RESOLUTION AND EXISTING ABA POLICIES

The proposed resolution is consistent with and builds upon existing ABA policies. It seeks to highlight the growth and evolution of ombuds functions and encourages greater use of ombuds programs. In the early stages of the evolution of the ombuds concept, ombuds were limited to governmental and administrative functions, but the use of the ombuds continues to grow.8 This proposed resolution is intended to keep the ABA abreast of these changes to facilitate good decision-making as new ombuds programs are created.

The ABA has adopted four prior resolutions related to the ombuds function.

Resolution Adopted by the ABA in January 1969

As noted above, the ABA adopted a resolution in 1969 encouraging state and local governments to "give consideration to the establishment of an ombudsman authorized to inquire into all administrative actions and to make public criticism."9 The resolution further sets out 12 suggested characteristics or parameters for a statute or ordinance establishing such an ombudsman, including independence, freedom "to investigate any act or failure to act by any agency, official, or public employee," authority, discretion, and immunity from civil liability.10

Resolution Adopted by the ABA in July 1971

In 1971, the ABA adopted a resolution which amended the 1969 resolution and recommended the creation of a pilot ombudsman program "for limited geographical area or areas, for a specific agency or agencies or for a limited phase or limited phases of Federal activity."11 It was suggested that such experimentation take place before the establishment of a government-wide program.12

---

8 References to ombuds can be found in the Administrative Dispute Resolution Act of 1999 and the Uniform Mediation Act of 2003, which further demonstrate a broad acceptance of the ombuds function.
9 See Howard, supra n. 4.
10 Id. at Appendix 1 (full text of 1969 ABA Resolution and Report).
11 Id. at Appendix 2 (full text of 1971 ABA Resolution and Report).
12 Id.
Resolution Adopted by the ABA in August 2001

In 2001, the ABA adopted a resolution supporting the greater use of ombuds to “receive, review, and resolve complaints involving public and private entities.” 13 The ABA also endorsed the Standards for the Establishment and Operation of Ombuds Offices dated August 2001. The report accompanying the 2001 Resolution set out the ABA’s support of Classical, Organizational, and Advocate Ombuds models. 14

Resolution Adopted by the ABA in February 2004

The ABA adopted its fourth ombuds resolution in 2004, revising the Standards from 2001. 15 The 2004 ABA Standards mention the ombuds categories of Legislative, Executive, Organizational, or Advocate. 16

Related ABA Policy: Resolution 100 (2016)

In a similar context involving disputes in the healthcare arena, the ABA just recently adopted a resolution encouraging the greater use of ADR mechanisms to help resolve healthcare disputes. The report accompanying the Resolution specifically references ombuds as such a mechanism.

V. DEVELOPMENTS SINCE 2004

Since the adoption of the 2001 and 2004 Resolutions, the ombuds role and function has continued to develop in a variety of ways.

Classical Ombuds

The ABA used the term “Classical Ombuds” in its 2001 report but re-classified this function as “Legislative Ombuds” and “Executive Ombuds” in its 2004 report. 17 While the resolution itself does not specifically define roles, this report recognizes the definition of “classical” put forth by the USOA, the oldest ombuds association in the United States. As referenced in this report, the term “classical” is used to describe a form of practice in which the office has authority to independently and impartially investigate complaints against an entity or any complaints within the entity’s jurisdiction (i.e., engage in fact-finding). The responsibility to impartially investigate complaints in a

14 Id.
15 See Resolution 04M 115, available at: http://www.americanbar.org/content/dam/aba/migrated/leadership/2004/dj/115.authcheckdam.pdf (last accessed March 18, 2016); see also Howard, supra note 2, Appendix 7.
16 Id.; see also, n.2 supra.
17 By definition, a Legislative Ombuds according to the ABA Standards would be a Classical Ombuds, but not all Classical Ombuds are Legislative Ombuds. Therefore, for purposes of this report, Legislative Ombuds are encompassed by Classical Ombuds.
formal way is a hallmark of the classical model. However, while the classical model may be characterized by the conducting of formal investigations, classical ombudsmen are not limited to conducting only “formal” investigations. A significant amount of their work is done informally, through inquiries, providing assistance and coaching, etc. In addition, unless specifically restricted, classical ombudsmen can also investigate or informally address complaints from employees of an agency, the same types of complaints that organizational ombuds handle. It is important when describing the classical model to be clear that the model does not limit the ombudsman to conducting only formal investigations of complaints against an agency from parties outside the agency.  

- Growth and Development in the Classical Model

Over the past decade, there has been growth in the number of classical ombuds at the local and state levels. At the local government level, this growth is most apparent in school districts. Portland and Seattle are examples of school districts creating a classical ombuds office to address education-related concerns.

Most municipal ombuds offices follow the classical model and deal with external complaints by users or those impacted by programs or agencies. King County, Washington, Dayton-Montgomery County, Ohio, and Detroit, Michigan are examples of general jurisdiction municipal offices.

At the state level, only five states have general jurisdiction ombuds offices created in pure classical form as offices housed in the legislative branch with oversight over executive branch functions: Alaska, Arizona, Hawaii, Iowa, and Nebraska.

The recent addition of classical ombudsman offices at the state level has primarily been within offices created to serve specific programs, such as children and family services, mental health services, or corrections. In 1995, Michigan created the Office of Children’s Ombudsman to independently investigate complaints about protective services, foster care, adoptions services and juvenile justice. According to the National

---

18 Other terms have also evolved to help describe governmental programs that previously were considered to be “classical” because they were established by government agencies. For example, some of these programs are described as “externally facing” or “internally facing,” depending on whether the principal constituency served is the public or the agency’s employees. Some of these programs in other respects also more resemble “organizational” ombuds programs than what has been traditionally understood to be “classical” ombuds programs.


20 South Carolina also has an ombuds office which arguably is not based on a “pure classical model.”
Conference of State Legislatures, twenty-two states now have Children’s Ombudsman Offices.\(^{21}\)

For those offices created at the state level to address specific programs, the models may differ. The office may be attached to the agency whose actions the ombudsman is authorized to investigate; others are attached to the governor or another agency within the executive branch. For those ombuds offices that lack structural independence from a sponsoring agency, particular steps must be taken to ensure functional independence. Such independence is intended to give complainants the confidence that any investigation is impartial and also lessens any fear of retaliation.

- **Standards of Practice**

The ABA adopted *Standards for the Establishment and Operations of Ombuds Offices* in 2001 and revised these Standards in 2004.\(^{22}\) Among other things, the final standards create a particular set of guidelines for those practicing under the various models, including both Legislative Ombuds and Executive Ombuds. These Standards can be and have been used to establish ombuds offices.\(^{23}\)

The USOA, a national organization for public sector ombuds professionals, did not fully endorse the 2001 standards or participate in the drafting of the revised 2004 standards. Instead, the USOA adopted Governmental Ombudsman Standards in 2003, identifying basic principles, guidelines, and best practices for ombudsman offices which follow the classical model of practice.\(^{24}\) USOA Standards include independence, impartiality, and confidentiality, with the addition of credible review process.\(^{25}\) USOA has also developed a model statute for state legislatures to use in creating new ombuds offices.\(^{26}\)

**Executive Ombuds**

According to the 2004 ABA Standards, Executive Ombuds “may be located in either the public or private sector and receive[] complaints from the general public or internally”...to “hold the entity or specific programs accountable or work with officials to improve the performance of a program.” Executive Ombuds may conduct investigations and issue reports.


\(^{22}\) See 2004 Resolution, *supra* n. 2 and 12.

\(^{23}\) However, not all offices function in practice in accordance with the Standards. Urging adherence to recognized standards is an important objective of the present proposed resolution...


\(^{25}\) Id.

\(^{26}\) Available at: http://www.usombudsman.org/site-usoa/wp-content/uploads/USOA-MODEL-ACT.pdf (last accessed April 3, 2016)
Externally-facing federal sector ombuds offices are often created by statute and assist in resolving process issues arising from the public’s interactions with a federal agency. While such ombuds usually do not have formal investigative authority, many of them review and study broader systemic issues and provide feedback and recommendations to the agency and, where required by law, to Congress. They typically practice according to the standards of independence, impartiality, and confidentiality in keeping with guidance set forth by USOA, the Coalition of Federal Ombudsmen, and others. This has been a growth sector for many years.

One example of the executive ombuds model is the US Government’s Freedom of Information Act (FOIA) ombudsman. Congress updated the FOIA in 2007 to establish a federal office—the Office of Government Information Services (OGIS)—to provide mediation services as an alternative to litigation between FOIA requesters and federal agencies. From the office’s inception, Congress referred to the office as the “FOIA Ombudsman” and though it is not a term used in the statute, the FOIA community has embraced both the name and the mission. Requests for assistance from the FOIA Ombudsman come from both requesters and agencies.

In addition to resolving disputes, the statute directs OGIS to review agency FOIA policies, procedures and compliance, with the goal of improving the FOIA process. The office’s handling of cases, as it mediates and facilitates disputes, allows for a first-hand observation of agency practices that also is helpful in its review role. As with its mediation services, the OGIS examines an agency’s FOIA process in the role of an advocate for the FOIA process in general, with a particular focus on impartiality and fairness. OGIS has made a number of recommendations to the President and to Congress to improve the administration of FOIA and to promote government openness, as directed by the statute. The 114th Congress appears to have heeded concerns about the need to give the FOIA ombudsman more authority and independence. Both the House of Representatives and the Senate passed a FOIA reform bill to do just that, which the President signed into law as the FOIA Improvement Act of 2016.

Organizational Ombuds

Initially, Organizational Ombuds programs in the US were created in response to particular societal needs. In the college and university context, the rise of organizational ombuds programs coincided with student riots and campus unrest in the 1970’s. In the

---

corporate setting, many programs were created as a result of concerns over improving corporate responsibility and governance and to encourage employees and others to report misconduct without fear of retaliation. An Organizational Ombuds office works within an organization to serve as an informal line of communication, a resource for interpersonal and systemic challenges, and a champion of organizational best practices for corporate governance.

- **The International Ombudsman Association Standards of Practice**

The formation of the IOA in 2005 was a major milestone for organizational ombuds. The IOA was created from the merger of the University and College Ombuds Association (UCOA) and The Ombudsman Association (TOA), which primarily served corporate and other organizational ombuds programs. IOA, the largest international association of professional organizational ombuds practitioners in the world, currently represents almost 900 members from the United States and across the globe. The IOA has established Standards of Practice for organizational ombuds, which include independence, impartiality, informality, and confidentiality.

- **Organizational Ombudsman Certification**

In 2009, IOA established the Certified Organizational Ombudsman Practitioner (Co-Op) certification; this program requires certified organizational ombuds to meet training and experience prerequisites, successfully complete an examination and to adhere to the IOA Code of Ethics and Standards of Practice. In addition to passing required certification exams, Co-Op members must have at least one year of experience as a practicing organizational ombudsman and demonstrate that they operate as independent, impartial, neutral and confidential practitioners in accordance with the IOA Standards. Co-Op re-certification is required every four years and has continuing education requirements. A “Co-Op Professional Practices Committee” is charged with investigating and adjudicating any formal complaints filed against a Co-Op member.

- **Federal Sector Ombuds**

The Coalition of Federal Ombudsman was formed in the mid-1990s and has grown in the federal space over the years. COFO is comprised of federal-sector ombuds that are internally-facing and therefore organizational ombuds (assisting on internal, workforce issues) externally-facing executive ombuds (assisting with process issues arising from the public’s interactions with the agency), or ombuds that are both internally- and externally-facing. The Coalition of Federal Ombudsmen supports the

---


35 IOA Standards of Practice, available at: https://www.ombudsassociation.org/IOA_Main/media/SiteFiles/IOA_Standards_of_Practice_Oct09.pdf (last accessed March 18, 2016). It bears noting that the Hawaii legislature has contemplated the creation of a university organizational ombuds office that would adhere to USOA standards of practice, though it is unclear how this will take shape in practice.
principles of independence, impartiality (neutrality), and confidentiality. The Coalition of Federal Ombudsmen and the Federal Interagency ADR Working Group Steering Committee created the Guide for Federal Employee Ombudsman$^{36}$ in 2006. The Guide is intended to operate as a supplement to the ABA's Standards for the Establishment and Operations of Ombudsman Offices referenced above.

**Advocate Ombuds**

Advocate Ombuds serve as advocates for identified constituencies, often those identified as vulnerable populations, such as residents of nursing homes and prisoners. A key difference between an advocate ombuds and a legislative or executive ombuds is that many advocate ombuds do not practice impartiality/neutrality but do use impartiality in determining whether, and to what extent, advocacy is appropriate in any particular instance. Some examples of advocate ombuds are:

- **Long-Term Care Ombuds**

  Long-Term Care Ombudsmen (LTCOs) are “advocates for residents of nursing homes, board and care homes and assisted living facilities.”$^{37}$ Under the Older Americans Act, every state is required to have a LTCO program to address complaints and advocate for improvements in the long-term care system. There are currently 53 LTCO programs – representing all 50 states, Guam, Puerto Rico, and Washington D.C. The LTCO program is federally-administered by the Agency on Aging, though each state program has autonomy in its day-to-day operations. LTCO programs may emphasize different practices due to the demographics and local needs they address, and they consistently strive to handle complaints, create awareness, and advocate on behalf of quality care. Their work is to remain confidential unless a resident gives permission. According to the Administration of Community Living, the LTCO program continues to flourish; in 2014 there were over 127,000 cases opened nationwide.$^{38}$

- **Corrections Ombuds**

  Several states have statutes establishing Corrections Ombudsman offices, which advocate for fairness on behalf of those incarcerated. Corrections Ombudsman also provide information about the prison system to inquirers, clarify policies, facilitate resolution of complaints and issues, and make recommendations. Ombuds operating in correctional facilities may also operate under what may be seen as classical ombudsman standards; the exact nature of the work is dependent on the language of the charter or statute creating the office.

---


News ombuds have been in practice in the United States since 1967\textsuperscript{40} and the Organization of News Ombudsmen (ONO) was formed in 1980. Modern day news ombudsmen, also known as public editors or reader representatives, are typically tasked with dealing with listeners, readers, or viewers regarding 'accuracy, fairness, balance, and good taste in news coverage.'\textsuperscript{41} The ombudsman will investigate the issue, attempt to find a solution, and at the very least provide an explanation of what caused the issue. Some news ombuds offer opinions or recommendations regarding the best way to resolve the particular issue, often openly criticizing the news outlet, an approach which is consistent with advocate ombuds standards. News ombudsmen offer a number of beneficial advantages to news organizations, including reducing libel lawsuits, strengthening the relationship with the public, and enhancing credibility.\textsuperscript{42} According to Jeffrey Dvorkin, former Executive Director of the Organization of News Ombudsmen, “Ombudsmen see the world differently. They are there to sort out the differences among the various critics, to engage with the public and to foster a culture inside the news organization to acknowledge that the public must be part of the journalistic process.”\textsuperscript{43}

VI. 2016 ADMINISTRATIVE CONFERENCE RECOMMENDATION 2016-5, “THE USE OF OMBUDS IN FEDERAL AGENCIES”

Background

More than twenty-five years ago, the Administrative Conference of the United States (ACUS), a small federal administrative agency which undertakes non-partisan research projects and then makes recommendations for the improvement of federal agency practices and processes, conducted a study of ombudsman programs in federal agencies, selecting for review six offices that were set up to help the public resolve problems arising in dealing with the government. That study served as the basis for the Administrative Conference’s Recommendation 90-2 (adopted in 1990) which urged “the President and Congress to support federal agency initiatives to create and fund an effective ombudsman in those agencies with significant interaction with the public” and provided guidance for the establishment and operation of federal ombudsman offices.\textsuperscript{44}

\textsuperscript{39} Characterizing News Ombuds as Advocates is somewhat artificial. News ombuds advocate on behalf of journalistic integrity and honesty/transparency in news.

\textsuperscript{40} Organization of News Ombudsmen, http://newsombudsmen.org/about-ono (last accessed March 3, 2016).

\textsuperscript{41} Id.


\textsuperscript{44} ACUS Recommendation 90-2, available at: https://www.acus.gov/recommendation/ombudsman-federal-agencies
Since that time, the number, prominence, and diversity of federal ombuds offices has grown dramatically. With urging from the Dispute Resolution Section Ombuds Committee, ACUS sponsored a new study in 2015 on the current status of ombuds in federal agencies. The study identified which federal agencies make use of ombuds offices, described the scope of their activities, identified best practices for the establishment and operation of ombuds offices, and recommended situations in which expanded use of ombuds may benefit agencies. The contractor selected to undertake the study (with a team of researchers that included prominent ombuds, lawyers, and academics) submitted its extensive (over 600 pages in length) Final Report, “A Reappraisal--The Nature and Value of Ombudsmen in Federal Agencies” to ACUS on November 14, 2016.45


Administrative Conference Recommendation 2016-5

Recommendation 2016-5 adds further support to both goals of the proposed resolution: it recognizes the value of ombuds programs and urges support for them by the President and Congress, and it encourages greater compliance with generally recognized standards for ombuds programs.

In particular, Recommendation 2016-5 states:

Federal ombuds now include multiple variations of both primarily externally-focused and primarily internally-focused ombuds (i.e., those who receive inquiries and complaints from persons within the agency). The individuals and offices can and do make a distinct and beneficial contribution to government effectiveness. While all forms of alternative dispute resolution embraced by the ADRA [Administrative Dispute Resolution Act] have the capacity to reduce litigation costs and foster better relationships, the ombuds alone affords the constituent and the agency the opportunity to learn about and address the issues before, in effect, they have been joined. Constituents and the agency are served by the ombuds’ skilled, impartial assistance in resolution, and the agency is served by the opportunity for critical early warning of specific and systemic issues.46

45 A copy of the Executive Summary of the Final Report is available at: https://www.acus.gov/sites/default/files/documents/PART%201.Executive%20Summary%2011.16.16_0.pdf. Both the Executive Summary and the other sections of the Final Report provide in-depth support for the recommendations that were then adopted by the Administrative Conference.

46 Administrative Conference Recommendation 2016-5 at 1-2.
Recommendation 2016-5 noted the challenging environment in which federal agencies now work, and observed that ombuds are “uniquely situated to provide both pertinent information and assistance in resolving issues to constituents and the agency alike,” all of which leads to greater trust, which it described as “a commodity without which government in a democratic society cannot function effectively.” The same observations could also be made about ombuds in virtually all of the other contexts in which ombuds programs have been created.

Recommendation 2016-5 addressed head-on the issue underlying the second aspect of the proposed resolution—the need for compliance with generally recognized standards—and its conclusion is unequivocally consistent with the language of the proposed resolution. The Recommendation discussion of this point (which also applies to the other contexts in which ombuds programs have been created), could very well serve as a summary of this report and deserves quoting at some length:

Although the functionality of the federal ombuds landscape is quite diverse, most federal ombuds share three core standards of practice— independence, confidentiality, and impartiality—and share common characteristics. The core standards are set forth in the standards adopted by the American Bar Association (ABA), the International Ombudsman Association (IOA), and the United States Ombudsman Association (USOA) though with some variations, particularly with respect to confidentiality. These organizations’ standards are generally followed, as applicable, and considered essential by the ombuds profession, both with and outside government. . . .

Most federal ombuds also share the following common characteristics: (1) Ombuds do not make decisions binding on the agency or provide formal rights-based processes for redress; (2) they have a commitment to fairness; and (3) they provide credible processes for receiving, reviewing, and assisting in the resolution of issues. The three core standards and these common characteristics, taken together, are central to the ombuds profession. (Emphasis in the original) (Citations and footnotes omitted.)

Indeed, Recommendation 2016-5 goes even further: it recommends that, in addition to the creation of new ombuds programs that comply with these standards, existing ombuds programs in federal agencies which do not comply should “align their office standards and practices with those included in this recommendation” or “consider modifying their title, where permitted, to avoid any confusion.” It is precisely this point that the proposed resolution seeks to address: the American Bar Association should encourage the greater use and development of ombuds programs that comply with generally accepted standards.

47 Id. at 3
48 Id.
49 Id. at 3-4
50 Id. at 3 and 6.
VII. CONCLUSION

An effective ombuds office serves as an alternative channel to assist people in resolving conflicts and in surfacing their concerns without fear of retaliation. Despite the many benefits offered by an effective ombuds office, many governments and organizations have not yet created ombudsman programs. This resolution is intended to call attention to and encourage the use of a broad range of ombuds functions, which likewise employ a range of ADR processes to effectively address systemic and individual issues. The ever-increasing need for mechanisms to resolve individual and systemic conflicts is recognized by multiple entities, including the media, universities, government, leading non-profit agencies and Fortune 500 companies. Such offices serve increasingly important societal interests, and as such, the value of the ombuds function in all sectors cannot be overstated. However, to maximize the effectiveness of these programs they should be created in such a manner that they will be able to operate consistently with the generally recognized standards that experience has shown are critical to effective ombuds programs.

Respectfully submitted,

Nancy Welsh, Chair
Section of Dispute Resolution
August, 2017
GENERAL INFORMATION FORM

Submitting Entity: Section of Dispute Resolution

Submitted By: Nancy Welsh, Chair

1. **Summary of Resolution.**

This resolution encourages the greater use and development of ombuds programs, consistent with recognized standards of practice, as an effective means of preventing, managing, and resolving individual and systemic conflicts and disputes.

2. **Approval by Submitting Entity.**

Yes. The proposed resolution was approved by the Dispute Resolution Section Council on February 4, 2017.

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

Yes. The ABA previously adopted four resolutions from 1969 to 2004 supporting the greater use of ombuds in a variety of sectors and functions. However, this resolution is the first proposal since 2004 and addresses definitional issues in the previous resolutions while also encouraging the use of generally recognized standards.

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

The proposed resolution builds upon four existing ABA resolutions adopted by the House of Delegates from 1969 to 2004 supporting the increased use of ombuds in a variety of sectors and functions. These include (1) a resolution adopted in February 1969 recommending that state and local governments consider establishing an ombudsman authorized to inquire into administrative action and to make public criticism, consistent with twelve essential characteristics; (2) a related resolution adopted in August 1971 recommending several amendments to the 1969 resolution; (3) ABA Resolution 107D, adopted in August 2001, supporting the greater use of ombuds to receive, review and resolve complaints involving public or private entities and endorsing the Standards for the Establishment and Operation of Ombuds Offices dated August 2001; and (4) ABA Resolution 115, adopted in February 2004, endorsing revised Standards for the Establishment and Operation of Ombuds Offices.

5. **If this is a late report, what urgency exists which requires action at this meeting of the House?** N/A
6. **Status of Legislation.** (If applicable)

During the 115th Congress, at least fourteen separate bills have been introduced that would establish or reform ombudsman positions in different federal agencies. However, the proposed resolution supports the greater use of ombuds in general and does not expressly address any of those bills or any other bills that may be proposed later in the 115th Congress. The proposed resolution, however, is entirely consistent with Recommendation 2016-5 adopted by the Administrative Conference of the United States on December 14, 2016 which encourages greater use of ombuds programs and that both new and existing programs should adhere to generally accepted standards.

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

On an ongoing basis, the Section of Dispute Resolution and the ABA Governmental Affairs Office will examine the various ombuds-related bills pending in Congress and determine whether ABA advocacy letters should be submitted in connection with any of those bills.

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

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

10. **Referrals.**

    Referred to all Section, Division and Forum staff representatives including State and Local Government Law, Litigation, TTIPS, Government and Public Sector Lawyers, GP Solo, Young Lawyers Division, Law Student Division and Administrative Law Section.

11. **Contact Name and Address Information:**

    Mr. Charles Howard, Chair, Section of Dispute Resolution Ombuds Committee
    Shipman and Goodwin LLP
    1 Constitution Plaza
    Hartford, CT, 06103-1919
    Phone: 860-251-5616
    choward@goodwin.com

12. **Contact Name and Address Information:**

    Mr. James Alfini
    South Texas College of Law at Houston
    Room 636T
    San Jacinto St.
    Houston, TX 77002
    Phone: 713-927-0584
    jalfini@stcl.edu
EXECUTIVE SUMMARY

1. Summary of the Resolution

   This resolution encourages the greater use and development of ombuds programs, consistent with recognized standards of practice, as an effective means of preventing, managing, and resolving individual and systemic conflicts and disputes.

2. Summary of the Issue that the Resolution Addresses

   The ever-increasing need for mechanisms to resolve individual and systemic conflicts is recognized by multiple entities, including the media, universities, government, leading non-profit agencies and Fortune 500 companies, and this proposal once again encourages the expanded use of ombudsman programs. During the most recent legislative cycle, a number of bills were introduced to establish or reform ombudsman positions in different federal agencies. The proliferation of Ombudsman programs since the 2004 resolution, both domestically and internationally, in conditions that did not always recognize or adhere to generally accepted ombuds standards, led the Ombuds Committee of the ABA Dispute Resolution Section to draft this resolution. The proposed resolution is consistent with Recommendation 2016-5 adopted by the Administrative Conference of the United States on December 14, 2016 which encourages greater use of ombuds programs and that both new and existing programs should adhere to generally accepted standards.

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

   The proposed resolution language encourages greater use of ombuds programs in keeping with recognized standards of practice. The proposed resolution is not intended to favor any particular ombuds category or set of standards. Instead, it is intended to encourage members of the ABA, lawmakers, policy makers, and others to deepen their understanding of the different roles ombuds play, and how these ombuds functions relate to conflict management systems, government operations, and societal interests at large and to then implement a program that will best serve the identified needs.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA

   The Dispute Resolution Section is not aware of opposition from any other section or division or from other sources.
RESOLVED, That the American Bar Association reaffirms its opposition to restructuring the United States Court of Appeals for the Ninth Circuit because there is no compelling empirical evidence of adjudicative or administrative dysfunction in the existing structure; and

FURTHER RESOLVED, That the American Bar Association supports ongoing efforts by the United States Court of Appeals for the Ninth Circuit and other federal courts to utilize technological and procedural innovations in order to continue to enable them to handle caseloads efficiently while maintaining coherent, consistent law in their respective jurisdictions.
REPORT

I. Introduction

The federal circuit courts of appeals were established by Congress in 1891.\(^1\) Over time, the number of circuits has increased from the original nine circuits to the current 12 circuits. The federal circuits vary in size (i.e., the number of judges comprising the courts of appeals and the total number of judicial officers within the circuit), have differing caseloads and cover differing numbers of states, territories, residents and total geography. Proposals are occasionally made to divide the existing circuits,\(^2\) and on a few occasions such proposals have been adopted, e.g., the division of the old Fifth Circuit into the current Fifth Circuit and the Eleventh Circuit. Like the emergence of cicadas from the soil, periodic proposals have arisen in recent decades to split the Court of Appeals for the Ninth Circuit. Characterized by one of its critics as a “supersized appellate court,”\(^3\) the Ninth Circuit has been said to be in need of division for several reasons, including the oft-cited assertion that the circuit allegedly has a “high rate of reversal” by the United States Supreme Court. Current legislative proposals focus on the large geography of the circuit, promising that division of the circuit will “bring justice closer to the people.”\(^4\)

The proponents of the Resolution have studied all of the legislative proposals for splitting the Ninth Circuit and the relevant factual record. The proponents urge the American Bar Association (ABA) to oppose these proposals because there is no compelling empirical evidence of either adjudicative or administrative dysfunction in the existing structure that would warrant a split. The proponents believe that adoption of the Resolution is necessary because the House of Delegates needs to articulate clear policy on this important issue based upon the current factual record. The proponents also ask the House to adopt policy supporting the ongoing efforts of the Ninth Circuit and other federal courts to utilize technological and procedural innovations

---


2 While proposals to divide or restructure the circuits usually focus on the appellate court and the states that would be included in any new circuits, division would also result in the realignment of the lower courts and restructuring of the administrative and ancillary functions within the court system.


4 See the title of the House Judiciary Subcomm. Hearing, supra note 2. Some have suggested that the true objective of these recurring proposals to divide the Ninth Circuit is to “gerrymander” a circuit whose decisions are considered by some to be “too liberal.” See, e.g., House Judiciary Subcomm. Hearing, supra note 2, https://www.c-span.org/video/?425486-1/ninth-circuit-court-appeals-judges-testify-court-restructuring (transcript of opening statement at 6:25 by John Conyers, Jr., Ranking Member, House Comm. on the Judiciary, and transcript of statement at 15:34 by Jerrold Nadler, Ranking Member, Subcomm. on Courts, Intellectual Property, and the Internet). The authors take no position on this issue.
to enable the courts to handle caseloads efficiently while maintaining coherent, consistent law within their respective jurisdictions.

II. Past Congressional Inquiries and Legislative Proposals to Restructure the Ninth Circuit

The federal courts of appeals have long been subject of study, primarily because of concerns about the persistent growth in the appellate caseload. The Ninth Circuit—the largest circuit in geographic size, population, judgeships, and annual caseload—has been the subject of numerous studies and proposals over the years.

In 1972, Congress created the Hruska Commission, formally called the Commission on Revision of the Federal Court Appellate System, to study the federal appellate system. In 1975, the Hruska Commission issued its final report, which included recommendations for dividing both the Fifth and Ninth Circuits (then composed of 15 and 13 judges respectively) on the basis of an announced preference for smaller circuits. The ABA endorsed those recommendations.

At that time, Congress declined to divide the circuits and instead implemented other Hruska Commission recommendations. These included substantially increasing the number of authorized judgeships in both circuits and authorizing any circuit with 15 or more judges to use limited en banc panels or to divide into administrative units to deal with rising caseloads. The Ninth Circuit chose to adopt these new procedures; the judges of the Fifth Circuit preferred division.

In 1980, Congress divided the Fifth Circuit by placing Florida, Georgia, and Alabama into a new Eleventh Circuit. This was the second (and last) time that Congress has

---

5 In 1960, almost 4,000 appeals were filed in the regional courts of appeals, which were composed of 68 judges. In 1970, almost 12,000 appeals were filed and the number of authorized judgeships increased to 97. By 1980, appeals almost doubled and authorized judgeships increased to 132. In 1990, there were 40,898 appeals filed and 156 judgeships. The number of authorized judgeships increased to 167 in 1991 as a result of an omnibus judgeship bill. No additional judgeships have been created since then, despite more growth in caseload. In 2016, over 61,000 appeals were filed.

6 When it was established in 1891, the Ninth Circuit included California, Idaho, Montana, Nevada, Oregon and Washington. Hawaii, Arizona, Alaska, Guam and the Northern Mariana Islands were added subsequently. Fed. Judicial Ctr., History of the Federal Judiciary, http://www.fjc.gov/history/home.nsf/page/courts_coa_circuit_09.html. The total number of authorized court of appeals judgeships has increased from 2 in 1891 to 29 today. Id.


divided a circuit since 1891, when it created the system of regional circuit courts of appeals as we know them today.⁰

Although the ABA originally supported the Hruska Commission’s recommendation to split both the Fifth and Ninth Circuits, it rescinded that position in 1990 with respect to the Ninth Circuit, on the basis that procedural changes and court management innovations allowed the circuit to manage its rising caseload without sacrificing quality or timeliness.

In 1993, at the request of the Federal Courts Study Committee, which had been established three years earlier by Congress, the Federal Judicial Center (FJC) undertook a 15-month examination of the appellate court system and issued a report titled Structural and Other Alternatives for the Federal Courts of Appeals. The FJC concluded that the expansion of federal jurisdiction without a concomitant increase of resources was creating a burden for the federal courts of appeals and that it did not appear to be a stress that would be significantly relieved by structural changes to the appellate system. Its report stated that it could not “conclude, as some assert, that the justness of appellate outcomes has been detrimentally affected by caseload volume.”¹¹ It advocated for non-structural efforts to deal with the problem of increased volume.

In 1997, Congress created the Commission on Structural Alternatives for the Federal Courts of Appeals, chaired by Justice Byron R. White (the “White Commission”), to study the structure and alignment of the federal appellate system, with particular focus on the Ninth Circuit, and to submit recommendations on changes in circuit boundaries or structure to the President and Congress.¹² The White Commission’s report to Congress concluded that the Ninth Circuit should not be split:

There is no persuasive evidence that the Ninth Circuit (or any other circuit, for that matter) is not working effectively, or that creating new circuits will improve the administration of justice in any circuit or overall. Furthermore, splitting the circuit would impose substantial costs of administrative disruption, not to mention the monetary costs of creating a new circuit. Accordingly, we do not recommend to Congress and the President that they consider legislation to split the circuit.¹³

---

⁰ The first split occurred in 1929, only after almost unanimous consensus was reached among members of Congress and judges on how to divide the circuit. A new Tenth Circuit was carved out of five contiguous westernmost states of the existing Eighth Circuit. Tenth Circuit Act of 1929, ch. 363, 45 Stat. 1346 (1929). The ABA supported this division.


The White Commission noted that there were benefits from the current makeup of the Ninth Circuit, including the development of a consistent body of law that applies to the entire western region of the United States and governs relations with the other nations of the Pacific Rim. It also noted financial and practical advantages of the circuit's administrative structure.

The White Commission nevertheless recommended that Congress restructure the Ninth Circuit into three regionally based adjudicative divisions. The ABA opposed this recommendation on the ground that the only rationale for the recommendation—a subjective preference for smaller decisional units—was an insufficient reason to restructure a judicial circuit. Congressional reaction to the White Commission's report was tepid, and legislation introduced during the 106th Congress by Senator Frank Murkowski (R-AK) received minimal attention.

During the 107th Congress, bills were introduced in the House and Senate by Representative Simpson (R-ID) and Senator Murkowski to split the Ninth Circuit into two circuits, with Arizona, California, and Nevada remaining in the Ninth Circuit and Alaska, Hawaii, Oregon, Washington, Idaho, and Montana forming a new Twelfth Circuit. Hearings were held, but no further action was taken.

During the 108th Congress, bills proposing three different ways to divide the Ninth Circuit were introduced. Representative Simpson reintroduced his previous bill; he and Senator Murkowski introduced bills with only California and Nevada remaining in the Ninth Circuit, and Representative Renzi (R-AZ) and Senator Ensign (R-NV) introduced bills containing a novel three-way split. Although the House Judiciary Committee had not held a hearing on the three-way circuit restructuring proposal, House members attempted to secure the bill's passage by attaching it to an omnibus judgeship bill that had already passed the Senate. The strategy succeeded in the House, but failed in the Senate.

During the 109th Congress, seven circuit restructuring bills were introduced. Three bills (introduced by Senators Murkowski and Ensign and Representative Simpson) proposed keeping California, Guam, Hawaii, and the Northern Mariana Islands in the Ninth Circuit and placing the remaining states in the new Twelfth Circuit. A separate House bill (introduced by Representative Sensenbrenner (R-WI)) combined Representative Simpson's bill with the omnibus judgeship bill from the previous Congress. With 10 cosponsors—more than any other circuit-splitting bill has garnered to date—it was reported to the House, but never scheduled for a vote.

During the 110th–114th Congresses, similar bills were introduced by many of the same members, but none received any action.

---

14 The ABA House of Delegates adopted policy in August 1999 opposing the recommendations of the White Commission.

15 See Appendix A and Appendix B for visual representations of the circuit realignments proposed by the bills discussed in this report.
III. Current Congressional Activity

In the current 115th Congress, four circuit restructuring bills have been introduced. S. 295 and H.R. 196, introduced by Senator Daines (R-MT) and Representative Simpson respectively, share the same circuit reconfiguration but differ in other details. These bills would retain California, Guam, Hawaii, and the Northern Mariana Islands in the Ninth Circuit and assign the other states to the new Twelfth Circuit. Representative Biggs (R-AZ) has introduced H.R. 250, which would retain Oregon and Washington along with California, Guam, Hawaii, and the Northern Mariana Islands in the Ninth Circuit, and assign the other states to the new Twelfth Circuit. S. 276, introduced by Senator Flake (R-AZ), would tweak that arrangement a bit by assigning Washington to the new Twelfth rather than the Ninth Circuit. In addition to these realignment bills, legislation to establish a new Commission on Structural Alternatives for the Federal Courts of Appeals has been introduced by Senator Sullivan (R-AK).

IV. Existing ABA Policy

One of the primary goals of the ABA is to promote improvements in the administration of justice. It is therefore not surprising that the ABA has examined the issue of restructuring the Ninth Circuit on multiple occasions over the past 50 years. Originally supportive of realignment of the Ninth Circuit in the 1970s, the ABA continued to examine the issue over the next several decades in light of the emergence of technological developments that increasingly bridged geographical distances, the successful use of limited en banc review panels, and the circuit’s innovative use of case management techniques. This culminated in the ABA rescinding its earlier position and adopting policies in the 1990s opposing division of the Ninth Circuit.\(^\text{16}\) Since then, the ABA has periodically reviewed new proposals to split the circuit.\(^\text{17}\) On March 16, 2017, the ABA submitted testimony, based upon previously adopted policy, opposing the current legislative proposals to restructure the Ninth Circuit at a hearing of the Subcommittee on Courts, Intellectual Property and the Internet of the House Committee on the Judiciary.\(^\text{18}\)

V. No Compelling Evidence Exists that the Ninth Circuit Needs Restructuring

The ABA has found no compelling evidence to support claims that the Ninth Circuit is failing to deliver quality justice.\(^\text{19}\) The perceived problems identified by supporters of

\(^{16}\) In 1998, the ABA Board of Governors adopted a resolution that opposed restructuring of the Ninth Circuit “in view of the absence of compelling empirical evidence to demonstrate adjudicative or administrative dysfunction.” A resolution adopted by the ABA House of Delegates in 1999 opposed enactment of legislation that mandated restructuring of the Ninth Circuit into “adjudicative divisions” in view of the “absence of compelling evidence to demonstrate adjudicative dysfunction.”

\(^{17}\) The ABA last expressed opposition to circuit restructuring in a statement submitted to the Senate Judiciary Committee on September 20, 2006, for a hearing on proposals to split the Ninth Circuit.

\(^{18}\) See House Judiciary Subcomm. Hearing, supra note 2.

\(^{19}\) The ABA’s findings are consistent with recent analyses and studies conducted by the Ninth Circuit. See House Judiciary Subcomm. Hearing, supra note 2 (written statements of Sidney R. Thomas, Chief Judge, and Alex Kozinski and Carlos T. Bea, Circuit Judges, United States Court of Appeals for the Ninth Circuit).
the legislation do not justify restructuring and would not be remedied by any of the various proposed circuit divisions. Two examples will demonstrate this disconnect between perception and intent.

A. **Delay and Backlog**

Critics often complain that the circuit has a backlog of pending cases and is slow to process new cases. Even if true, neither of these concerns would be resolved by realignment. Circuit division does not reduce caseload or eliminate backlog; it only reallocates it. Circuit size is not the critical factor in appellate delay—too many vacancies, too few authorized judgeships, and national policy decisions that increase workload without providing concomitant resources are the prime causes of delay and backlog.

The Ninth Circuit does indeed have the slowest median processing time for cases terminated on their merits, but that one statistic does not convey very much about the way the Ninth Circuit is handling its caseload. Statistics compiled by the Administrative Office of the U.S. Courts (AO) for the 12-month period ending June 30, 2016\(^{20}\) show that in recent years the Ninth Circuit has been getting ahead of the curve by terminating more cases than are commenced. It is also notable that the circuit’s disposition times have steadily improved over the past decade. In fact, Judge Sidney R. Thomas, Chief Judge of the Ninth Circuit, reported that case processing time has been reduced by almost 35%. Furthermore, while the circuit may lag behind others in the median time from the date of filing to final disposition, once cases are ready for oral argument, they move expeditiously through the system and are closed in record time. The Ninth Circuit was the second fastest circuit in terms of median time from the date of the oral argument to final disposition with a rate of 1.1 months. It also shared with four other circuits the distinction of having the fastest median time from submission on the briefs to disposition—a record-breaking 0.2 months.

One of the reasons that the Ninth Circuit has been able to function so well despite its growing caseload is because it has been on the forefront of utilizing technology to enhance administrative efficiency. In fact, the Ninth Circuit was the first to institute automated docketing and electronic web-based filing. It also developed and uses to great advantage an automated issue identification system that inventories cases in a way that flags potential conflicts for early resolution and facilitates efficient resolution of cases that share the same central issue. The system also enables the court to issue pre-publication reports to court members to advise them in advance of the filing of every published opinion and to identify pending cases that might be affected by the lead opinion. In addition to using technology effectively, the Ninth Circuit has introduced case management solutions, such as the creation of the positions of Appellate Commissioner and Circuit Mediator, to help resolve cases that do not require resolution by an Article III judge. These programs, available to the circuit because of its aggregate resources, have produced administrative efficiencies that have improved case management and increased productivity.

\(^{20}\) The AO’s statistical tables are available on its website at http://www.uscourts.gov/statistics-reports.
Moreover, dividing the Ninth Circuit would not be a likely cure for whatever delay problems exist. Wherever California goes, with or without any other states, the system will be overburdened unless and until new judgeships are created. Indeed, one of the primary academic proponents of dividing the Circuit admitted in his testimony before the Congress that the purported benefits that he believes would flow from splitting the Circuit could not be achieved without dividing California and placing the state in two circuits.\textsuperscript{21} Because California has far fewer judges on the Ninth Circuit than its proportion of the cases in the Circuit, splitting off other states from California would effectively increase the caseload for the judges that remained in the Circuit with California.

The Ninth Circuit is also the only federal circuit that currently has live streaming of its video arguments. In commenting on the leadership role that the circuit has taken in allowing cameras in the courtroom, Chief Judge Thomas recently remarked that “[t]he more transparent we are the more confidence people will have in our judicial institutions.”\textsuperscript{22}

B. Reversal Rate

Contrary to often-repeated statements, the rate of reversal of Ninth Circuit decisions by the Supreme Court is not the highest of all the circuits and, even if it were, there is no evidence that size has any bearing on reversal rates.\textsuperscript{23}

The Supreme Court, not surprisingly, reverses more cases than it affirms. According to an analysis by Politifact, between 2010 and 2015, the Supreme Court reversed about 70\% of the cases it reviewed.

During the same time period, 79\% of the Ninth Circuit cases were reversed, and the Sixth Circuit, with a reversal rate average of 87\%, had the highest reversal rate.\textsuperscript{24} Our review of reversal rates, as reported by SCOTUSblog, confirms these statistics.\textsuperscript{25} Further proof that reversal rate has nothing to do with the size or volume of cases decided by a circuit is readily

\begin{footnotesize}
\footnotesize
\begin{itemize}
\item \textsuperscript{21} House Judiciary Subcomm. Hearing, supra notes 2 and 4 (transcript of testimony at 1:57:28 by Professor Brian T. Fitzpatrick).
\item \textsuperscript{23} Indeed, one academic proponent of splitting the Ninth Circuit conceded in recent written testimony submitted to Congress that “the existing studies are inconclusive” on whether the “size of the Circuit [is] one of the causes of the high reversal rate.” House Judiciary Subcomm. Hearing, supra note 2 (written statement of Brian T. Fitzpatrick, Professor, Vanderbilt Law School).
\item \textsuperscript{24} See Lauren Carroll, \textit{No, the 9th Circuit isn’t the ‘most overturned court in the country,’ as Hannity says}, Politifact (Feb. 10, 2017), http://www.politifact.com/punditfact/statements/2017/feb/10/sean-hannity/no-9th-circuit-isnt-most-overturned-court-country/.
\end{itemize}
\end{footnotesize}
apparent when one reviews reversal rates year-by-year; there simply is no discernable
correlation.

VI. Views of Judges and Lawyers of the Ninth Circuit Count

We believe that the views of judges and the lawyers who practice daily before the
courts in the Ninth Circuit should be accorded great deference. In his testimony before
Congress, Ninth Circuit Chief Judge Sidney R. Thomas stated: “I oppose division of the Ninth
Circuit. Circuit division would have a devastating effect on the administration of justice in the
western United States. A circuit split would increase delay, reduce access to justice, and waste
taxpayer dollars. Critical programs and innovations would be lost, replaced by unnecessary
bureaucratic duplication of administration. Division would not bring justice closer to the people;
it would increase the barriers between the public and the courts.”26 In his testimony, former
Chief Judge Alex Kozinski of the Ninth Circuit stated: “Our geographic size has forced us to
experiment and innovate. The size of our judicial corps has given us the resources to develop
and deploy innovative techniques. Because circuits are funded based on the number of
judicial positions they have, we have the resources with which to hire staff and purchase
equipment that will bring our courts closer to the people we serve.”27 In his testimony, Judge
Carlos T. Bea of the Ninth Circuit stated: “In conclusion, I think you should take into
consideration . . . the views [of] people on the ground—the litigants practitioners and judges in
the circuit. The overwhelming majority of the people directly involved is against a split of the
Circuit. Talk to the people who deal with the issue daily, and I think you will come around to
agreement with them.”28

As the Ninth Circuit judges who appeared before the Congress testified, there are
substantial advantages to the region being under a consistent body of case law. Technology
companies present a good example. The tech corridors in Seattle, Silicon Valley, Los Angeles
and Phoenix are presently under a consistent regime that promotes understanding and balance for
the players in each location. Settled laws promote economic growth. Balkanized or disparate
interpretations are not good for commerce.

In the past, Congress has agreed that the views of the affected legal community
carry great weight and has refrained from using its power to restructure a circuit unless there was
consensus within Congress and the affected legal community that it was absolutely necessary,
and there was agreement over how best to reconfigure the circuit. There are, of course, some
judges in the circuit who support division, but we surmise that they comprise a scant minority.
While we do not know the exact number of judges of the Ninth Circuit that oppose division, we
do know that the past three chief judges of the Ninth Circuit, spanning back to 2000, have
strongly opposed division and have been vocal in their support for the benefits derived from the
circuit’s size. We also know that neither the Judicial Council of the Ninth Circuit nor the

26 House Judiciary Subcomm. Hearing, supra note 2 (written statement of Chief Judge Thomas).
27 Id. (written statement of Judge Kozinski).
28 Id. (written statement of Judge Bea).
Judicial Conference of the United States supports restructuring. These facts strongly suggest that there is no groundswell of support among the judges of the Ninth Circuit or elsewhere in the legal community for division.

In addition to the ABA and its thousands of members who practice daily before the courts of the Ninth Circuit, many other segments of the organized bar have also spoken out in opposition to splitting the circuit. In 2006, all but one of the state bar associations that had adopted a policy position on the issue opposed division, and several specialty bars, including the Federal Bar Association, likewise opposed division. Outside of those state and local bar associations that are co-sponsors of this Resolution, we do not have statistics with regard to the current positions of the organized bar in the Ninth Circuit but we are in the process of updating our information and will share the results as soon as possible.

Critics often mention that large circuits suffer from a loss of collegiality and cite it as a reason to divide the Ninth Circuit. While one could just as easily argue that collegiality is fostered by the diversity of voices in a large circuit, the judges of the Ninth Circuit are in the best position to comment on their working relationships.

VII. Circuit Restructuring Is a Costly Proposition

This is not a minor point, especially at a time when budgets continue to be slashed and the national deficit continues to grow. Splitting the circuit would not only result in the loss of efficiencies mentioned earlier, it would also result in steep startup costs (especially if new courthouses needed to be constructed) and duplicative overhead costs. In 2006, the AO estimated that startup costs for a two-way split could run as much as $96 million, with recurring annual costs ranging from $13–$16 million, and that a three-way split could cost as much as $134 million initially and an additional $22 million annually thereafter. The potential cost of circuit restructuring alone counsels against division, absent verifiable compelling evidence of dysfunction.

VIII. Conclusion

In conclusion, we respectfully request that the House of Delegates adopt the Resolution, thereby (i) opposing restructuring of the United States Court of Appeals for the Ninth Circuit because there is no compelling empirical evidence of adjudicative or administrative dysfunction in the existing structure and (ii) supporting ongoing efforts of the United States Court of Appeals for the Ninth Circuit and other federal courts to utilize technological and procedural innovations in order to continue to enable them to handle caseloads efficiently while maintaining coherent, consistent law in their respective jurisdictions.

Respectfully submitted,

Michael H. Reed.
Chair, Subcommittee on Federal Courts of the
Standing Committee on the American Judicial System
August 2017
APPENDIX A
Current Proposals to Divide the 9th Circuit

115th Congress
H.R. 250
(Biggs, R-AZ)

114th Congress
H.R. 4457
(Shumlin, R-VT)
S.2490
(Flake, R-AZ)

115th Congress
S. 295 (Daines, R-MT)
20 14 Judgeships split
H.R. 196 (Simpson, R-ID)
25-9 Judgeships split

114th Congress
H.R. 166 (Simpson, R-ID)
S. 2477 (Daines, R-MT)

113th Congress
H.R. 144 (Simpson, R-ID)

11th Congress
H.R. 191 (Simpson, R-ID)
S. 1727 (Ensign, R-NV)

110th Congress
H.R. 221 (Simpson, R-ID)

109th Congress
H.R. 3125 (Simpson, R-ID)
S. 1845 (Ensign, R-NV)
S. 1296 (Murkowski, R-AK)

KEY
= New 9th Circuit
= New 12th Circuit
Earlier Proposals to Divide the 9th Circuit

109th Congress
H.R. 2112
(Simpson, R-ID)

108th Congress
H.R. 1033
(Simpson, R-ID)

108th Congress
S. 562
(Murkowski, R-AK)

109th Congress
H.R. 211 (Simpson, R-ID)
S. 1301 (Ensign, R-NV)

108th Congress
H.R. 4247 (Rehut, R-AZ)
S. 2278 (Ensign, R-NV)

**KEY:**
- = New 9th Circuit
- = New 12th Circuit
- = New 13th Circuit
GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on the American Judicial System

Submitted By: Michael H. Reed, Chair, SCAJS Subcommittee on Federal Courts

1. Summary of Resolution(s).

This Resolution opposes restructuring the United States Court of Appeals for the Ninth Circuit because there is no compelling empirical evidence of adjudicative or administrative dysfunction in the existing structure. It further supports ongoing efforts by the Ninth Circuit and other federal courts to utilize technological and procedural innovations in order to continue to enable them to handle caseloads efficiently while maintaining coherent, consistent law in their respective jurisdictions.

2. Approval by Submitting Entity.

The Standing Committee on the American Judicial System approved this Resolution by email on April 25, 2017. The Section of Litigation Council approved this Resolution on May 6, 2017. The Tort Trial and Insurance Practice Section Council approved this Resolution on April 29, 2017. The Criminal Justice Section Council approved this Resolution on May 6–7, 2017. The Washington State Bar Association Board of Governors approved this Resolution on May 19, 2017. The Hawaii State Bar Association approved this Resolution on May 25, 2017. The King County Bar Association approved this Resolution on May 19, 2017. The Beverly Hills Bar Association approved this Resolution on May 23, 2017. The Judicial Division Council provided notice on May 3, 2017 of its support for this Resolution. The Standing Committee on Legal Assistance to Military Personnel provided notice of its support on May 9, 2017.

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

A similar resolution has not been submitted previously.

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

This Resolution would build upon and enhance existing ABA policy, but would not change any current ABA policy.

Originally supportive of realignment of the Ninth Circuit in the 1970s, the ABA continued to examine the issue over the next several decades in light of the emergence of technological developments that increasingly bridged geographical distances, the successful use of limited en banc review panels, and the Ninth Circuit's innovative use of case management techniques. This culminated in 1990, when the House of Delegates adopted Resolution 123 at the Annual meeting, rescinding its earlier position in support of realignment of the Ninth Circuit. In 1998, the ABA Board of Governors adopted a resolution that opposed restructuring of the Ninth Circuit.
“in view of the absence of compelling empirical evidence to demonstrate adjudicative or administrative dysfunction.” Resolution 110A, adopted by the ABA House of Delegates at the Annual Meeting in 1999, opposed enactment of legislation that mandated restructuring of the Ninth Circuit into “adjudicative divisions” in view of the “absence of compelling evidence to demonstrate adjudicative dysfunction.”

Since then, the ABA has periodically reviewed new proposals to split the circuit. The ABA last expressed opposition to circuit restructuring in a statement submitted to the Senate Judiciary Committee on September 20, 2006, for a hearing on proposals to split the Ninth Circuit. On March 16, 2017, the ABA submitted testimony, based upon previously adopted policy, opposing the current legislative proposals to restructure the Ninth Circuit at a hearing of the Subcommittee on Courts, Intellectual Property and the Internet of the House Committee on the Judiciary.

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

N/A

6. Status of Legislation. (If applicable)

In the current 115th Congress, four circuit restructuring bills have been introduced. S. 295 and H.R. 196, introduced by Senator Daines (R-MT) and Representative Simpson (R-ID) respectively, share the same circuit reconfiguration but differ in other details. These bills would retain California, Guam, Hawaii, and the Northern Mariana Islands in the Ninth Circuit and assign the other states to the new Twelfth Circuit. Representative Biggs (R-AZ) has introduced H.R. 250, which would retain Oregon and Washington along with California, Guam, Hawaii, and the Northern Mariana Islands in the Ninth Circuit, and assign the other states to the new Twelfth Circuit. S. 276, introduced by Senator Flake (R-AZ), would tweak that arrangement a bit by assigning Washington to the new Twelfth rather than the Ninth Circuit. As of the date of filing this Form, the Senate bills have been read twice and referred to the Committee on the Judiciary and the House bills have been referred to the Subcommittee on Courts, Intellectual Property, and the Internet.

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

The adoption of this Resolution will enhance the ability of the ABA to oppose the restructuring of the Ninth Circuit and to support technological and procedural innovations by the federal courts.

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

None.

9. Disclosure of Interest. (If applicable)

N/A.
10. **Referrals.**

Business Law Section  
Criminal Justice Section (Co-Sponsor)  
Government and Public Sector Lawyers Division  
Judicial Division (Supporter)  
Judicial Division Appellate Judges Conference  
Judicial Division Lawyers Conference  
Judicial Division National Conference of Federal Trial Judges  
Law Practice Division  
Section of Administrative Law and Regulatory Practice  
Section of Intellectual Property Law  
Solo, Small Firm and General Practice Division  
State and Local Government Law Section  
Tort Trial & Insurance Practice Section (Co-Sponsor)  
Young Lawyers Division  
Standing Committee on Election Law  
Standing Committee on Legal Aid and Indigent Defendants  
Standing Committee on Legal Assistance for Military Personnel (Supporter)  
Commission on Immigration  
Alaska Bar Association  
State Bar of Arizona  
State Bar of California  
Hawaii State Bar Association (Co-Sponsor)  
Idaho State Bar  
State Bar of Montana  
State Bar of Nevada  
Oregon State Bar  
Washington State Bar Association (Co-Sponsor)  
Guam Bar Association  
Commonwealth of the Northern Mariana Islands Bar Association  
King County Bar Association (Co-Sponsor)  
Beverly Hills Bar Association (Co-Sponsor)

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

Michael H. Reed  
Chair, SCAJS Subcommittee on Federal Courts  
Pepper Hamilton LLP  
3000 Two Logan Square  
18th and Arch Streets  
Philadelphia, PA 19103-2799  
Office: (215) 981-4416  
reedm@pepperlaw.com
12. **Contact Name and Address Information.** (Who will present the report to the House?
Please include name, address, telephone number, cell phone number and e-mail address)

Michael H. Reed  
Chair, SCAJS Subcommittee on Federal Courts  
Pepper Hamilton LLP  
3000 Two Logan Square  
18th and Arch Streets  
Philadelphia, PA 19103-2799  
Office: (215) 981-4416 Cell (215) 901-4573  
reedm@pepperlaw.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution opposes restructuring the United States Court of Appeals for the Ninth Circuit because there is no compelling empirical evidence of adjudicative or administrative dysfunction in the existing structure. It further supports ongoing efforts by the Ninth Circuit and other federal courts to utilize technological and procedural innovations in order to continue to enable them to handle caseloads efficiently while maintaining coherent, consistent law in their respective jurisdictions.

2. Summary of the Issue that the Resolution Addresses

There is no compelling empirical evidence of either adjudicative or administrative dysfunction in the existing structure of the United States Court of Appeals for the Ninth Circuit that would warrant a split. Nevertheless, members of Congress continue to propose splitting the Ninth Circuit without justification.

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

This Resolution clarifies the ABA's position and enhances the ABA's ability to oppose restructuring of the United States Court of Appeals for the Ninth Circuit absent compelling evidence justifying restructuring.

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

None known at the time this Summary was prepared.
RESOLVED, That the American Bar Association urges the President to sign and the Senate to approve ratification of the Inter-American Convention on Protecting the Human Rights of Older Persons, approved by the General Assembly of the Organization of American States on June 15, 2015.
REPORT

On June 15, 2015, the General Assembly of the Organization of American States (OAS) approved the Inter-American Convention on Protecting the Human Rights of Older Persons during the General Assembly of the institution. This resolution calls on the President of the United States to sign the Inter-American convention and on the Senate to approve ratification of the convention.

The purpose of the Convention is to promote, protect, and ensure the recognition and the full enjoyment and exercise, on an equal basis, of all human rights and fundamental freedoms of older persons in the Americas in order to contribute to their full inclusion, integration and participation in society. As of March 2017, the convention has been signed by the governments of Argentina, Bolivia, Brazil, Chile, Costa Rica and Uruguay. The full text of the Convention can be accessed at: www.oas.org/en/sla/dil/inter_amERICAN_treaties_A-70_hUMAN_RIGHTSOLDER_PERSONS.asp.

This resolution calls on the United States to sign and ratify the convention. We know from experience that a rights treaty is not a magic bullet, but it will serve as a very important tool to bring about a better future for older people. The rationale for the convention rests on a recognition that, while all existing conventions addressing human rights and fundamental freedoms apply to older persons, they lack specificity and coherence in addressing the special circumstances of older persons as a group; and in their enforcement, they have consistently been inadequate in protecting the human rights deficiencies experienced by older persons.

Current Landscape of Human Rights and Aging

The need for a convention on the human rights of older persons is driven both by demographic trends which make increasing numbers of elders vulnerable to human rights abuses and by the unique human rights shortcomings experienced by older persons that are not adequately addressed in existing human rights instruments.

The demographics are daunting. Worldwide, persons age 60 years and older numbered 607 million in the year 2000, or 9 percent of the world population. By 2015 the number rose to 901 million people, or over 12% of the population. By 2050, the global population of older persons is projected to reach nearly 2.1 billion, or 21.5% of the global population. Moreover, the number of people aged 80 years or over, the “oldest-old” persons, is growing even faster. In 2000, there were 71 million people aged 80 or over worldwide. By 2050, that number is projected to increase to 434 million, a more than six-fold increase in its size in 2000.1 The growth rate is not uniform everywhere. Two thirds of the world’s older persons live in the developing regions and their numbers are growing faster there than in the developed regions. Gender differences are also important. In 2015, women accounted for 54 per cent of the global population aged 60 years or over and 61 per cent of those aged 80 years or over in 2015. Older women are especially vulnerable to multiple discrimination, based on age, gender, race, and other characteristics.

Older persons in large and growing numbers suffer unique human rights shortcomings around the world. They too often struggle on the margins of society because of discriminatory views on aging. We may not see this as frequently in the United States, but we do see it. Conditions vary widely worldwide and abuses are too common. Older men and women are often denied access to services, jobs, pensions and other financial supports, and adequate health and long-term care, including person-centered end-of-life care. Older individuals are unduly vulnerable to abuse, neglect, and poverty. While there are a good number of existing human rights instruments and mechanisms that, in theory, offer potential to protect the rights of older persons, this potential is seriously diluted by the lack of specificity, depth, comprehensiveness, and consistency.

The above is not meant to suggest that international law completely ignores rights protection for older persons. The UN’s first rights document after WWII, the non-binding Universal Declaration of Human Rights, contains this in Article 25, paragraph 1:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. (Emphasis added)

Only three of nine legally binding UN rights instruments make even brief reference to the circumstances of older people: the Migrant Workers Convention; the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); and the Convention on the Rights of Persons with Disabilities (CRPD). However, only the Migrant Workers Convention prohibits discrimination on the basis of age, a provision which obviously excludes those who are not migrant workers. CEDAW provides for the equal right of women to social security in old age, and it offers some protection against sexist inheritance practices. The CRPD requires states to provide services to prevent and minimize further disabilities among older people and to provide “age appropriate” or “age sensitive” measures for persons with disabilities.

Nevertheless, human rights law is largely silent on important topics such as:

- Rights within community-based and long-term care settings, both for the caregiver and for the person receiving care.
- Legal planning mechanisms for older age.
- The abolition of mandatory retirement ages.
- Legal capacity and equality before the law for older women and men under guardianship or diagnosed with dementia.

3 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 7; CRPD Article 25 (b) Article 28 (2) (b) Article 13, Article 16.
4 CEDAW, Article 11.1 (e).
5 CRPD Article 25 (b) Article 28 (2) (b) Article 13, Article 16.
- The right to access to health care, which in existing human rights instruments, fails to address nursing homes and other institutional isolation and rights to home and community-based care.
- End-of-life rights, including access to palliative care.
- Elder abuse and exploitation in its many forms across cultures, including violence as a result of witchcraft accusations in some cultures.
- Property rights in old age, the loss of which especially impact older women.
- Rights to economic security in the face of worldwide population aging.
- Existing human rights law only offers limited protection against the negative impact of the actions of the private sector and individuals within families.

International human rights standards for identified vulnerable populations (women, children, refugees, persons with disabilities) have gained increasing recognition in contemporary society. However, older persons as a group have not been a high priority beneficiary of this attention. In response to this perceived shortcoming, a growing advocacy effort among both non-governmental and governmental organizations has sought to bring about a convention drafting and approval process directly addressing the human rights of older persons. This effort produced the first regional international convention on human rights and aging, approved by the Organization of American States.

Other related efforts demonstrate a growing worldwide awareness of a need to hone in on the human rights of older persons. For example, a United Nations Open-Ended Working Group on Ageing, created by the General Assembly in 2010, has focused heavily on whether there is a need for a United Nations convention on the rights of older persons. The Working Group has met at least annually since then and continues its deliberations. See http://social.un.org/ageing-working-group.

In addition, the U.N. Human Rights Council announced, in May, 2014, the appointment of an Independent Expert “on the full enjoyment of the human rights of all older persons.” During her initial 3-year term, the Independent Expert was specifically tasked with assessing how existing international human rights instruments have been implemented in relation to older people’s rights, identifying both good practices and implementation gaps. Along with other specified duties, the Independent Expert produced a comprehensive report on her findings and recommendations in July of 2016.

The African Union has been active, since 2009, considering a draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Older Persons in Africa. The draft Protocol received the full support of the African Commission on Human and Peoples’ Rights and was adopted during the 26th African Union Summit which took place in January 2016. It is open to ratification by Member States of the African Union. See www.achpr.org/mechanisms/older-disabled.

The European states have also begun to focus on the human rights of older persons in recent years. In February 2014, the Council of Europe adopted the first European instrument dealing specifically with the full spectrum of human rights of older persons, -- Recommendation CM/Rec(2014)2 of the Committee of Ministers recommends a range of measures to be taken by
Member States in order to combat discrimination based on old age and covers the major rights challenges facing older persons: non-discrimination; autonomy and participation; protection from violence and abuse; social protection and employment; care; and administration of justice.

The European Union has no special instrument addressing older persons, although the EU Charter of Fundamental Rights does contain one sentence on the rights of the elderly: “The Union recognizes and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.”

The United Nations and its instrumentalities have issued some 17 documents on aging since 1948, including declarations, principles, resolutions, plans of action, and proclamations. However, none of these rises to the level of a binding treaty. Most provisions affecting older persons that are recognized in treaties and other instruments protect economic, social and cultural rights. These types of treaties identify standards for progressive implementation. Such categorization tends to imply that these rights are programmatic aspirations - in contrast with civil and political rights, which are of immediate application. In other words, they are “soft law” -- they lack sanctions for non-compliance or infringements. Though it applies only to the Americas, the Inter-American Convention on Protecting the Human Rights of Older Persons is the first international convention providing mandatory rights recognition and protection for older persons.

It is noteworthy that the comprehensive report of the U.N. Independent Expert to the Human Rights Council, favorably highlights the OAS convention as a model practice, stating:

The Convention is an example of good practice that could inspire other regions, as it allows States to strengthen cohesion and normative action and to clarify States’ obligations with regard to the rights of older persons.

The need for an international convention on the rights of older persons has been recognized for some time. In a 2003 analysis, Professors Diego Rodriguez-Pinzon and Claudia Martin of the Academy on Human Rights and Humanitarian Law at the American University provided a detailed overview of the different types of international human rights and the various international regional systems of protection that relate to varying extents to older persons. These authors concluded that older persons are the only group in need of the special protection (unlike women, children, persons with disabilities, etc.) that do not have an international instrument to protect their rights; the current international instruments are not providing adequate answer to their needs. Thus, they recommended that any future action or plan for the elderly should consider creation of a legal instrument and supervising body for the rights of older persons. The Inter-American Convention fulfills that recommendation.

---

6 EU Charter of Fundamental Rights, Article 25.
Content of the Inter-American Convention

For the first time, a treaty provides a comprehensive statement on how existing broadly defined human rights apply to older persons, especially in connection with respect to circumstances unique to or disproportionately affecting older persons. For example, the convention defines key terms not addressed in other treaties, such as age discrimination in old age, multiple discrimination, palliative care, active and healthy aging, and long-term care services. Starting with a set of general principles, the convention then sets forth 27 specific protected rights:

Article 5: Equality and non-discrimination for reasons of age
Article 6: Right to life and dignity in old age
Article 7: Right to independence and autonomy
Article 8: Right to participation and community integration
Article 9: Right to safety and a life free of violence of any kind
Article 10: Right not to be subjected to torture or cruel, inhuman, or degrading treatment or punishment
Article 11: Right to give free and informed consent on health matters
Article 12: Rights of older persons receiving long-term care
Article 13: Right to personal liberty
Article 14: Right to freedom of expression and opinion, and access to information
Article 15: Right to nationality and freedom of movement
Article 16: Right to privacy and intimacy
Article 17: Right to social security
Article 18: Right to work
Article 19: Right to health
Article 20: Right to education
Article 21: Right to culture
Article 22: Right to recreation, leisure, and sports
Article 23: Right to property
Article 24: Right to housing
Article 25: Right to a healthy environment
Article 26: Right to accessibility and personal mobility
Article 27: Political rights
Article 28: Freedom of association and assembly
Article 29: Situations of risk and humanitarian emergencies
Article 30: Equal recognition before the law
Article 31: Access to justice

While articulating specific rights, the overall mandate of the convention is more than just a compilation of specific rights. Its message is that the social paradigm of aging must change. Older persons must be seen as legitimate, productive, and important rights holders in an aging world, rather than perceived as merely a vulnerable and no-longer-productive group that makes unwarranted claims on public resources. The Preamble of the Convention recognizes:

the need to address matters of old age and ageing from a human-rights perspective that recognizes the valuable current and potential contributions of older persons to the common good, to cultural identity, to the diversity of their communities, to human, social, and economic development, and to the eradication of poverty
Position of the United States

In a query to the U.S. State Department on the Department’s position on the OAS convention, a State Department Official provided the following response on August 11, 2016:

[T]he U.S. has consistently opposed the negotiation of new legally binding instruments on the rights of older persons. The U.S. recognizes the importance of using the OAS and the UN to address the challenges older persons face in this hemisphere and throughout the world, including the enjoyment of their human rights. However, the U.S. does not believe that a regional convention is necessary to ensure that the human rights of older persons are protected. Rather than promoting a new instrument, the U.S. believes resources of the OAS and its member states should be used to identify practical steps that governments in the Americas might adopt to combat discrimination against older persons, including best practices in the form of national legislation and enhanced implementation of existing international human rights treaties. In doing so, such efforts should be aimed at addressing immediately and in practical ways the challenges faced by older persons.

The U.S. is generally wary of conventions and reluctant to ratify them. However, the alternative to a convention offered above is exactly the course of action tried for almost 35 years that has not worked. In 1982, the First World Assembly on Ageing adopted the International Plan of Action on Ageing. The “Vienna Plan” was the first international instrument on aging that aimed to provide a roadmap to strengthen the capacities of governments and civil society to deal effectively with the aging of populations. Building on gaps in that plan, the General Assembly adopted the U.N. Principles on Older Persons in 1991. These principles specifically promoted the rights of older persons. In 2002, the Second World Conference on Ageing in Madrid adopted the “Madrid International Plan of Action on Aging” or MIPAA to strengthen efforts toward goals not met by the prior two instruments. MIPAA called for the promotion and protection of all human rights and fundamental freedoms, including the right to development, the need to include aging in global agendas, and the need to combat discrimination based on age.

The U.N. Commission for Social Development evaluated MIPAA after ten years and then 20 years. Its 20-year review found that the goals of the Plan overall have not been met. Among the Commission’s findings:

- Implementation continued to be weak. Gaps between policy and practice and the mobilization and/or building of sufficient human and financial capacities remained a major constraint. Ten years after its adoption, the Madrid Plan of Action had made only limited headway in national development plans. The mainstreaming of ageing issues saw little progress by any yardstick....

- Recommendations for action proposed in the strategic implementation framework through 2012 had only limited impact on the situation of older persons. Awareness of the

---

9 Email communication from Judith Heumann, Special Advisor for International Disability Rights. U.S. Department of State, August 11, 2016, to Charles Sabatino, ABA Commission on Law and Aging.
Madrid Plan of Action and the current living conditions of older persons remained low in many developing countries.

The second review and appraisal highlighted several major challenges faced by older persons that were common to all or most regions and that undermined the social, economic and cultural participation of the aged, namely, income security, access to age-appropriate health-care services, access to labour markets and social protection, protection from abuse and violence and age discrimination.\(^\text{10}\)

The flaw in relying only on aspirational road maps and identifying best practices is that they have no teeth. They lack a rights based mandate and enforceability mechanism.

This conclusion is reinforced by the findings of the U.N. High Commissioner for Human Rights whose office did an analysis of the normative standards in international human rights laws in 2012 and concluded:

The analysis supports the view that there is a demonstrable inadequacy of protection arising from normative gaps, as well as fragmentation and a lack of coherence and specificity of standards as they relate to the experience of older persons.\(^\text{11}\)

Also implicit in the U.S. opposition is what may be referred to as “treaty fatigue,” i.e., fatigue that states are experiencing as a result of having to periodically report to international bodies on their compliance with treaties. This burden means that some states are late with their reports, submit reports with inaccuracies, or do not report at all. There are also concerns about the backlog that a number of treaty bodies face, and about the costs of treaty-making and treaty-implementing.

These concerns are the same as raised in opposition to the Convention on the Rights of Persons with Disabilities and the Convention on the Rights of the Child. Yet, these conventions have proven to be important human rights tools and are widely, if not universally, accepted as valuable benchmarks for state obligations with respect to these populations.

While the U.S. State Department’s position is understandable, it should not deter the ABA from advocating for a stronger pro-aging rights stance. This resolution enables the ABA to use its principled, rule of law orientation to persuade the United States to step into a leadership role in supporting a global rights-based paradigm of aging.

**Rationale for ABA Action and Existing ABA Policy**

The ABA has the ability and the stature to play a key role in shaping US policy with respect to human rights and international conventions. The ABA brings to the table the legal expertise and

---


\(^\text{11}\) U.N. High Commissioner for Human Rights, Normative Standards in International Human Rights Law in Relation to Older Persons: Analytical Outcome Paper 3.
a long history of human rights values that adds an important voice in helping to shape positions taken by the Administration. The ABA can serve in a leadership role to advocate for the first ever binding treaty that articulates with specificity human rights principles as they apply to the aging members of our aging society.

The ABA has supported other conventions in recent years such as the Convention on the Rights of Persons with Disabilities (2010), the Convention on the Rights of the Child (1991), and the Convention on the Elimination of All forms of Discrimination against Women (1996), all of which have been signed but not ratified by the United States. Specifically on the subject of international aging, the ABA adopted a resolution in August 2011, to support efforts toward an international convention. The resolution stated:

That the American Bar Association urges the United States Department of State and the United Nations and its member states to support the ongoing processes at the United Nations and the Organization of American States to strengthen protection of the rights of older persons, including the efforts and consultations towards an international and regional human rights instrument on the rights of older persons. (emphasis added).

Thus, ABA policy clearly points toward the creation of a regional and international human rights instrument on aging. The ABA has also acted on that goal by appointing a liaison to the U.N. Open-Ended Working Group on Aging in 2012. The OAS convention is the first major step in fulfilling that goal and deserves the full weight of the ABA behind it. As a regional convention, it will serve as a model to the ongoing efforts in the United Nations and elsewhere.

Conclusion

The proposed policy acknowledges the human rights milestone represented by the OAS convention and enables the ABA to speak out clearly in support of the rights of older persons and to encourage the U.S. to sign and ratify the convention. As a prominent advocate for international human rights and the rule of law, the ABA shoulders an especially important leadership role to advocate for the first ever binding treaty that articulates with specificity human rights principles as they apply to the aging members of our aging society.

Respectfully submitted,

Hon. Patricia Banks, Chair
Commission on Law and Aging
August 2017

12 The current ABA Liaison to the U.N. Open-Ended Working Group on Ageing is Prof. William Mock.
GENERAL INFORMATION FORM

Submitting Entity: Commission on Law and Aging

Submitted By: Hon. Patricia Banks, Chair, Commission on Law and Aging.

1. Summary of Resolution(s).
This resolution calls on the President of the United States to sign the Inter-American Convention on Protecting the Human Rights of Older Persons and urges the Senate to approve ratification of the convention. The convention was approved by the General Assembly of the Organization of American States (OAS) on June 15, 2015.

The purpose of the Convention is to promote, protect, and ensure the recognition and the full enjoyment and exercise, on an equal basis, of all human rights and fundamental freedoms of older persons in the Americas in order to contribute to their full inclusion, integration and participation in society.

2. Approval by Submitting Entity.
Approved by Commission on Law and Aging on October 21, 2016.

3. Has this or a similar resolution been submitted to the House or Board previously?
No

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

On the subject of international rights of older persons, the ABA adopted a resolution in August, 2011, to support emergent efforts to strengthen the protection of the rights of older persons, including consideration of an international convention. The resolution stated:

That the American Bar Association urges the United States Department of State and the United Nations and its member states to support the ongoing processes at the United Nations and the Organization of American States to strengthen protection of the rights of older persons, including the efforts and consultations towards an international and regional human rights instrument on the rights of older persons.

Thus, ABA policy clearly points toward the creation of a regional and/or international human rights instrument on aging. The ABA has also supported other specialized conventions in recent years, albeit in the United Nations, such as the Convention on the Rights of Persons with Disability (2010), the Convention on the Rights of the Child (1991), and the Convention on the Elimination of All forms of Discrimination against Women (1996), all of which have been signed but not ratified by the United States.

5. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A
6. **Status of Legislation.**
   As of March 2017, the convention had been signed by the governments of Argentina, Bolivia, Brazil, Chile, Costa Rica and Uruguay. Ratification is still pending in these states.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** The policy will allow further consultations with the State Department to urge its consideration of the convention and will enable collaboration with other non-governmental organizations in advocacy for the convention.

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

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

10. **Referrals.**
    - Center for Human Rights
    - Civil Rights and Social Justice
    - Commission on Disability Rights
    - Commission on Domestic and Sexual Violence
    - Commission on Hispanic Legal Rights and Responsibilities
    - Commission on Homelessness and Poverty
    - Government and Public Sector Lawyers Division
    - National Legal Aid & Defender Association
    - Rule of Law Initiative
    - Section of Administrative Law and Regulatory Practice
    - Section of Dispute Resolution
    - Section of Family Law
    - Section of Litigation
    - Section of Real Property, Probate and Trust law
    - Section of Science and Technology Law
    - Section of State and Local Government Law
    - Section of Tort, Trial and Insurance Practice
    - Senior Lawyers Division
    - Special Committee on Bioethics and the Law
    - Standing Committee on Governmental Affairs
    - Standing Committee on Legal Aid and Indigent Defendants
    - Standing Committee on Pro Bono and Public Service
    - Standing Committee on the Delivery of Legal Services
    - The Judicial Division
    - Young Lawyers Division
    - Section of International Law
11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)

   Charlie Sabatino, Director
   ABA Commission on Law and Aging
   1050 Connecticut Ave., NW, Ste. 400
   Washington, DC 20036
   202-662-8686 (office)
   charles.sabatino@americanbar.org

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

   Hon. Patricia Banks, Chair
   Commission on Law and Aging
   312-968-0016
   p0017b@sbeglobal.net
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution calls on the President of the United States to sign the Inter-American Convention on Protecting the Human Rights of Older Persons and urges the Senate to approve ratification of the convention. The convention was approved by the General Assembly of the Organization of American States (OAS) on June 15, 2015.

The purpose of the Convention is to promote, protect, and ensure the recognition and the full enjoyment and exercise, on an equal basis, of all human rights and fundamental freedoms of older persons in the Americas in order to contribute to their full inclusion, integration and participation in society.

2. Summary of the Issue that the Resolution Addresses

Older persons in large and growing numbers suffer unique human rights shortcomings around the world. They too often struggle on the margins of society because of discriminatory views on aging. We may not see this as frequently in the United States, but we do see it. Conditions vary widely worldwide and abuses are too common. Older men and women are often denied access to services, jobs, pensions and other financial supports, and adequate health and long-term care, including person-centered end-of-life care. Older individuals are unduly vulnerable to abuse, neglect, and poverty. While there are a good number of existing human rights instruments and mechanisms that, in theory, offer potential to protect the rights of older persons, this potential is seriously diluted by the lack of specificity, depth, comprehensiveness, and consistency.

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

For the first time, this treaty provides a comprehensive statement on how existing broadly defined human rights apply to older persons, especially in connection with respect to circumstances unique to or disproportionately affecting older persons. For example, the convention addresses essential matters not expressly addressed in other treaties, such as discrimination based on age; multiple discrimination; palliative care; long-term care services and supports; a right to life and dignity in old age; a right to independence and autonomy; a right to participation and community integration; and a right to safety and a life free of violence of any kind.

4. Summary of Minority Views

None as of this writing.
RESOLVED, That the American Bar Association urges Congress to enact legislation enabling the United States Department of Justice to initiate and pursue civil actions to obtain equitable relief for systemic violations of the constitutional right to the effective assistance of counsel, both directly and through private litigants deputized to file such actions in the name of the United States; 

FURTHER RESOLVED, That the American Bar Association urges Congress to enact legislation recognizing the right of private litigants, in their individual capacity or as members of a class action, to obtain equitable relief in federal court for systemic violations of the constitutional right to the effective assistance of counsel.
Introduction

The ongoing crisis in indigent defense is well-documented. Given continued failures by state and local governments to fully enforce the right to effective assistance of counsel, this Resolution recommends that the federal government and private individuals, subject to such violations be granted the tools necessary to ensure that the Sixth Amendment’s mandate is fulfilled. It proposes that Congress vest the Department of Justice with authority to file civil lawsuits challenging systemic violations of the right to counsel. Because the Department will always be severely limited by time and resources, the resolution also recommends that the Department be permitted to deputize private litigants, acting on its behalf, to seek equitable relief for criminal defendants whose right to counsel is being violated. Last, it urges that private litigants be empowered to file such actions in an individual or class action capacity to vindicate their Sixth Amendment rights. This Resolution aligns with the ABA’s consistent recognition of the failure to fulfill the Sixth Amendment’s mandate and its opinion that the constitutional guarantee of effective assistance of counsel must be strictly enforced.

This Resolution does not seek to supplement or alter the means by which an individual convicted of a crime can raise post-conviction claims—for example, through petitions for writ of habeas corpus or ineffective assistance of counsel claims raised on appeal. Rather, the Resolution seeks only to enable the ABA to urge Congress to enact legislation recognizing the validity of prospective claims for equitable relief where systemic violations of the right to counsel are alleged and to enable the Department of Justice to pursue such claims when it deems appropriate.

Background: Gideon’s Promise Still Broken

In the years that have passed since the Supreme Court’s landmark decision Gideon v. Wainwright,1 various studies have documented the obstacles criminal defendants face in attempting to secure the effective assistance of counsel.2 Among other things, these studies have highlighted inadequate funding of public defense systems across the country, chronic appointment of incompetent or inexperienced lawyers, severe delays in the appointment of counsel, discontinuity of attorney representation, a lack of training and oversight for attorneys representing criminal defendants, excessive public defender caseloads and understaffing of public defender offices, inadequate or nonexistent expert and investigative resources for defense counsel, and a lack of meaningful attorney-client contact.3

---

Although defendants are guaranteed the right to counsel in theory, it often fails to translate into practice; this gap has worsened as state and local budgets have been forced to tighten and the provision of public defense given low priority in the spending of such limited funds.\(^4\) The problems referenced above, and suggestions for guiding principles that would help to ensure effective provision of defense services to clients, have been chronicled in previous ABA reports and publications\(^5\)—yet the Sixth Amendment’s guarantee to adequate counsel remains vastly underenforced.

Various proposals have been made in an attempt to address the public defense crisis, including calls for better training of public defenders and increased funding for public defense.\(^6\) Yet many of those proposals rely on state governments taking action—often an unlikely solution, given that criminal defendants remain a minority with little to no political clout. Even if such proposals were successful, increased funding and better training alone would not solve all of the problems plaguing public defense, including the problems of insufficient independence and oversight.\(^7\)

While litigation has often been used to seek reform at the state and local levels, it too suffers from critical limitations. Individual defendants may raise a claim of ineffective assistance of counsel, but seeking such relief can take years, and often defendants are not entitled to legal assistance in making such challenges during habeas review.\(^8\) Moreover, many courts have been
unwilling to entertain such claims prospectively, before a defendant has already received the ineffective assistance of counsel.\(^9\)

As described below, in several cases, defendants have attempted to bring class-action lawsuits to challenge systemic public defense failures.\(^10\) Although some state courts have been receptive to these claims, many have been hesitant to find such claims justiciable or to address claims regarding systemic deficiencies in performance (as compared to the constructive or actual denial of counsel).\(^11\) The federal courts have often relied on the abstention doctrine in refusing to hear such claims.\(^12\)

**The Need for Federal Enforcement to Vindicate the Right to Adequate Counsel**

This Resolution suggests Congress should provide the federal government with authority to initiate and pursue lawsuits to protect against systemic violations of the Sixth Amendment for adult defendants, as it already has the authority to do in the context of juvenile defendants (see discussion of 42 U.S.C. §14141 below). In doing so, Congress would merely be allowing the executive branch authority to ensure compliance with the Sixth Amendment, a power the federal judiciary already possesses but cannot fully implement, given procedural obstacles and the inability of pro se litigants to effectively litigate the issue on their own. Given the limited capacity and resources of the federal government, this Resolution further suggests that the Justice Department have the ability to deputize private litigants to file such actions in the name of the United States.

**Current Federal Involvement in Public Defense Reform**

While this Resolution proposes that the federal government play a more direct role in ensuring compliance with the Sixth Amendment, it has already assumed an important, if limited, role in public defense reform. In recent years, the Department of Justice has taken a more active stance with regard to pending public defense litigation filed by others, due in large part to the creation of the Office for Access to Justice, which was established in March 2010 to address the access-to-justice crisis in the criminal and civil justice system.\(^13\)

The Department has filed a number of statements of interest in important cases regarding systemic public defense failures, including *Hurrell-Harrin v. State of New York*, a class action suit challenging systemic public defense failures.

---


\(^11\) See Drinan, supra note Error! Bookmark not defined.; Brensike Primus, supra note 6, at 4 n.21 (describing limitations in New York and Michigan cases).

\(^12\) Under *Younger v. Harris*, 401 U.S. 37 (1971), federal courts must abstain from interfering with state court criminal proceedings. *See also* Luckey v. Miller, 976 F.2d 673, 676-79 (11th Cir. 1992) (affirming district court’s dismissal, based on abstention doctrine, of a class action lawsuit challenging Georgia’s public defense system). As Eve Brensike Primus has explained, federal legislation authorizing federal enforcement by DOJ would not raise the same abstention concerns and could, if needed, specify that the limited number of enforcement actions brought under such a statute be exempted from abstention. Brensike Primus, supra note 6, at 6, 15.

\(^13\) https://www.justice.gov/atj.
lawsuit filed in the Supreme Court of the State of New York alleging that due to systemic failures in four New York counties, criminal defendants had been constructively denied the right to counsel. The Department’s brief was filed in September 2014, just weeks before a historic settlement was reached in the case. The Department also filed a statement of interest in August 2013 in federal court in Washington State in *Wilbur v. City of Mount Vernon*, a class action lawsuit alleging that excessive misdemeanor caseloads prevented public defenders from providing effective representation. Just months later, on December 4, 2013, the district court found a systematic deprivation of the right to assistance of counsel and issued an injunction in favor of the plaintiffs requiring the defendant cities to hire a part-time public defender supervisor tasked with monitoring and reporting on the delivery of public defense representation. In 2015, the Department filed a statement of interest in federal court in Georgia in *N.P. v. State of Georgia*, a class action asserting that the public defense system in the Cordele Judicial Circuit was so underfunded and poorly staffed that juveniles were routinely denied their right to legal representation. The case settled less than a month after the Department filed its statement.

The Department has also filed amicus briefs in cases like *Adam Kuren, et al. v. Luzerne County, et al.*, a class action filed in the Supreme Court of Pennsylvania alleging that the public defense system in Luzerne County, Pennsylvania, is so underfunded and poorly staffed that attorneys appointed to represent adults accused of committing criminal acts serve as attorneys in name only. The sole focus of the Department’s brief was whether criminal defendants could bring a civil claim alleging a constructive denial of counsel under the Sixth Amendment to the United States Constitution. Notably, the ABA also filed an amicus brief in the Luzerne County case in support of the criminal defendants, arguing that, where excessive workloads and a lack of resources prevent defenders from providing adequate representation, the court should recognize a prospective cause of action and provide systemic relief.

Most recently, the Department filed an amicus brief in *Tracy Tucker et al. v. State of Idaho, et al.*, in the Supreme Court of Idaho. The brief argues, on behalf of the United States, that criminal defendants who cannot afford an attorney may bring a prospective civil lawsuit to prevent violations of their constitutional right to counsel under the Sixth Amendment, rather than waiting to bring an ineffective assistance of counsel claim after conviction. The ability to bring pre-conviction claims is critical to systemic reform and yet they have been “relatively rare” and “deemed cognizable with little frequency.”

---

20 [https://www.americanbar.org/content/dam/aba/images/abanews/Amicus_Flora.pdf](https://www.americanbar.org/content/dam/aba/images/abanews/Amicus_Flora.pdf).
22 Lucas, *Reclaiming Equality*, supra note 3, at 1216 (explaining that most courts view such claims as reserved for postconviction review).
Federal Enforcement Authority in Other Contexts

The authority referenced in this Resolution is not without parallel in existing federal law. Congress has created similar enforcement actions to prevent state officials from engaging in systemic violations of civil rights, including 42 U.S.C. § 14141.

Section 14141 authorizes the Attorney General to conduct investigations and, if warranted, file civil litigation to eliminate a "pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice... that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." As a result of § 14141, DOJ is authorized to file lawsuits against state officials who systematically deny juveniles their due process rights to effective legal representation. The proposal to provide DOJ with enforcement authority to file federal enforcement actions to obtain equitable relief from systemic right-to-counsel violations is merely an extension of the type of authority DOJ now has pertaining to state juvenile court proceedings.23

Similarly, the notion that private individuals might be deputized to bring civil actions on behalf of the United States government is not a novel concept. To the contrary, the government’s authority to deputize in areas where the government has a conflict or lacks the time and resources to fully enforce federal law on its own, is grounded in both practice and history. One such example is the qui tam provision of the False Claims Act, 31 U.S.C. § 3730, which authorizes private citizens with independent knowledge of fraud perpetrated against the government to sue and recover a portion of the claim. Other examples of deputization include the independent counsel statute24, and DOJ’s use of a private attorney (David Boies) for its antitrust suit against the Microsoft Corporation. The general authority to deputize is grounded in practice and history and the DOJ would retain approval over any actions filed on its behalf.

The Importance of Federal Enforcement Authority

As discussed above, a federal enforcement mechanism is necessary to ensure that state and local governments fulfill their responsibility to provide effective legal representation to criminal defendants who cannot afford counsel. As evidenced by decades of reporting on such failures by the ABA and others, many defendants are still not receiving effective legal representation, and states and localities are not solving the problem on their own.

Litigants seeking redress in federal court have been unable to make much headway. Defendants attempting to file civil actions to obtain systemic relief in federal court are often stymied by procedural barriers, like abstention and standing doctrine. By carving out a federal path for such lawsuits, this Resolution supports the availability of a new and untapped mechanism to ensure compliance with the Sixth Amendment. Moreover, it is apparent from the Department’s current, yet limited, involvement—its filing of amicus briefs and statements of interest in right to counsel

24 28 U.S. Code Chapter 40
cases—and the speed with which many of those cases have been resolved after the Department’s appearance in the case, that the federal government possesses unmatched influence in this area.

**The Need for Private Enforcement to Vindicate the Right to Adequate Counsel**

While the federal government’s influence and power to have an impact through litigation in federal court is tremendous, there still remains a possibility that the Department will fail to pursue such actions or will be unable to do so at the level needed to provide redress for systemic violations across the country. Thus, it is critical that private individuals, subject to such systemic violations, be able to initiate and pursue such actions, either as individuals or as part of a class.

Currently, individual defendants wishing to challenge systemic violations of the right to counsel, or public interest legal organizations bringing challenges on behalf of such defendants—which is often the relevant posture—face myriad obstacles in trying to bring such a claim in federal court. Aside from issues of abstention and standing, many such cases encounter courts only willing to entertain claims of ineffective assistance post-conviction. Therefore, even when the systemic failures are clear, and when representation of indigent defendants will almost certainly suffer as a result, those seeking to raise such a claim cannot seek injunctive relief and prevent further future Sixth Amendment violations from occurring. Instead, they must wait until after conviction (and the consequences that accompany conviction) to file suit. In one recent example, the Utah Attorney General filed a motion to dismiss a class-action challenge to Utah’s indigent defense system, arguing “a criminal defense must first be provided before the Court can determine whether a criminal defendant received constitutionally insufficient counsel.” Although a growing number of jurisdictions allow for such a claim to be filed in state court, and one federal court of appeals has recognized such a prospective cause of action, defendants in other jurisdictions lack a clear path to injunctive relief.

The notion that Congress should provide a vehicle to prevent such violations before they happen is not novel: United States Representative Sean Maloney of New York and United States Senator Cory Booker of New Jersey introduced legislation this past session proposing that federal district courts be empowered by Congress to provide declaratory and injunctive relief against systemic violations of the right to counsel.

**Alignment with ABA Goals and Objectives**

For decades, the ABA has chronicled the failure to fulfill Gideon’s mandate. In 1982 in *Gideon Undone*, the Standing Committee on Legal Aid and Indigent Defendants, in conjunction with the

25 See *supra* note 12.
26 Lucas, *Reclaiming Equality*, *supra* note 3, at 1216 & n.75 (providing numerous examples of courts deeming such claims appropriate for collateral, post-conviction review).
29 Luckey v. Harris, 860 F.2d 1012 (11th Cir. 1988).
Criminal Justice Section and General Practice Sections, and the National Legal Aid and Defender Association, relayed witness testimony documenting, among other things: inadequate funding for public defense (only 1.5% of total criminal justice expenditures by state and local governments); excessive public defender caseloads; the failure to advise misdemeanor defendants of their right to counsel and frequent waiver by such defendants; a tendency by states to place much of the funding burden on counties; and inadequate compensation of appointed private attorneys.\textsuperscript{31}

Nearly two decades later, on the 40\textsuperscript{th} anniversary of Gideon, the ABA held extensive public hearings to assess the current state of public defense.\textsuperscript{32} In Gideon’s Broken Promise, an ABA report summarizing the testimony provided at those hearings, it became clear that many of the same issues remained: inadequate funding for public defense; the failure to appoint counsel in cases where a right to counsel exists; a lack of basic oversight and accountability in public defense systems, and a failure by lawyers providing public defense services to deliver competent representation.\textsuperscript{33}

In response to these findings, the ABA has attempted to define what is necessary to establish and maintain an effective public defense system. In Providing Defense Services, the ABA promulgated thorough standards intended to guide public defense providers in ensuring all eligible persons have quality legal representation.\textsuperscript{34} In February 2002, the ABA approved Ten Principles of a Public Defense Delivery System, focused on characteristics critical to an effective public defense system, such as independence of the defense function, manageable workloads, and parity between the prosecution and the defense.\textsuperscript{35} And in 2009, the ABA released a set of guidelines focused specifically on the management of excessive caseloads, a primary obstacle to the provision of effective assistance of counsel.\textsuperscript{36}

In 2005, the ABA passed another Resolution, recommending specific steps be taken to fulfill Gideon’s mandate including, among other things: increased funding by state and territorial governments; establishing oversight organizations to ensure the independence and uniformity of defense services; substantial federal financial support of public defense services; and a suggestion that attorneys carrying excessive caseloads should decline to take on additional cases, consistent with their ethical obligations.\textsuperscript{37}

While these efforts by the ABA do much more than restate the Sixth Amendment’s requirement that defendants be provided with the effective assistance of counsel, they clearly demonstrate the ABA’s consistent commitment to this issue and to the notion that the federal government has an important role to play in fulfilling that requirement. And with good reason, as the provision of counsel is fundamental to ensuring so many other constitutional guarantees are met. The Resolution described herein does not encompass all that the ABA has promulgated on

\footnotesize{\textsuperscript{31} GIDEON UNDONE: THE CRISIS IN INDIGENT DEFENSE FUNDING (1982). \textsuperscript{32} GIDEON’S BROKEN PROMISE, supra note 3, at iv. \textsuperscript{33} Id. \textsuperscript{34} ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES (3d. ed. 1992). \textsuperscript{35} AMERICAN BAR ASS’N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002). \textsuperscript{36} AMERICAN BAR ASS’N, EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS (2009). \textsuperscript{37} ABA Resolution 107, Adopted by ABA House of Delegates on Aug. 9, 2005.}
the subject; instead, it is merely an attempt to ensure systemic violations of the Sixth Amendment can be addressed effectively.

Conclusion

More than 50 years after Gideon was decided, its promise remains unfulfilled. For decades, the ABA has documented these failures and also promulgated detailed standards to guide attorneys in providing quality legal representation to criminal defendants and jurisdictions in structuring sound public defense systems. Yet, efforts to date have been unsuccessful, due in large part to the unwillingness of state and local governments to provide what is needed for an effective public defense system. The federal courts have not played a major role in the implementation of Gideon, and this Resolution aims to change that. The ABA should support legislation that would enable the Department of Justice to seek redress for systemic Sixth Amendment violations. In doing so, it should also support the Department’s ability to deputize civil litigants to bring such suits, given the time and resource limitations of the Department itself and the fact that this practice has precedent in other contexts. Last, where the federal government is unwilling or unable to intervene, it should support legislation enabling private citizens to file such suits to ensure their Sixth Amendment rights remain intact.

Respectfully submitted,

Hon. Lora Livingston, Chair
Standing Committee on Legal Aid and Indigent Defendants
August 2017
GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Legal Aid and Indigent Defendants

Submitted By: Hon. Lora Livingston, Chair

1. **Summary of Resolution(s).** This resolution urges Congress to enable the United States Department of Justice to ensure compliance with the Sixth Amendment right to effective assistance of counsel. Specifically, it urges Congress to (1) enable the DOJ, or its deputies to pursue civil action to obtain equitable relief where violations of that right occur; and (2) recognize a cause of action in federal court for equitable relief from systemic violations of the right to counsel.

2. **Approval by Submitting Entity.** This resolution was passed by the Standing Committee on Legal Aid and Indigent Defendants on April 23, 2017. Co-sponsorship approved by the Criminal Justice Section Council on May 4, 2017.

3. **Has this or a similar resolution been submitted to the House or Board previously?**
   An earlier version of this resolution was submitted, then withdrawn, at the February 2017 Midyear meeting.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?**
   None.

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

6. **Status of Legislation.** (If applicable)
   The Equal Justice Under Law Act (S. 238 & H.R. 968) has been introduced in the current 115th Congress, First Session, and would enable a plaintiff, individually or as part of a class, to bring a civil action in federal court for systemic failures to enforce the right to counsel.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.**
   This policy will enable the ABA Governmental Affairs Office to educate and lobby Congress to enact legislation that would help protect the Sixth Amendment right to the effective assistance of counsel.

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

10. Referrals.
    At the same time this policy resolution is submitted to the ABA Policy Office for inclusion in
    the 2017 Annual Agenda Book for the House of Delegates, it is being circulated to the chairs
    and staff directors of the following ABA entities:

    Sections, Divisions
    Criminal Justice
    Government and Public Sector Lawyers Division
    Civil Rights and Social Justice
    Judicial Division
    Litigation
    State and Local Government Law
    Young Lawyers
    Ethics and Professional Responsibility
    Solo, Small Firm and General Practice Division

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

    Lauren Sudeall Lucas
    Associate Professor, Georgia State University College of Law
    85 Park Place NE, Room 222
    Atlanta, GA 30303
    Phone: (404) 413-9258
    Email: lslucas@gsu.edu

    Malia N. Brink
    Assistant Counsel for Public Defense
    Standing Committee on Legal Aid and Indigent Defendants
    American Bar Association
    1050 Connecticut Ave NW, 4th Floor
    Washington, DC 20036
    Phone: (202) 662-1584
    Email: malia.brink@americanbar.org

    Terry Brooks
    ABA Division for Legal Services
    321 N. Clark, 19th Floor
    Chicago, IL 60654
    312-988-5747 – Office
    312-799-0498 – Mobile
12. **Contact Name and Address Information.** (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

Hon. Lora Livingston  
1000 Guadalupe Street  
Austin, TX 78701  
Phone: (512) 854-9309  
Lora.Livingston@traviscountytx.gov
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges Congress to enable the United States Department of Justice to ensure compliance with the Sixth Amendment right to effective assistance of counsel. Specifically, it urges Congress to (1) enable the DOJ, or its deputies to pursue civil action to obtain equitable relief where violations of that right occur; and (2) recognize a cause of action for equitable relief, cognizable in federal court, by persons charged with crimes, either individually or as representatives of a class, for systemic violations of the right to counsel.

2. Summary of the Issue that the Resolution Addresses

Public defense has, for several decades, been in a state of crisis. Throughout the nation, public defense providers are inadequately funded and carry grossly excessive workloads. These attorneys, saddled with hundreds or thousands of cases per year, are frequently unable to meet their Sixth Amendment duties to effective assistance of counsel. The United States Department of Justice has authority to pursue civil actions to obtain equitable relief where violations of this right occur in the juvenile context, but that authority does not presently exist in the adult context. Given the Department’s limited time and resources, deputization, as well as a private enforcement through individual and class action lawsuits are also necessary to ensure that such violations do not occur.

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

The United States Department of Justice is better positioned than any other organization or entity in our nation to enforce the right to effective assistance of counsel. Where the federal government cannot or will not intervene, an alternative mechanism is necessary to ensure that private litigants and the public interest legal organizations that pursue impact litigation on their behalf can also seek redress for systemic Sixth Amendment violations. By enacting the legislation recommended in this resolution, Congress will greatly deter widespread violation of the Sixth Amendment.

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

The Judicial Division expressed concerns with a previous version of this Resolution submitted for consideration at the 2017 Midyear Meeting. The Resolution was withdrawn for revision. In the current Resolution, SCLAID was able to address a number of the concerns raised by the Judicial Division, however, the Judicial Division continues to have concerns regarding extending the private right of action.
RESOLVED, That the American Bar Association adopts the *ABA Guidelines for Best Practices for Individual Retirement Accounts*, dated August 2017;

FURTHER RESOLVED, That the American Bar Association urges all financial institutions that act as custodians of Individual Retirement Accounts to adopt and apply the Guidelines to all such accounts;

FURTHER RESOLVED, That the American Bar Association urges the Financial Industry Regulatory Authority to require its Members to adopt and apply the Guidelines for all Individual Retirement Accounts.
ABA Guidelines for Best Practices for Individual Retirement Accounts  
(Dated: August, 2017)

1. Appointment of Trusted Contact Persons:

A broker-dealer who is a member ("Member") of the Financial Industry Regulatory Authority ("FinRA") should permit each owner ("Investor") of an account described in sections 408(a), 408(k) or 408A of the Internal Revenue Code ("IRA account") to name at least three trusted contact persons pursuant to FinRA's Rule 4512(a)(1)(F).

2. Red Flag Alerts to Trusted Contact Persons

(a) Each Member should as promptly as possible alert each and every trusted contact person of each and every Notice Event listed in Appendix A.

(i) A copy of any notice sent to one or more trusted contact persons should also be sent to the Investor unless the Member has a reasonable belief that an unauthorized person is intercepting and/or reading messages sent to the Investor, in which case the alert sent to the trusted contact persons should include a notice that a copy was not sent to the Investor and the reason why it was not sent.

(b) Every reasonable effort should be made to deliver those alerts to one or more trusted contact persons before any funds or securities in the account are transferred or distributed, or any other modifications, such as changes of beneficial interests, contact information or links to a new bank account, are made or become effective.

(c) Generally, an electronic notice such as e-mail should be utilized, unless the trusted contact person in question has indicated a different preference.

(d) Exception: if the Member has a reasonable belief or substantial suspicion that a trusted contact person is or has been financially exploiting the Investor, or is likely to do so, that trusted contact person should not be alerted, but, in that event, the other trusted contact persons, if any, should be notified that such trusted contact person was not so alerted and the reason why. If there is no other trusted contact person who can be notified, the Member should promptly notify appropriate government and social agencies, such as an adult protection service or a law enforcement agency.

(e) Special rule for passwords and security questions and answers: A notice to a trusted contact person that there has been a change in the password, or in the security questions and answers used by the Member to verify the identity of a person attempting to access or make changes to the account on line, should only alert the trusted contact person to the fact that the password or other information was changed, but should not include the new password or other information used for verification purposes.
APPENDIX A
Notice Events

The following is a list of Notice Events as of August, 2017: The list is not intended to be exclusive or inflexible, and FinRA Members may add others or make appropriate modifications from time to time in order to reflect changes in technology and the techniques used by financial predators.

1. Subject to the special rule in Guideline 2(e), any change in the password or other sign-in information, including changes in security questions or the answers to such questions.

2. Any change in the identity of, or in the contact information for, the Investor, a trusted contact person, or any other person to whom copies of statements or other information about the account are transmitted, and any other person who has on-line access to account information, including the holder of a power of attorney or a person with trading authorization for the account. This includes changes of names, postal and e-mail addresses, telephone numbers and tax and account identification numbers and any permanent or temporary suspension of any of the foregoing.

3. Any change in beneficial interests, including changes in percentages or the identities of the beneficiaries, or in the contingencies associated with such interests.

4. Any change in the identity or contact information of the person or bank, brokerage or other account to which distributions or transfer of funds or securities may be made. This includes adding or subtracting an account to which distributions or transfers may be made or any modification in the kinds or amounts of funds or securities that may be transferred to or from such account or in the limitations on or authorizations for such transfers.

5. Any request or direction for a distribution or payment which, because of the amount or timing or pattern of distribution or payment, is highly unusual and which the Member has a significant concern that it might be indicative of financial exploitation or other abuse of the Investor. This includes attempts to transfer money to engage in commonly known fraudulent schemes.

6. Any request or direction to engage in trading activities which the Member has a concern is significantly inconsistent with the Investor’s account profile or is otherwise significantly inconsistent with a sound retirement investment program, such as using almost the entire balance in the account to purchase highly speculative options or positions, or investing large amounts in assets that are illiquid or otherwise not readily tradeable, or engaging in excessive churning of an account.

7. A request for authorization to make withdrawals or payments with checks drawn on the account or, where such authorization already exists, to a substantial increase in the amount that may be withdrawn or paid by such checks, either individually or
cumulatively. If the account permits the use of credit, debit or ATM cards, an initial request for the issuance of such cards, or any request for a substantial increase in the amounts authorized. Depending on the circumstances, an unusual, sudden and unexplained increase in the frequency in the use of such checks or cards, or in the amounts charged or withdrawn, may also be determined to be a Notice Event. In case of doubt, a sudden increase in frequency or in the amounts attempted to be charged, paid or withdrawn should be treated as a Notice Event.

8. Any event that requires the filing of a Suspicious Activity Report with the Financial Crimes Enforcement Network, a report to an adult protective service, or a report to any other governmental agency.
1. Purpose and Applicability of Guidelines

These Guidelines recommend certain practices and procedures for broker-dealers who are members ("Members") of the Financial Industry Regulatory Authority ("FinRA") and other financial institutions to apply in connection with IRA accounts. They are intended to provide an improved, but extremely important, mechanism for protecting the owners of IRA accounts from financial exploitation by third parties. The Guidelines were drafted primarily with the elderly in mind, since they are more likely to be victimized by financial predators, but these protective practices and procedures should apply to all investors in IRA accounts, regardless of age. In addition, a financial institution may determine to apply these Guidelines, with appropriate modifications, to other forms of investment accounts and to other individuals.

The procedures recommended by the Guidelines will also help to avoid financial losses that occur even in the absence of third party predators. An example is excessive churning of an account by an investor with dementia.

The Guidelines are designed to be in addition to, and not in lieu of, each of the following:

(a) The requirements in FinRA's recent amendment to its rule 4512 and its recent adoption of new rule 2165, both of which will become effective on February 5, 2018 ("Rules"). Those Rules deal primarily with Investors over the age of 65, but the Guidelines can and should be applied to all Investors' IRA accounts, regardless of age. The Rules also permit, but do not require, its Members (broker-dealers) to utilize the procedures specified as "best practices" by the Guidelines.


(c) Any requirements to file reports with various government and social agencies (e.g., a Suspicious Activity Report that is required to be filed with the Financial Crimes Enforcement Network ("FinCEN") or a report to an adult protective service).

---

1 www.finra.org/industry/notices/17-11
2 Serveourseniors.org/about/policy-makers/nasaa-model-act/
3 Serveourseniors.org/about/industry/practices-procedures-guide/
2. TRUSTED CONTACT PERSONS

FinRA's Rules, as amended effective February 5, 2018, provide that an Investor over the age of 65 (and in some cases, under age 65) may name an individual to be a trusted contact person, who may be provided with confidential information about an Investor's account under certain circumstances. When initially proposed, FinRA invited comments from the public. Several commentators recommended that Investors be allowed to designate more than one trusted contact person. While FinRA declined to require multiple designations, it stated that financial institutions were free to allow additional designations. In part, the Guidelines are in response to FinRA's statement that multiple designations of trusted contact persons are permissible; the Guidelines take the position that the best practice is to allow Investors to appoint at least three trusted contact persons for their IRA accounts. The Guidelines provide that persons under the age of 65 should also be allowed to name trusted contact persons.

3. NOTICE EVENTS (Red Flags)

To make the Guideline practices effective, the broker-dealer needs to notify the trusted contact persons of suspicious activities or conditions. FinRA's comments acknowledged that this could be useful and, while it did not mandate such notices, neither did it prohibit them. The Guidelines specify that the best practice is to provide such notices.

Most of the red flags in this list are mentioned at various places in FinRA's own reports on the subject. The most significant exception, one that does not appear to be mentioned by FinRA and which is included in this list, is a change of beneficial interest, which can result in the diversion of the Investor's entire account at death to the financial predator or the predator's own family. In effect, this is a theft of the entire account at death.

The list of Notice Events must necessarily remain fluid, as new techniques for taking financial advantage of Investors appear. The list in Appendix A is not intended to be exclusive, and each Member may, on its own, add additional items to the list for its own use. Although this particular list covers red flags that are likely to be most relevant to IRA accounts at the present time, other organizations have comparable lists of red flags both for this and for other contexts. Members should take into account when appropriate those other listings of red flags. In addition, from time to time, it may be appropriate to modify the ones on the current list to reflect changes in technology and the techniques used by financial predators. It is contemplated that recommendations of sources like FinRA, NASAA and various government agencies would be taken into account in modifying this list.

Although the list of Notice Events might appear to be quite lengthy, it is intended that, under normal circumstances, not more than a small number of alerts would be necessary in any

---

5 See, e.g., FinCEN's list at www.fincen.gov/resources/advisories/fincen-advisory-fin-2011-a003
calendar year. Overwhelming trusted contact persons with an avalanche of alerts would be counter-productive. For example, it is unlikely that an Investor would change beneficial interests more than once every few years, or change bank linkages more than once a year. Although it is often recommended that passwords be changed frequently, few Investors, especially the elderly, actually do this, or do it more than once a year. On the other hand, a large number of alerts over a short period of time is probably indicative of fraudulent or other inappropriate activity and justifies investigation by the trusted contact persons.

---

6 Frequent changes of beneficiaries by an elderly person, especially if he or she appears to have dementia, is often a sign that someone is exercising undue influence.

7 Item number (7) in Appendix A refers to checks that can be drawn against an IRA account, and credit, debit and ATM cards. The authorization to withdraw funds using checks or credit, debit or ATM cards from an IRA account may facilitate theft of the funds in an account. Nothing in this list should be interpreted to imply approval of the use of such checks or cards for the elderly.
A. Introduction

The Resolution and the accompanying Guidelines have been prepared by the Senior Lawyers Division’s Task Force on IRA Accounts (“Task Force”). They are intended to improve the security of the IRA accounts of the elderly from financial predators.

They will also help protect the elderly from the consequences of their own mismanagement of their financial matters that may occur, even when there is no third party involved, as a result of physical and mental disabilities (e.g., dementia, failing eyesight). A common example might be excessive churning of an account. To some extent, they may also be helpful in identifying scams to which the Investor has become a victim, by spotting and highlighting new and unusual patterns of distributions or transfers of funds.

The Task Force’s focus has been on IRA accounts of the elderly. They are the single largest category of retirement assets for the elderly, and tend to reach their peak values at just the age when dementia and other disabilities afflict a majority of those account owners. Yet, because of certain provisions of both state and US tax laws, none of the normal means of protecting the owners (e.g., trusts, inter vivos gifts to heirs) can be used for IRA accounts. Accordingly, they are in greatest need of the kind of protection that would be provided by the adoption of the best practices set forth in the Guidelines.

In general, the Guidelines authorize and direct the use of a small committee of trusted individuals who would be in a position to monitor the account. An analogy might be to the protectors’ committees that have been finding increasing use in trust and estate planning. The account owner would be allowed to designate several trusted individuals who would receive alerts of significant account events that might suggest a serious problem, and who would be in a position to take appropriate protective actions if and when necessary.

Although drafted with the elderly and IRA accounts in mind, the Guidelines apply to all IRA accounts that are held by financial institutions as custodians, regardless of age. While the Task Force takes no position on where, when or how they might be applied to other types of accounts, the Guidelines have been drafted so that they (or similar guidelines) could also be applied to other types of investment accounts on a voluntary basis, if deemed appropriate by the financial institution itself.

1 The Task Force deferred consideration of plans administered by trustees, as is common in plans administered by credit unions and banks. Such plans constitute a very small portion of the market for IRA accounts. In addition, trustees have fiduciary obligations that custodians do not have.
B. Identifying the Problem

No one is immune from the threat of becoming the victim of a financial predator, but the elderly are especially vulnerable. As we age, the likelihood increases that we will suffer from diminished capacity and lose the ability to protect ourselves adequately from that threat. It is also more likely for the elderly to experience emotional fragility and instability and, even apart from dementia, other physiological changes that affect mental function, all of which contribute to that vulnerability.2 Recent studies suggest that, by age 75 (and possibly sooner), a significant number of individuals are already afflicted with varying degrees of cognitive impairment, a precursor to full-blown Alzheimer’s Disease,3 the most common form of dementia in the elderly.4

By the end of 2017, there will probably be more than $8 trillion dollars in IRA accounts, the largest single category of retirement assets for the elderly.5 The mere size of this pot of gold

---

2 E.g., The MetLife Study of Elder Financial Abuse (June 2011) at p. 22 (www.metlife.com/assets/cao/mtl/pubs/mtl-studies/2011/mni-elder-financial-abuse.pdf) See, also, the Interagency-guidance-on-privacy-laws-and-reporting-financial-abuse-of-elder-adults.pdf: “Older adults ... may be especially vulnerable due to isolation, cognitive decline, physical disability, health problems, and/or the recent loss of a partner, family member, or friend”. www.fdic.gov/news/news/press/2013/interagency-guidance-on-privacy-laws-and-reporting-financial-abuse-of-elder-adults.pdf: Peck and Law, in their book, “Alzheimer’s and the Law” (ABA Publishing 2013), at pages 297-300, refer to several studies that conclude that, because of changes in the brain that can commence as early as the mid-50s, the elderly lose the ability to discriminate between legitimate requests for financial assistance and fraudulent ones: “These changes in the senior’s brain help explain why people that no one ever would have expected are giving money away to the Canadian lottery or all these other scams ... [A]ll of a sudden, many things are believable to them, because of changes in the brain.” This characteristic is also reported in the MetLife Study, supra.

3 There is an effort by some organizations to substitute the term “Alzheimer’s Dementia” for Alzheimer’s Disease”, reflecting that it is just one form of dementia. In this Report, we continue to use Alzheimer’s Disease, since it is the more familiar term.

4 The most recent statistics indicate that, by age 85, approximately one third of the population will have Alzheimer’s Disease. Of all dementia cases, 54% suffer from AD. See W M van der Flier, P Scheltens, Epidemiology and risk factors of dementia. Journal of Neurology, Neurosurgery and Psychiatry (2005), dx.doi.org/10.1136/jnnp.2005.082867. This includes various other causes for dementia (e.g., Parkinson’s Disease, strokes, physical injuries). Putting these two statistics together, it appears that more than 50% (and possibly even 60%) of the population at that age may have some form of dementia. All of these percentages increase almost exponentially as you go up the age brackets toward 90 and 95. Many observers believe that only half of those who do have it come to the attention of medical authorities, indicating that the real numbers are much worse than these. Finally, recent studies indicate that cognitive impairment actually starts up to 10 or even 20 years before changes in behavior and problems with memory become apparent and Alzheimer’s is specifically diagnosed. (See, e.g., www.alz.org/facts/overview.asp at pg 8) Accordingly, by age 75 or perhaps even earlier, if these studies are correct, close to half of the population will already have begun to suffer a measurable degradation of mental capacities.

5 As of December 31, 2015, the Investment Company Institute ["ICI"] estimated that IRA accounts held $7.3 trillion. See www.icifactbook.org/ch7/16_fb_ch7. Between that date and March 1, 2017, the Dow Jones index increased 18%, the NASDAQ Index by 23% and the S&P by 20%. Using 20% as a guide, and on a reasonable assumption that distributions did not exceed investment income for most retirees, it would seem that the balances in IRA accounts have now reached $8.6 trillion, if not more. It is also possible that the ICI study does not fully reflect balances in
in the hands of people who are mentally handicapped, emotionally fragile and otherwise unusually susceptible is inevitably going to attract the attention of the wrong parties. Because of the interplay of the required minimum distribution (“RMD”) rules for tax-exempt retirement plans and the long term yields that even conservative investment strategies often produce, these accounts tend to reach their maximum values after age 80, just when the frailties of old age start to afflict the great majority of seniors and their ability to manage and protect their investments becomes increasingly impaired.

According to most reports, the largest single category of financial predator of the elderly is the caregiver, followed closely by relatives and friends. For example, the owner’s son may have a gambling habit with large debts, and always be desperate for more money, or a daughter may have a drug addiction with a similar need for acquiring funds at any cost. Or the children just have a high standard of living that requires additional cash to sustain and have an impatient feeling of entitlement to the parent’s savings. The spouse of a second or third marriage may divert the funds to his or her own children, disinheriting the children of the other spouse. In one case reported in the newspapers, the thief was a “younger” woman (age 63) who married the

---

ROTH IRAs. The ICI studies are based largely on IRS statistics, but ROTH account balances are not normally reported to the IRS or reflected in its published tables. Since there are no required distributions from ROTH accounts prior to death, they probably grow much faster than regular IRA accounts.

6 The RMD rules require that, starting at age 70½, the owner withdraw a minimum percentage of the account balance each year. That percentage starts at 3.77% the first year and increases a small amount each year thereafter. It does not exceed 5% until age 79, 6% until age 83, 7% until age 86 or 8% until age 89. The ICI reports that most IRA account owners over the age of 70½ withdraw only that RMD, and usually withdrew that amount even when the law temporarily permitted them to withdraw less. See www.ici.org/ira. IRA ROTH account owners generally withdraw less than the RMD amount and, consequently, those accounts peak at even later ages (if at all). See www.icifactbook.org/ch7/16_fb_ch7:

“In contrast to traditional IRAs, Roth IRAs have no RMDs (unless they are inherited). As a result, withdrawal activity is much lower among Roth IRA investors. In 2013, only 4 percent of Roth IRA investors aged 25 or older made withdrawals, compared with 23 percent of traditional IRA investors.”

7 Most investors put a majority of their retirement funds in equities, including mutual funds and ETFs. See, e.g., www.ici.org/pdf/2017_factbook.pdf. Over the past 10 years, the average equity yields have exceeded the RMD amounts by significant amounts. For example, as of October 31, 2016, the Dow Jones Total Market Index Fund had a net yield over the prior 10 years of 8.07%. Over that same period, the S&P 500 index resulted in a net yield of 7.85%, and the Dow Jones Industrial Average yielded 8.18%. Vanguard’s Total Stock Market Index Fund had a return of 8.10%. (For other studies of average yields over extended periods, see pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/histretSP.html and www.stockpickersystem.com/historical-rate-of-return/. The RMD factor does not exceed the lowest of these numbers, 7.85%, until age 88. Therefore, the typical IRA account balance of an owner who withdraws only the RMD amount has probably been increasing every year until well past age 85. Moreover, ROTH account owners are not required to withdraw the RMD and, since ROTH withdrawals are tax free, retirees need to withdraw less from ROTH’s than from regular IRA accounts to cover the same amount of ordinary day to day living expenses. Accordingly, it is likely that ROTH accounts grow at even faster rates than these numbers suggest for ordinary IRA accounts. This is confirmed in the ICI study, supra, at p. 156.

8 E.g., Peck and Law, Alzheimer’s and the Law, 285 (ABA Publishing, 2013) (“[A]bout 90 percent of the financial exploitation of seniors is committed by family members or people they should be able to trust, such as caregivers.”)
victim (age 80) and then promptly mortgaged the house and emptied his bank accounts and insurance policies. She gave all the money to her own children. The victim’s own children lost their inheritance and, worse, were forced to assume the financial burden of supporting the now indigent parent. Another widely reported case involved a step-son who allegedly withheld medications and food, and kept the victim isolated from friends and other relatives, until he signed over his financial accounts, which were then emptied out. Another case closely followed by the press recently involved the Brooke Astor estate. Her son, who was over 80 years old, was convicted of stealing tens of millions of dollars from his 105 year old mother while she was alive and afflicted with Alzheimer’s Disease. The New York Times recently reported that the son of one of the two surviving Dionne quintuplets stole her share of funds from a legal settlement intended to provide for her support.

Caregivers, friends and relatives are often given responsibility for managing household affairs, including financial matters like buying food or paying the rent. Mental problems are not the only reason why the elderly might need and request assistance with such matters. For example, arthritis, paralysis following a stroke or injury, failing eyesight or other handicaps might make it too difficult for the victim to go shopping at the local grocery, or use a keyboard or ATM machine, or even write a check, or to understand what a vendor’s bill is for. He or she will request the caregiver, relative or friend to assist in those activities. In all these cases, the person handling those financial matters can merely request the victim to sign a check, saying that it is for the purpose of paying taxes, or grocery bills, but which in fact is payable to herself, or a boyfriend. The victim may not know how much the check is for or to whom it is payable. The caregiver might ask for money to pay her own salary in the morning, and then ask for the same amount later that day and again at night, because the victim does not remember any of the previous requests for the same amount or purpose. Or a caregiver may be told (or learn on his or her own) how to log into the IRA account on line. Too often, all the caregiver (or any other person) has to do is just ask the elderly person to tell him or her the password, or where it is written down, and he or she will be told. At this point, the caregiver can easily change the beneficiaries at the victim’s death to his own children, without anyone realizing it until it is too late. Another way for caregivers (including nursing and assisted living home employees) and relatives to gain control of financial assets is to withhold care, including medications, food, clothing, bathing and laundry service until the victim assigns to the caregiver or relative control over the financial accounts. They can also isolate the victim by preventing access to television, telephones and friends until the victim complies.

---

10. See, e.g., www.nytimes.com/2013/03/27/nyregion/brooke-astors-son-loses-appeal.html?module=Search&mbReward=relbias%3As%2C%#123%22%22%3A%22%1%3A7%22&%#125;
12. See note 2, supra.
Giving someone a power of attorney is not an effective device for protecting the account. Most appointees have neither the training nor the experience nor the time to audit an account, which would have to be done on close to a daily basis. Asking an attorney or accountant to provide that service on a regular basis would be unbelievably expensive at normal hourly rates—conceivably thousands of dollars a week. Granting a power of attorney (even to an attorney or child) may actually be counter-productive—it can enable the very theft the Investor is trying to prevent. Approximately 15% of thefts of the property of the elderly are attributable to people holding powers of attorney and other fiduciaries. \(^\text{13}\)

It is almost universally believed that most losses, perhaps close to 90%, are not discovered or reported. \(^\text{14}\) In many cases, the victims do not even know that there was a loss, or they decline to report the theft because they are reluctant to reveal how gullible they were. More importantly, they do not want to send a child or other close relative or friend to jail. \(^\text{15}\) Nor do they always report an unrelated caregiver, because they are afraid that, if the caregiver is taken away, there will be no one to take care of the victim, and no one to talk to all day long. Loneliness is a fearsome prospect if the caregiver is arrested.

Finally, if they do report the loss, law enforcement agencies are usually helpless to do anything about it, anyway. \(^\text{16}\)

---


\(^{14}\) E.g. Newsletter from the US Attorney’s office of the W.D. Wash. (Feb. 2017) at www.justice.gov/usao-wdwa/victim-witness/victim-info/financial-fraud (only 15% reported to law enforcement agencies)

\(^{15}\) See www.nytimes.com/2015/04/25/your-money/as-cognition-slips-financial-skills-are-often-the-first-to-go.html?ref=business&_r=1. The article supports the conclusion that “senior abuse is often committed by a close relative or trusted professional”

\(^{16}\) Law enforcement and social welfare agencies are too often understaffed, underfunded and perhaps inadequately trained. Criminal convictions are very difficult to obtain in the absence of witnesses. For example, a caregiver who helps himself to some extra cash can claim that it was a gift, or a compensatory bonus for extra care and services. Proving otherwise beyond a reasonable doubt is close to hopeless. Court proceedings can take years and, in the end, the defendant will be judgment proof anyway. See, e.g. https://www.ncjrs.gov/ovc_archives/reports/fraud/psvl/chap3.htm:

“...[I]n reality, very few fraud perpetrators actually pay restitution. Many perpetrators will have spent the money and have no discernible resources with which to repay victims. In other cases, perpetrators will have placed assets in the names of others or hidden money in offshore accounts. Even if the court orders full restitution to victims, the collection and distribution of payments is often difficult, especially if perpetrators are sentenced to long periods of incarceration.”
C. The Special Problems of IRA Accounts

The Guidelines are directed primarily to IRA accounts because, unlike other assets, none of the usual methods of protecting against predators are available. For most assets, the owner can prevent future losses to predators in various ways. For example, they can be conveyed to trusts with appropriate protective provisions, or gifted inter-vivos to the intended beneficiaries, possibly with retained life interests in income or cash flow. A homestead can be deeded to the children, reserving a life estate (e.g., through a qualified personal residence trust). Those transactions may involve some legal and administrative expenses but they are at least options. In addition, many of these transactions, like life insurance trusts and charitable remainder gifts, engender significant income and estate tax benefits, as well as removing them from the potential grasp of a financial predator. However, in 49 of the 50 states, transfers of interests in retirement accounts are strictly prohibited. More important, for all 50 states, U.S. Treasury Regulations treat any transfer of an interest in an IRA account as a taxable distribution of the entire balance and disqualify the account from any future tax benefits. The resulting tax cost would be catastrophic.

The Task Force did not address the situation for section 401(k) and other ERISA-qualified plans or IRA accounts administered by trustees. Transfers of interests in those kinds of accounts are also prohibited, but those plans involve other considerations.

---

17 The restrictions are intended to protect retirement accounts from claims of creditors even in bankruptcy. Alaska is the only state that allows such transfers, but the tax restrictions would still apply in Alaska.
18 See U.S. Treasury Regulation Sec. 1.408-4(a)(2). Since the distribution of such a large amount is likely to put the taxpayer in the very highest tax bracket for the year, is also taxable at state and possibly other local levels, and can have other ripple effects on calculations of things like medical expenses and other itemized deductions, the cost of such a transaction can approach 70%. And this still does not include the present discount value of the loss of future tax savings.
19 Generally, state laws have the same proscription against transfers of 401(k) accounts as they do for IRA accounts. The prohibition against transfers of 401(k) plans under the federal tax laws is even stronger than for IRA accounts. U.S. Treasury Regulation §1.401(a)-13(b)(1) has a blanket proscription against transfers of interests in 401(k)s. On the other hand, employers often serve as trustees of Section 401(k) plans and even when they are not the trustee, they usually have an interest in maintaining the integrity of the plans and interests of the employees. Most IRA accounts managed by FinRA members are custodial types, with no professional management or fiduciary responsibilities, and there is no employer to keep an eye on things. Also, many employees roll over interests in 401(k) plans to IRA accounts when they retire, before declining mental competency and other frailties of old age become significant. So solving the problem for IRA accounts would give 401(k) owners an option to convert and gain the same protections available for IRA accounts. The Task Force may address 401(k) and other kinds of plans at a later date.
D. The Proposed Solution

In the area of trust and estate planning, an effective solution to problems of this sort is to use a “protectors’ committee”. This is a practice that became common in Europe several years ago and is becoming more widely used today in the United States.\textsuperscript{20} 

In the case of protectors’ committees, the object is to have a small group of trusted individuals who are able to monitor the activities of the trustee to make sure that the trustee does not engage in actions that are inappropriate. The creator of the trust or will, while still able to make and understand his financial decisions (e.g., when creating the trust initially or signing a will), designates one or more trusted individuals to act as “protectors”.\textsuperscript{21} The protectors can be a spouse, children, other relatives, a financial advisor, an attorney, an accountant or just a close and lifelong friend. As noted in more detail, below, more than one should be designated to provide for the contingency that one might be incapacitated or otherwise unavailable when needed, and perhaps more important, to make sure that one of the protectors does not become part of the problem rather than part of the solution.

The creator of the trust or will can specify exactly what powers and rights the protectors can have but, typically, they would be entitled to receive copies of all statements, tax returns, government filings and market transaction confirmations. When circumstances call for it, they could step in and require a trustee to post a bond or file a judicial accounting. In some cases, they may also have the right to veto or disapprove actions of the trustee, or require the trustee to make or not make certain elections. They can have the power to relocate the trust to another state in order to change the law applicable to the trust. If nothing else works, the protectors can be empowered to replace the trustee. They might also be able to terminate the trust if it has outlived its purpose or usefulness.

This type of approach which has proved to work very well to protect the family’s interests posthumously, also works well to provide necessary protections of the accounts of the elderly during periods of incapacity or declining competency during their lifetimes.\textsuperscript{22}

\textsuperscript{20} See Frolik, Trust Protectors: Why They Have Become “The Next Big Thing”, 50 Trust and Estate Law Journal No. 2 (Fall 2015).

\textsuperscript{21} Having diminished mental capacity, even during the early stages of Alzheimer’s Disease, does not necessarily disqualify a person from executing legal documents, including wills and trusts. See Peck, “Exploitation and Alzheimer’s, 15 Experience Magazine No. 2 (ABA Senior Lawyers Division (2015)). Accordingly, they may still be able to indicate the people whom they trust to serve as monitors or protectors.

\textsuperscript{22} The NY Times article noted above, in footnote 15, contains this same suggestion:

"Another financial adviser asks his clients to assemble what he calls a protective tribe, or a handful of people who are willing to step in and assist if and when the need arises. 'The protective tribe is important because senior abuse is often committed by a close relative or trusted professional,' said Jean-Luc
However, to implement this idea for IRA accounts, we don't need a full-blown protectors' committee, and even if we tried to create one, it could not have the same legal powers that a true protectors committee could have. We only need individuals who are willing and able to monitor the account and watch for irregularities. A trusted contact person designated in accordance with the FinRA procedures can function as such a monitor.

The FinRA procedures that will take effect on February 5, 2018 will allow an Investor to name one trusted contact person but, to make this more effective, the Guidelines require financial institutions to allow the appointment of at least three trusted contact persons. Collectively, they would be able to serve the necessary monitoring function. Note that being appointed, and accepting the designation, as a trusted contact person will not require that person to monitor the Investor's account. It only empowers him or her to do so if necessary and appropriate under the circumstances.

In addition, in order to permit the trusted contact person or persons to monitor the IRA account of the Investor effectively, it is necessary that they be entitled to receive financial information about the account, especially of red flags of suspicious activity. The FinRA rule allows, but does not require, the broker-dealer to alert the trusted contact person of such danger signs. The Guidelines make it clear that the best practice is to do that.

The alerts sent to the trusted contact persons can include changes in passwords or sign-ins, changes in bank account linkages, changes in e-mail or postal addresses and distributions that are unusual in timing or amount or otherwise atypical. Authorization to use a new credit or debit card, or to write checks on the account (or to increase the amounts authorized) can be danger signs. Perhaps the most ominous one would be an attempt to change the beneficial interests at the death of the Investor (disinheriting every member of his family or shifting interests from one heir to another without his or her knowledge). A list of these and other common red flags is attached as Appendix A to the Guidelines. Because techniques and technology keep changing, this list is necessarily non-exclusive, and financial institutions are free (and encouraged) to augment and otherwise modify the list as may be appropriate from time to time.

Unless a trusted contact person indicates a different mode of communication, notices of those red flags would be sent out electronically, making them virtually instantaneous. Upon

---

23 As noted elsewhere, the Task Force does not recommend that IRA accounts authorize the use of checks, credit cards, debit cards or ATM cards for the purpose of withdrawing funds from the account.

24 If, as a result of part three of this Resolution FinRA did make the Guidelines mandatory for its members, it might be the logical entity to keep the list of red flags up to date.
receipt of information that suggests problems, the trusted contact persons can take whatever actions they believe necessary. After inquiring into the situation, they might decide to request the assistance of law enforcement agencies, adult protection services or other social services. They may attempt to arrange for psychological and other medical examinations. They may try to eliminate a caregiver’s access to the account owner, by removing the caretaker (if necessary, with the help of the police) from the home—or possibly removing the Investor to a safer location. If nothing else works, they can commence a guardianship or conservatorship proceeding to take control of the victim’s finances. 25 Or they might be able to conclude that there is nothing amiss, and take no action at all.

It should be noted that the trusted contact persons were deemed to be trustworthy by the Investor while he or she was still capable of making that determination. By designating them, the Investor also consents to providing them with confidential information. There is no legitimate concern that providing that information to the trusted contact persons involves an invasion of privacy since full consent to that was given up front. In fact, the consent is not intended to be merely permissive. In these circumstances the owner wants that information to go to the monitors and not to be withheld.

The Investor is not required to appoint three trusted contact persons, or even one trusted contact person. It is only an option for the Investor. If the Investor changes his or her mind about wanting to trust that person, the designation can be cancelled at any time. 26 The forms used by financial institutions to obtain designations of trusted contact persons from the Investor should make this clear—that it is an option and not a requirement, and that the persons designated as trusted contact persons may be provided with confidential information. 27 If the Investor does not want to confide such confidential information to others, he or she is not required to appoint even a single trusted contact person—and should not do so.

From all of the above, the use of trusted contacts persons to monitor the accounts of an IRA account has substantial benefits in securing against fraudulent loss, and no discernible downside. Given today’s computer technology, the cost of providing alerts and duplicate statements is infinitesimally small.

25 Guardianships are deemed extremely expensive and inefficient and generally are recommended only as a last resort.
26 However, since the first thing a financial predator is likely to try to cut off communications to a trusted contact person, FinRA correctly notes that a change in the designation is itself a red flag. Accordingly, notice of the termination of a designation needs to be sent to the trusted contact person before the termination becomes effective.
27 FinRA notes that confidential information may include non-financial data, such as medical problems. See, e.g., https://www.sec.gov/rules/sro/fina/2016/34-79215.pdf, at page 54. Problems associated with possible medical conditions are not included in the list of red flags in Appendix A, but such information as may be supplied pursuant to Rule 4512 apart from the Guidelines could be valuable information that would help a trusted contact person evaluate the information that otherwise is supplied pursuant to the Guidelines.
Some members of the Task Force attempted to institute this procedure for themselves personally at several major financial institutions (all members of FinRA), requesting that notices of certain important red flags (especially changes in beneficial interests after death) be sent automatically to a list of up to three other people (usually from among a group consisting of one or more children, a spouse, a trusted attorney or financial advisor). They were usually advised that the institution would not undertake to alert third parties, even those designated for the purpose of providing or obtaining information about the owner’s personal accounts. At most, and most commonly, they would agree to send duplicate monthly statements to selected individuals, but not much more. In some cases, they would only provide information to, and permit access by, individuals who had their own personal accounts at that same institution. They would recognize a power of attorney, but would not notify that attorney-in-fact of red flags, including even the termination of the power of attorney itself or a change of password which would make it impossible for the attorney-in-fact to function. If the Investor was relying on the ability of that attorney-in-fact to watch over the account, neither the Investor nor that attorney-in-fact would be aware that that ability had been terminated without notice, leaving the investor without the safeguards on which he or she was relying. In some cases, the institution justified its action (or rather, its refusal to act) based on what it perceived to be privacy concerns or because it was waiting for FinRA to provide guidance. In other cases, no justification was proffered.28

The concern about privacy might be a legitimate one when the problem is trying to notify a third party of suspicious activity in an account if that party has not been previously cleared by the Investor to get that information. A disclosure to the wrong person, even a spouse or other close relative, might be the worst possible step, since it might be that very person who is the financial predator. There might be other reasons as well why an Investor does not want to provide information about his or her financial positions to that particular third party.

But the situation here is different. The account owner has specified individuals that he or she believes are trustworthy and has consented to the disclosures.29 That account owner does not want the information to be trapped inside a black hole where his or her own support team is

---

28 One institution did agree to most of these suggestions, but sent the notices only by regular mail, which arrived more than one week later. If the addressee is out of town for a week or two, it could take close to a month before he or she would get those notices, have time to review them and realize that there might be fraudulent activities going on in the account. In today’s world of electronic commerce, where transactions can be completed in nanoseconds, that delay undermines the value of those notices to the point where they may be close to useless. Another institution said it would only send an alert to the account owner and not to anyone else, even if it was notified that the account owner had advanced dementia and did not have the ability to comprehend what the alert was trying to alert him or her about. It was irrelevant to that institution that such an alert is useless. Another said that it would allow access rights to be granted to third parties (like a child, spouse or attorney) only if those third parties already had their own personal investment accounts at that institution.

29 The owner can also withdraw or change that designation—and consent—at any time that circumstances indicate that the particular monitor is no longer trustworthy.
unable to see what is happening. The disclosures are almost certainly beneficial to the interests of the account owner and privacy concerns should not stand in the way. Actually, it is virtually impossible to perceive any downside to such disclosures, at least when there is more than one trusted contact person able to monitor the account. The rules on privacy are intended, and should be construed, to protect the individual, not impede that protection.

Of course, there could be a slight but non-zero risk that one of the trusted contact persons might become the financial predator, notwithstanding the account owner’s trust. Indeed, the “default” in the FinRA Rule, specifying only one trusted contact person, may actually create a problem where none existed otherwise. But that risk is almost entirely eliminated by having two or three trusted contact persons; each would be in a position to monitor the actions of the other trusted contact persons and take appropriate steps if needed.

What is sorely needed is a procedure that all financial institutions should observe to permit account owners—and, as discussed below, not necessarily just those over age 65—to specify one or more individuals who would receive copies of all monthly statements, as well as alerts of red flag events, especially changes in beneficiaries and the termination of a monitor’s status.30

In these times where everything happens in split seconds on a computer, it is essential that that particular notice be given as quickly as possible, i.e., electronically. That would also keep down costs and improve efficacy.31

Changing a password without telling the attorney-in-fact is one way to eliminate the ability monitors or persons holding powers of attorney to oversee what is happening and possibly prevent a problem. It is also important to make sure that the monitors are themselves alerted to the another extremely important red flag, one mentioned in both FinRA’s and the SEC’s comments: any attempt to remove one or more of the trusted contact persons from the picture, even if only for a temporary period and even if requested by the Investor himself or herself.32 This can be the first step any financial predator planning to raid the account would take or try to arrange. The predator would do this to make sure that no one else would see or get information about what is happening inside the account. If the predator could not do this on his own, he would persuade (or trick) the Investor to do this for him. But if the trusted contact persons are

---

30 It could include the right to give one or more of the trusted contact persons powers of attorney, although that is a serious step with potential pitfalls. See, e.g., Kerry Peck, “Exploitation and Alzheimer’s”, 15 Experience Magazine No.2 (ABA Senior Lawyers Division (2015)). A monitor could also have the ability to buy and sell securities, although there might need to be certain limitations on the dual role of monitor and account manager, a matter discussed in the text, infra.

31 As noted elsewhere in this Report, one financial institution provided an alert only by regular (“snail”) mail, which was close to useless as an alert for financial irregularities.

alerted to the termination of their ability to observe what is going on in the account, whether it is a change in a password or a termination of their status as trusted contact persons, they will be able to determine whether that change or termination is itself a preliminary step to a pending financial exploitation.

Any account owner should be permitted to name several trusted contact persons (at least three) to avoid the possibility that one of them becomes a problem, becomes too ill to function, or otherwise becomes unavailable. If one of them starts going bad or is unable to function, the other two will be able to see it and take appropriate steps, including making any necessary arrangements to replace that third trusted contact person.

The Guidelines specify that any alert sent to the trusted contact persons should also be sent to the Investor. However, if the financial institution has reason to suspect that that notice might alert the financial predator and warn him or her to cover his or her tracks, the alert should not be sent to the Investor but only to the trusted contact persons, and the trusted contact persons should be so advised. This situation would arise, for example, if it becomes known to the financial institution that an unauthorized person is intercepting the messages to the Investor or that for any other reason the Investor is not being allowed to read those messages.

E. Coordination with Newly Adopted Rules of FinRA and the Proposed Model Act and Guidelines of NASAA

The new rules recently adopted by FinRA, effective February 5, 2018, provide that each Member is required to ask each Investor over the age of 65 (and in a few cases, those younger than 65) to designate a “trusted contact person.” They also authorize the Member to put a temporary hold on distributions for up to 25 days if there is a reasonable belief that the Investor is being or is likely to be financially exploited. If the distribution is delayed, the Member must notify that trusted contact person. However, the rules do not require the financial institution to withhold distributions. Nor is it required to notify the trusted contact person (or anyone else) of other red flags, unless and until it actually withholds a distribution. If it does not exercise its discretion to suspend distributions, it never has to give any information whatsoever to the trusted contact person. At best, the giving of any warnings is absolutely arbitrary. In the opinion of the members of the Task Force, this discretion makes the proposed rules of dubious value and unreliable as an adequate defense to exploitation.

For Investors under the age of 65, the FinRA Rules apply only if the financial institution determines that the Investor is physically or mentally impaired.\(^{33}\) That determination is not a

\(^{33}\) FinRA Rule 2165(a)(1)(B) includes someone under the age of 65 only if “. . . the member reasonably believes[that that person] has a mental or physical impairment that renders the individual unable to protect his or her own interests.”
prerequisite for applying the protective procedure in that Rule to those over age 65. The members of the Task Force do not understand how a financial institution has the ability to make such a determination. For example, the ABA publication, “Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists”, published jointly with the American Psychological Association, details at great length the difficulties that even an expert has in making a diagnosis of mental impairment or incapacity, and that assumes that the patient is in the same room as the examiner, not communicating through a computer terminal or talking over a telephone once or twice a year.\(^{34}\) Trying to determine an Investor’s physical impairments seems no less difficult absent a one-on-one medical examination by an experienced physician, not something done over the telephone or through a computer terminal.\(^{35}\) No do we understand why there should be a different standard for persons over and under the age of 65. It is not necessary to have been diagnosed with early onset Alzheimer’s Disease or be over 65 to be victimized. Accordingly, the Guidelines apply to all IRA accounts, regardless of the age of the Investor.

When the proposed rule change was first published, FinRA invited comments from the public. A member of the Task Force, acting in his individual capacity and not on behalf of any ABA entity, submitted critical comments and made several recommendations.\(^{36}\) FinRA adopted one minor recommendation,\(^{37}\) and provided that individual institutions could adopt a second one, that is, permitting the designation of more than one trusted contact person.\(^{38}\) But

---

\(^{34}\) Many financial institutions, in an attempt to compete by lowering fees and charges to the smallest possible amount, have come close to eliminating the ability of the Investor to speak to a human at the financial institution, either in person or on a telephone.

\(^{35}\) FinRA requires a Member to provide training sessions to help its employees or officers identify when investors are impaired, but Task Force members are dubious that they can be trained adequately without years of specialized education and training or would, with very exceptions, be able to make a diagnose merely by observing trading activity. The handbook mentioned in the text can be viewed at www.apa.org/pi/aging/programs/assessment/index.aspx. This requirement, that the Guidelines apply to all IRA accounts, regardless of age or health of the Investor, eliminates the need of the broker dealer to ascertain the mental or other medical condition of an Investor under the age of 65. This should significantly simplify a very difficult administrative burden on the broker-dealer.

\(^{36}\) Although that submission did not purport to represent in any fashion, directly or indirectly, the views or thoughts of any ABA entity, and made absolutely no reference, directly or indirectly, to the ABA, they reflected the thoughts of all of the active members of the Task Force, and are referred to in this Report as “our” comments and recommendations.

\(^{37}\) The original version of the Rule prohibited a person with trading authority for the account to be designated a trusted contact person. This would include a spouse holding a power of attorney. It is very common and often recommended by financial advisers and estate planners for a husband and wife to exchange durable powers of attorney for use if either one of the spouses becomes disabled. If they did this, the limitation in the original version of the proposed Rules would have prevented them from naming each other as a trusted contact person. We regarded this to be counter-productive. Responding in part to the comment submitted by the Task Force member in his individual capacity, this limitation was removed in the final version.

\(^{38}\) FinRA referred to the comments submitted by this member of the Task Force 12 times. One of the recommendations related to the persons who could qualify as a trusted contact person, which FinRA adopted.
it did not mandate that provision, nor did it adopt the key one of requiring all financial
institutions to alert the designated trusted contact person or persons of red flags. Instead, it said
that financial institutions could voluntarily adopt such proposals on their own and gave a number
of examples where it would be useful to exchange information with the trusted contact person (or
persons). The “best practices” set forth in the Guidelines take advantage of that flexibility and
allow the appointment of at least three trusted contact persons who could, if they so determined,
monitor the IRA account of the Investor.

The North American Securities Administrators Association (“NASAA”) has proposed a
Model Act that would cover many of these same points. It has also adopted guidelines that are
very similar to, and consistent with, the Task Force’s recommended guidelines. The major
difference is that NASAA’s Model Act and guidelines apply to all investment accounts, and are
not as detailed as the Task Force’s guidelines for IRA accounts.

The Guidelines are responsive to the suggestion in the FinRA comments to the proposed
amendments to its rule. They provide that the best practices would allow an Investor to appoint
at least three monitors and provide them with timely alerts of all red flags. The Task Force has
prepared a list of common red flags, but recognizes that as the techniques of financial predators
change, that list may have to be modified from time to time. It is possible that both FinRA and
NASAA might at appropriate times recommend such additional red flags.

Respectively submitted

William Missouri, Chair
Senior Lawyers Division

August, 2017

Another was to permit the appointment of more than one trusted contact person, which we believe is crucial.
While it did not adopt this as a requirement, it stated that institutions could do this on their own:

“While FinRA declines to require more than one trusted contact person, the proposed rule change would
not prohibit members from requesting or customers from naming more than one trusted contact person.”
The suggested Guidelines would make this the normal practice.

39 NASAA Model Legislation or Regulation To Protect Vulnerable Adults From Financial Exploitation (Adopted
40 See www.nasaa.org/40249/nasaa-releases-guide-practices-procedures-protecting-senior-investors-vulnerable-
adults-financial-exploitation/
41 Also, NASAA’s ability to make its guidelines mandatory is limited by the provisions of Section 15(i) of the

[Note: Internet links in these footnotes were accurate as of May 7, 2017.]
GENERAL INFORMATION FORM

Submitting Entity: Senior Lawyers Division

Submitted By: William Missouri, Chair

1. Summary of Resolution(s).

Part 1 of the Resolution recommends the adoption of the "ABA Guidelines for Best Practices for Individual Retirement Accounts" to be applied and used by financial institutions for IRA accounts. The practices set forth in the Guidelines would permit IRA account owners to create a monitors' committee that could oversee activities in the accounts that might indicate possible victimization of the Investor.

Part 2 of the Resolution recommends that the ABA urge all broker-dealers who are members of FinRA adopt and apply the practices recommended by the Guidelines.

Part 3 of the Resolution recommends that the ABA urge FinRA to make the practices listed in the Guidelines mandatory for broker-dealers.

2. Approval by Submitting Entity.

The Resolution was approved unanimously by the Council of the Senior Lawyers Division at its meeting in Washington D.C. on May 6, 2017.

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

No.

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

None

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

N/A.

6. Status of Legislation. (If applicable)

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

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

   None.

9. Disclosure of Interest. (If applicable)

   No specific conflicts have been identified. However, it is assumed that many, and perhaps most, members of the Senior Lawyers Division (and many other ABA members) have or at some future time will have IRA accounts that would be made more secure by the adoption and implementation of this Resolution.

10. Referrals.

    Tax Section
    Business Law Section
    Litigation Section
    Tort, Trial and Insurance Practice Section
    Real Property, Trust and Estate Section
    Solo, Small Firm and General Practice Division.
    ABA Commission on Law and Aging
    Joint Committee on Employee Benefits.

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

    Martin B. Cowan
    Co-chair, Task Force on IRA Accounts, Senior Lawyers Division
    70 Lovell Rd.
    New Rochelle, NY 10804
    (914) 632 9063
    MartinBCowan@Gmail.Com

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

    Martin B. Cowan
    Co-chair, Task Force on IRA Accounts, Senior Lawyers Division
    70 Lovell Rd.
    New Rochelle, NY 10804
    (914) 632 9063
    MartinBCowan@Gmail.Com
EXECUTIVE SUMMARY

1. Summary of the Resolution

Part 1 of the Resolution recommends the adoption of the “ABA Guidelines for Best Practices for Individual Retirement Accounts” to be applied and used by financial institutions for IRA accounts. The practices set forth in the Guidelines would permit IRA account owners to create a monitors’ committee that could oversee activities in the accounts that might indicate possible victimization of the Investor.

Part 2 of the Resolution recommends that the ABA urge all broker-dealers who are members of FinRA adopt and apply the practices recommended by the Guidelines.

Part 3 of the Resolution recommends that the ABA urge FinRA to make the practices listed in the Guidelines mandatory for broker-dealers.

2. Summary of the issue which the Resolution addresses:

IRA accounts tend to peak in value around age 85, an age at which a majority of account owners will be afflicted by various forms of dementia such as Alzheimer’s Disease and Parkinson’s Disease, and by other physical and mental disabilities that render them highly vulnerable to being victimized.

Because of state laws and U.S. Treasury Regulations, none of the methods that can be utilized to protect other forms of assets from financial predators, such as the creation of trusts or inter-vivos gifts to children or other beneficiaries, are permitted for IRA accounts.

At the present time, most, if not all, financial institutions do not permit Investors to arrange to have warnings conveyed to individuals trusted and designated in advance by those Investors of events or transactions that may signify possible fraudulent activities. The practices throughout the industry are inconsistent and, for the most part, insufficient to protect the Investor adequately.

3. An explanation of how the proposed policy position will address the issue.

The proposed ABA Guidelines provide a mechanism for establishing a committee of monitors, similar to the protector’s committees often used in the area of trust and estate planning to prevent inappropriate actions by trustees. This is accomplished by increasing to a minimum of three the number of trusted contact persons (as defined in FinRA’s proposed rules to become effective on February 5, 2018), and to send to those trusted contact persons alerts of red flags indicating possible financial abuses and irregularities.
The Guidelines would permit the trusted contact persons to monitor the activity in an IRA account. This would enable them to investigate suspicious activities and, if they deem appropriate, take corrective actions before significant losses occur. Those actions might involve contacting law enforcement or adult protection agencies, arranging for medical or psychological evaluations, eliminating a suspected financial predator’s access to the Investor or, if necessary, commencing guardianship or conservatorship proceedings.

4. A summary of any minority views or opposition which have been identified.

No opposition within the ABA has been identified.

When FinRA adopted the new Rules, it suggested that Members could adopt most or all of the practices specified in the Guidelines on a voluntary basis, but declined to make them mandatory.
RESOLVED, That the American Bar Association supports the principle that bar admission should not be denied based solely on immigration status.

FURTHER RESOLVED, That the American Bar Association urges Congress to amend 8 U.S.C. § 1621(d) to insert, at the conclusion of all existing language, the following sentence:

"A state court vested with exclusive authority to regulate admission to the bar may, by rule, order, or other affirmative act, permit an undocumented alien to obtain a professional license to practice law in that jurisdiction."
REPORT

"[W]e conclude that the fact that an undocumented immigrant’s presence in this country violates federal statutes is not itself a sufficient or persuasive basis for denying undocumented immigrants, as a class, admission to the State Bar," Chief Justice Tani Cantil-Sakauye wrote in her opinion on Sergio Garcia’s application to practice law in the State of California. "[T]he fact that an undocumented immigrant is present in the United States without lawful authorization does not itself involve moral turpitude or demonstrate moral unfitness so as to justify exclusion from the State Bar, or prevent the individual from taking an oath promising faithfully to discharge the duty to support the Constitution and laws of the United States."^2

Introduction

Jose Godinez-Samperio, whose parents brought him to the United States on a tourist visa and then never returned to Mexico, was denied permission to practice law in the state of Florida. He was denied admission despite having earned a law degree from Florida State University and passing the Florida state bar exam in 2011. In addition, the Chair-Elect of ABA Law Student Division, Thomas E. Kim, whose parents brought him to the United States on a tourist visa and then never returned to South Korea, will face uncertainty on whether he can practice law in the state of Oregon after he earns his law degree from Arizona State University in 2018.

The California Supreme Court recently ruled that based on a newly-minted California state law, Sergio Garcia,^4 who is also an undocumented immigrant,^5 would be admitted to the California State Bar and to the practice of law. This strange dichotomy illustrates the complicated situation that arises when state legislatures and courts step in to decide what rights should be granted to the estimated more than 11 million undocumented immigrants living in the country.

The question of whether an individual should be admitted to the practice of law by the State Bar and thereby obtain a license to practice law in the state is governed by state law. For

---

^1 In re Garcia, 58 Cal. 4th 440, 461, 315 P.3d, 117, 131 (2014).
^2 In re Garcia, 315 P.3d at 130.
^3 Though the state of Florida did not have a law that specifically authorized an undocumented immigrant to obtain a law license at the time the Florida Supreme Court heard Mr. Godinez-Samperio’s case, the Florida legislature has since passed a law providing such authorization.
^4 Mr. Garcia’s parents brought him to the United States when he was a seventeen-month-old, returned to Mexico when he was 9 years old, and then returned to the United States when he was 17 years old. His father, a lawful permanent resident of the U.S. who has since become a citizen, filed an immigration visa petition (petition for an alien relative) on Garcia’s behalf in 1994. The petition was approved the following year, but Mr. Garcia is still on the wait list for the actual visa due to the limited number of visas available for applicants from Mexico.
^5 The term “undocumented immigrant” is used in this Resolution to refer to “[a] non-United States citizen who is in the United States but who lacks the immigration status required by federal law to be lawfully present in this country and who has not been admitted on a temporary basis as a nonimmigrant. Although no shorthand term may be perfect, the United State Supreme Court and the California Legislature have at times used the term ‘undocumented immigrants’ to refer to this category of persons.” In re Garcia, 315 P.3d at 120, n. 1.
example, in In re Garcia, the court explained that to obtain admission to the State Bar under the California Constitution, it is the California Supreme Court—rather than the Legislature or Governor—that possesses the ultimate authority, and bears the ultimate responsibility to resolve questions of general policy relating to admission to the State Bar.\(^6\)

As exemplified by the aforementioned illustrations and the plight of other deserving undocumented immigrant law graduates seeking access to the legal profession, this is a situation that necessitates a long-term, national, consistent solution, which can be aided by the involvement of the American Bar Association.

**Legal Analysis Supporting Bar Admission for Undocumented Immigrants**

Article I, section 8 of the United States Constitution gives Congress the power “to establish a uniform rule of naturalization,” while Article VI provides that federal law “shall be the supreme law of the land . . . any thing in the Constitution or laws of any State to the contrary notwithstanding.” Over the last twenty years, Congress has passed various laws to discourage the inflow of undocumented immigrants. Specifically, in 1996, as part of welfare reform, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”), which makes non-citizens who are not “qualified aliens” ineligible for federal, state, and local “public benefits.”\(^7\) Notably, 8 U.S.C. § 1621 does not simply forbid the state from granting any professional license to an undocumented immigrant; instead, the proscription is qualified. Section 1621 only restricts the state from granting “any . . . professional license . . . provided by an agency of a State . . . or by appropriated funds of a State . . .”\(^8\) A state may, however, provide state and local public benefits to a non-qualified alien if it passes a law after August 22, 1996 affirmatively providing for such eligibility.\(^9\)

As California Attorney General Kamala Harris argued in her amicus curiae brief in support of Mr. Garcia’s application to practice law in California, 8 U.S.C. § 1621(c) is inapplicable to the situation of undocumented immigrants attempting to obtain licenses to practice law because legal licensing is not provided by a state agency but by the plenary power of the state courts:

Section 1621 does not apply because, although admission to the Bar is surely a professional license, neither of the two statutory qualifications is met. The license to practice law is not provided by ‘an agency of the state,’ but by this Court. Nor is the license provided by ‘appropriated funds of the state;’ instead it is funded by fees paid by its members directly to the State Bar, which is never appropriated by the Legislature.\(^10\)

---

\(^6\) *In re Garcia*, 315 P.3d. at 129.
\(^7\) 8 U.S.C. §§ 1611 and 1621.
\(^8\) 8 U.S.C. § 1621(c) (emphasis added).
\(^9\) 8 U.S.C. § 1621(d).
A. State Supreme Courts, which issue licenses to practice law, are not state agencies within the meaning of 8 U.S.C. § 1621

In a right that has been zealously protected, it is state courts that issue law licenses. Indeed, although the State Bar in many states assists with the bar admission process, every State in the Union recognizes that the power to regulate lawyers and the practice of law rests in the judiciary.\(^{11}\) United States Supreme Court Chief Justice Rehnquist wrote: “In the United States, the courts have historically regulated admission to the practice of law before them, and exercised the authority to discipline and ultimately to disbar lawyers whose conduct departed from prescribed standards.”\(^{12}\)

The PRWORA does not define the term “agency of a state” in 8 U.S.C. § 1621, § 1611 (which contains the definitions for the PRWORA), or in § 1101(a) (which is incorporated in 8 U.S.C. § 1611 by reference).\(^{13}\)

In the absence of a statutory definition, it is appropriate to use the ordinary and natural meaning of a statutory term.\(^{14}\) Absent statutory language to the contrary, statutory references to an “agency” are generally interpreted to exclude the courts.\(^{15}\) In *Hubbard v. United States*, the United States Supreme Court concluded that a court is not an agency for purposes of 18 U.S.C. § 1001. The Court noted that:

In ordinary parlance, federal courts are not described as “departments” or “agencies” of the government. As noted by the Sixth Circuit, it would be strange indeed to refer to a court as an “agency.” And while we have occasionally spoken of the three branches of our Government, including the Judiciary, as department[s],” that locution is not an ordinary one. Far more common is the use of “department” to refer to a component of the Executive Branch.\(^{16}\)

While *Hubbard* only directly addressed 18 U.S.C. § 1001, the analysis for 8 U.S.C. § 1621 would be the same. There is nothing found in the text of 8 U.S.C. § 1621 or in any related legislation that warrants abandoning the presumptive definitions. Rather, the statutory framework requires the opposite be done. By explicitly differentiating between “administrative

---


agencies” and “courts” in other sections of the PRWORA, Congress demonstrated that it fully understood the common meaning of “agency.” Had Congress intended to prohibit the types of benefits dispensed by “courts,” it would have undoubtedly included “courts” in section 1621. Further, because it would be implausible to assume that Congress did not recognize and appreciate the time-honored and ubiquitous role of the courts in issuing law licenses when it was drafting section 1621, it is significant that the statute specifically mentions professional licenses that are issued by “state agencies.”

B. Licenses to practice law are not provided with appropriated state funds

A bar license is simply not the kind of public benefit that is proscribed by 8 U.S.C. § 1621 because it is not “provided . . . by appropriated funds of a state.” Some could argue that bar licenses come from appropriated funds of the State and therefore State Courts are prohibited under 8 U.S.C. § 1621 from issuing such licenses to undocumented immigrant law graduates. However, this expansive view of 8 U.S.C. § 1621 is flawed. A professional license “provided . . . by appropriated funds of a state” is one that is paid for or subsidized by appropriated funds of state, instead of by the licensee.

Individual states do not, as a general matter and without exceptional circumstances where the lawyers in question are state employees, pay for or subsidize the bar admission-process or the bar licenses of individual attorneys. Rather, each attorney is responsible for paying for the license him or herself in the form of dues. Aside from the salaries paid to judges and other court personnel who may be involved in the admission process, bar admissions are financed entirely through fees.

A bar license, unlike the other public benefits listed in section 1621, does not provide any payment or assistance to the bar applicant; it merely authorizes an individual to engage in the practice of law. Clearly then, 8 U.S.C. § 1621 was not meant to capture or encompass bar licenses.

C. Construing federal law as excluding licenses to practice law avoids significant constitutional issues

The exclusive federal authority to regulate immigration established in the Constitution does not extend to ancillary matters. The Tenth Amendment of the United States Constitution protects states from undue federal restrictions on state sovereignty. A state’s “separation of powers” in its government structure falls within the protected realm of state sovereignty.

---

17 See Title III of the PRWORA (42 U.S.C. § 666(a)(5)(D)(i)(II)); see also Section 365 of PRWORA (42 U.S.C. § 666(a)(15)), which clearly differentiate between courts and administrative agencies.
18 As with “agency of a state,” the Welfare Reform Act of 1996 does not define “appropriated funds of a state.”
U.S.C. § 1621(d) were construed to require state legislative action to admit certain immigrant applicants to the state bar, the federal law would upset the separation of powers in those states that have assigned bar admission to the judicial system. Avoiding this Tenth Amendment problem supports the construction of 8 U.S.C. § 1621 so that it does not apply to state bar admissions decisions.

In addition, the Contracts Clause of the United States Constitution protects against state impairment of contracts, particularly where the state is a party to the contract. There is a strong argument that a state interpretation of federal law that prohibits the admission of a class of law school graduates would constitute an impairment of the implied contract between a student and a law school within the state. This is particularly applicable to a public law school. That implied contract, which is formed at admission to the law school, includes the assurance that the student will be permitted to practice law once they complete the law school requirements and satisfy other requisites of bar admission. Avoiding this Contracts Clause problem also counsels a proper interpretation of 8 U.S.C. § 1621 in a manner to exclude state bar admissions decisions.

Consequently, because law licensure falls within the sole control of state judiciaries, because licenses to practice law are not provided with appropriated state funds, and in order to avoid significant constitutional issues, it is appropriate for the American Bar Association to support the principle that bar admission should not be denied based solely on immigration status.

20 The Tenth Amendment applies to undue federal intrusion on state sovereignty, including separation of powers, even though the remainder of the federal statute may fall within the Congress’s power to regulate immigration. Acting within enumerated powers does not permit the Congress to invade a state’s sovereignty. See, e.g., N.Y. v. United States, 505 U.S. 144, 166, 112 S. Ct. 2408, 2423 (1992) (“We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.”). In other words, Congress cannot hide behind one of its clear powers to invade a state’s sovereignty. Thus, for example, Congress could not tell a state that only one named unelected individual may determine whether a state will provide state-funded benefits to immigrants; that would plainly violate a state’s right to select its own policymakers. The potential violation of a state’s duly adopted separation of powers detailed here is of the same nature.

21 Ultimately, no one need conclusively decide whether or not there would be a Tenth Amendment violation had Congress intended to interfere with a state’s separation of powers. Under the doctrine of constitutional avoidance, the mere fact of a potential issue counsels interpreting the statute so as to avoid imputing such a constitutionally knotty intention.

22 The existence of such an implied contract would not independently violate 8 U.S.C. § 1621 because in most states where public universities admit undocumented students, legislative action has already been taken under section 1621(d) to permit the admission of undocumented students, and, in over a dozen states, to further permit certain undocumented students to pay a lower in-state tuition rate.

23 Again, because this is simply an application of the doctrine of constitutional avoidance in the context of statutory construction, no one need determine conclusively whether there would be a Contracts Clause violation. This, of course, includes not having to determine whether there is in fact an implied contract as describe here.
Practical Reason Supporting Bar Admission for Undocumented Immigrants

Undocumented immigrants can work and make valuable contributions to the legal profession regardless of work authorization status. Deferred Action for Childhood Arrivals ("DACA") allows immigrants under 31 years of age who were brought to the United States by their parents to live and work legally in the United States. Since 2012, more than a half-million people have applied for DACA, according to U.S. Citizenship and Immigration Services. While many of the undocumented immigrant law graduates like Godinez-Samperio and Vargas qualify for DACA status, others, like Garcia, do not because they were simply too old at the time DACA came into effect. Regardless of whether an undocumented immigrant qualifies for DACA status, he or she may still legally work and practice law in certain circumstances.

Federal law does not prohibit an unauthorized alien from working as an attorney; it merely prohibits him or her from working as an "employee" in the conventional employer-employee relationship. Section 274A of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1324a, and its implementing regulations, which exclusively govern work authorization in the United States, do not apply to individuals working on a pro bono basis or those working outside the employer-employee relationship as an independent contractor or as self-employed.

The term "employment" includes "any service or labor performed by an employee for an employer within the United States. However, employment does not include casual employment by individuals who provide domestic service in a private home that is sporadic, irregular or intermittent." Notably, 8 C.F.R. § 274a.1(f)-(g) expressly excludes independent contractors in the definition of "employee" and "employer":

(f) The term employee means an individual who provides services or labor for an employer for wages or other remuneration but does not mean independent contractors as defined in paragraph (j) of this section or those engaged in casual domestic employment as stated in paragraph (h) of this section.

---

25 A recent survey of 1,608 DACA program participants conducted by Harvard University's National UnDACAmented Research Fund found that 42 percent expect to obtain a master's degree, a professional degree, or a law degree. CITE STUDY. Consequently, Michael A. Olivas — an immigration law professor at the University of Houston who submitted an amicus brief supporting Mr. Garcia's case — prediction that there are likely dozens more undocumented immigrants who will want to enter state bar associations in the coming years is not unlikely. See Jennifer Medina, Allowed to Join the Bar, But Not to Take a Job, NEW YORK TIMES (Jan. 3, 2014), https://www.nytimes.com/2014/01/03/us/immigrant-in-us-illegally-may-practice-law-california-court-rules.html?r=0.
26 It is unlawful for a person or other entity to hire an alien for employment or continue to employ an alien, "knowing the alien is an unauthorized alien." 8 U.S.C. § 1324a(a)(1)-(2).
27 8 C.F.R. § 274a.1(h).
The term employer means a person or entity, including an agent or anyone acting directly or indirectly in the interest thereof, who engages the services or labor of an employee to be performed in the United States for wages or other remuneration. In the case of an independent contractor or contract labor or services, the term employer shall mean the independent contractor or contractor and not the person or entity using the contract labor.

(emphasis added). 8 C.F.R. § 274a.1(g) further clarifies that the “person or entity using the contract labor” is not an “employer.”

Indeed, while an undocumented immigrant may not be employed as an employee, he or she may use his license to do pro bono work, work as an independent contractor, establish a solo law practice, or provide legal advice outside of the United States. Each of these activities are permissible under federal immigration law and would not subject the undocumented attorney or his or her clients to penalties under the IRCA.28

The Situation in the States

As more undocumented immigrants apply to become members of their respective State Bars, States around the nation will have to address the question of whether undocumented law graduates are eligible to obtain a law license. The following states are currently tackling or have resolved the issue of granting undocumented law graduates admission to practice law:

• California: Sergio Garcia was born in Mexico and brought to the United States by his parents when he was only 17 months old. Due to the massive visa backlog for Mexican nationals, Mr. Garcia’s visa application was on hold for over 19 years. During that time, however, Mr. Garcia went to school and ultimately graduated with a law degree from Cal Northern School of Law. He also took and passed the bar exam in California, a state with one of the lowest bar passage rates in the country. Yet, Mr. Garcia’s admission was revoked by the state bar due to his immigration status.

On October 5, 2013, Governor Edmund G. Brown signed A.B. 1024 into law, making California the first state to pass legislation that explicitly permits individuals who have met all eligibility requirements to be admitted to the State Bar regardless of their immigration status.29 A.B. 1024 was passed in direct response to the In re Garcia case, which was at the time pending before the California State Supreme Court.30 Merely two days before the piece of legislation was rewritten, oral arguments heard in the Garcia case centered around the applicability of 8 U.S.C. § 162. The legislature rewrote A.B. 1024 to expressly authorize its

29 See also Senate Bill 1159 (Cal., 2014), http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB1159.
Supreme Court to issue a law license to “an applicant who is not lawfully present in the United States [who] has fulfilled the requirements for admission to practice law.”

Notably, on November 12, 2013, the U.S. Department of Justice filed a letter brief with the California State Supreme Court withdrawing its opposition to Mr. Garcia’s application for a law license and conceding that federal law would no longer preclude the issuance of the bar license upon the effective date of A.B. 1024. Also, in her brief, the California Attorney General wrote that “admitting Garcia to the bar would be consistent with state and federal policy that encourages immigrants, both documented and undocumented, to contribute to society.”

Merely one day after A.B. 1024 went into effect, the California State Supreme Court found that the statute removed the federal obstacle to Mr. Garcia being admitted to the State Bar, stating that “[i]n light of the recently enacted state legislation, we conclude that the Committee’s motion to admit Garcia to the State Bar should be granted. The new legislation removes any potential statutory obstacle to Garcia’s admission posed by section 1621, and there is no other federal statute that purports to preclude a state from granting a license to practice law to an undocumented immigrant.”

- **Florida:** Jose Manuel Godinez-Samperio was brought by his parents to the United States from Mexico at age nine on a tourist visa. The family stayed in the United States after Mr. Godinez-Samperio’s visa expired. Mr. Godinez-Samperio attended school and graduated as valedictorian of his high school class. He later graduated with honors from Florida State University College of Law, and passed the bar exam in 2011. By this time, Mr. Godinez-Samperio had also attained DACA status and held federal work authorization. Yet, his admission remained on hold for three years because of his immigration status.

On March 6, 2014, the Florida Supreme Court, in *In re Garcia*, 315 P.3d at 121, denied Mr. Godinez-Samperio admission to the Florida State Bar, finding that its hands were tied by the state legislature, which had not taken advantage of the exception in 8 U.S.C. § 1621(d). Under that federal statute, states were allowed to authorize public benefits to undocumented immigrants as deemed appropriate.

In response to this decision, on April 25, 2014, the Florida Senate amended and passed an existing family law bill (HB 755) to allow a noncitizen to obtain a law license from the state Supreme Court. The bill’s language limited the scope of the non-citizen provision to an “unauthorized immigrant” who came to Florida as a minor, has lived in the State for at least 10 years, and has met Bar admission requirements. Subsequently, on May 1, 2014, the Florida House of Representatives amended and passed HB 755 to change the scope of the noncitizen provision to an “unauthorized immigrant” who came to the United States as a

---

32 *In re Garcia*, 315 P.3d at 121.
minor, has lived in the United States for 10 years, is a legally documented worker, has been issued a Social Security card, is registered for selective service (if male and required to do so), and has met Bar admission requirements. Governor Rick Scott signed HB 755 into law on May 12, 2014. Florida became the second state to pass legislation that explicitly permits individuals who have met all eligibility requirements to be admitted to the State Bar regardless of immigration status.35

**New York:** Cesar Vargas is an honor student and graduate of New York Law School with a 3.7 grade point average. He interned for a State Supreme Court justice, a Brooklyn District Attorney, and a Congressman. Mr. Vargas passed the state bar exam but was denied admission to the New York bar because he was brought to the United States from Mexico when he was five years old and has no immigration status.

Three years after Mr. Vargas passed the bar exam, on June 3, 2015, a five-judge panel of the New York Appellate Court issued its opinion in Matter of Vargas36 that Mr. Vargas could be admitted to practice law in New York, the state that had been his home since he was five years old. The court indicated that federal law “unconstitutionally infringes on the sovereign authority of the state to divide power among its three coequal branches of government.”

In 2016, the New York Board of Regents also authorized DACA recipients to obtain a professional license and certain teacher certifications if they have met all other requirements for licensure, without consideration of their citizenship status.

**Oregon:** Thomas E. Kim is an undocumented law student who is a DACA recipient. Mr. Kim is a full-tuition merit scholar and a top-tier second year student at Sandra Day O’Connor College of Law at Arizona State University. He has clerked for Davis Wright Tremaine, a prominent Pacific Northwest corporate law firm, and for the Federal Public Defender’s Office for the District of Arizona—Capital Habeas Unit representing clients in habeas corpus proceedings in the District Court, United States Court of Appeals, and the United States Supreme Court. He was brought to the United States from South Korea when he was thirteen years old. Mr. Kim will graduate from law school in 2018 and hopes to seek admission to the Oregon State Bar.

**Nebraska:** Nebraska noticed a trend of young immigrants who were leaving the state after obtaining their education because they were unable to obtain professional licenses based on their immigration status. In 2016, Nebraska passed LB 947, which allows for DACA recipients to obtain a professional or commercial license, including a law license.

**Illinois:** As of 2016, Illinois passed SB 23 allowing for DACA recipients who hold work authorization to apply and be admitted to practice law in the state.

---


Wyoming: In 2015, the Wyoming legislature repealed language requiring that a bar applicant be a U.S. citizen. This allowed for noncitizens seeking entry into the Wyoming State Bar to be admitted if they meet all requirements, without regard to their immigration status.

Other Measures: There is a movement in other states to allow for the licensing of persons without regard to their immigration status in different professions. Utah has allowed for the licensing of occupational therapists or therapy assistants. South Dakota has allowed for the licensing of dentists and dental hygienists. In West Virginia and Nevada, an alien person who meets the requirements to teach may be issued a permit to teach.

The cases in California, Florida, and New York do not exist in a vacuum. Similar cases will continue to emerge across the country. Without clear direction and encouragement from organizations like the American Bar Association, many states will likely be stymied by the question of whether to proceed on their own or wait for action on the federal level. When signing California's law, Governor Edmund G. Brown, Jr. made his stance clear when he said “I'm not waiting.” Neither should the American Bar Association.

Conclusion

There is undeniably an overwhelming need – both currently and on behalf of a growing number of qualified, but undocumented immigrants – for the American Bar Association to weigh-in on the issue of bar admissions. This resolution acknowledges that unmet need, and proposes a long-term and consistent solution moving forward by the American Bar Association’s support of the principle that bar admission should not be denied based solely on immigration status.

Summary

American Bar Association supports the principle that bar admission should not be denied based solely on immigration status.

Financial Report

The adoption of this resolution entails no financial expense to the ABA or Law Student Division.

Respectfully submitted,

Kareem S. Aref, Chair of Law Student Division

August 2017
1. Summary of Resolution.
American Bar Association supports the principle that bar admission should not be denied based solely on immigration status.

There is undeniably an overwhelming need – both currently and on behalf of a growing number of qualified, but undocumented immigrants – for the American Bar Association to weigh-in on the issue of bar admissions. This resolution acknowledges that unmet need, and proposes a long-term and consistent solution moving forward. Undocumented immigrants have the desire, and increasingly the education to gain admittance to practice law before this nation’s various state bars; they simply need the authorization to do so. That is what this Resolution seeks.

2. Approval by Submitting Entity. Approved by the Law Student Division assembly on April 24, 2017.

3. Has this or a similar resolution been submitted to the House or Board previously? No.

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

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


7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. Notice will go out to all law students and select ABA entities.

8. Cost to the Association. (Both direct and indirect costs) The adoption of this resolution entails no financial expense to the ABA.

9. Disclosure of Interest. (If applicable) Thomas E. Kim, Chair-Elect of Law Student Division.
10. **Referrals.**

Section of Legal Education and Admissions to the Bar  
Commission on Immigration  
NABE  
NOBC  
Conference of Chief Justices

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

Thomas E. Kim  
1712 SW San Mateo Ter. Beaverton OR 97006  
971-255-2806  
123ThomasKim@gmail.com

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

Thomas E. Kim  
1712 SW San Mateo Ter. Beaverton OR 97006  
971-255-2806  
123ThomasKim@gmail.com

Rene Morency  
4579 Laclede #321 St. Louis MO 63108  
314-795-0652  
jurisdoc2016@planetsuccessdomains.net

John Weber  
3311 Thrush Rd. Louisville KY 40213  
502-472-2037  
johnweber.ky@gmail.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

American Bar Association supports the principle that bar admission should not be denied based solely on immigration status.

2. Summary of the Issue that the Resolution Addresses

Like many undocumented law students in the United States, the Chair-Elect of ABA Law Student Division, Thomas E. Kim, whose parents brought him to the United States on a tourist visa and then never returned to South Korea, will face uncertainty on whether he can practice law in the state of Oregon after he earns his law degree from Arizona State University in 2018.

Undocumented immigrants have the desire, and increasingly the education to gain admittance to practice law before this nation’s various state bars; they simply need the state-by-state authorization to do so. That is what this Resolution seeks.

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

The recommended Resolution will enable the American Bar Association to facilitate and urge the appropriate governing bodies of American states and territories to enact rules permitting undocumented immigrants, who have met all the necessary prerequisite qualifications for admission in their respective jurisdiction, to join State Bars.

There is undeniably an overwhelming need – both currently and on behalf of a growing number of qualified, but undocumented immigrants – for the American Bar Association to weigh-in on the issue of bar admissions. This resolution acknowledges that unmet need, and proposes a long-term and consistent solution moving forward.

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

None.
RESOLUTION

RESOLVED, That the American Bar Association adopts the American Bar Association Model Provisions on Electronic Commerce for International Trade Agreements, dated August 2017, and recommends them as a standard template for use in international trade agreements and other relevant international agreements and guidelines.
Article 1.1: Definitions

For the purposes of this [Chapter]:

1. computing facilities means computer servers and storage devices for processing or storing information for commercial use;

2. covered person means:
   (a) a covered investment as defined in Article [x.1 (Definitions)];
   (b) an investor of a Party as defined in Article [x.1 (Definitions)]; or
   (c) a service supplier of a Party as defined in Article [x.1 (Definitions)];

3. digital product means a computer program, text, video, image, sound recording or other product that is digitally encoded, produced for commercial sale or distribution, and that can be transmitted electronically;\(^1,^2\)

4. electronic authentication means the process or act of verifying the identity of a party to an electronic communication or transaction and ensuring the integrity of an electronic communication;

5. electronic transmission or transmitted electronically means a transmission made using any electromagnetic means, including by photonic means;

6. personal information means any information, including data, about an identified or identifiable natural person;

7. trade administration documents means forms issued or controlled by a Party that must be completed by or for an importer or exporter in connection with the import or export of goods; and

8. unsolicited commercial electronic message means an electronic message which is sent for commercial or marketing purposes to an electronic address, without the consent of the recipient or despite the explicit rejection of the recipient, through an Internet access service supplier or, to the extent provided for under the laws and regulations of each Party, other telecommunications service.

\(^1\) For greater certainty, digital product does not include a digitized representation of a financial instrument, including money.

\(^2\) The definition of digital product should not be understood to reflect a Party's view on whether trade in digital products through electronic transmission should be categorized as trade in services or trade in goods.
Article 1.2: Scope and General Provisions

1. This Chapter shall apply to measures adopted or maintained by a Party that affect trade by electronic means.

2. This Chapter shall not apply to:

   (a) government procurement; or

   (b) information held or processed by or on behalf of a Party, or measures related to such information, including measures related to its collection.

Article 1.3: Customs Duties

1. No Party shall impose customs duties on electronic transmissions, including content transmitted electronically, between a person of one Party and a person of another Party.

2. For greater certainty, paragraph 1 shall not preclude a Party from imposing internal taxes, fees or other charges on content transmitted electronically, provided that such taxes, fees or charges are imposed in a manner consistent with this Agreement.

Article 1.4: Non-Discriminatory Treatment of Digital Products

1. No Party shall accord less favorable treatment to digital products created, produced, published, contracted for, commissioned or first made available on commercial terms in the territory of another Party, or to digital products of which the author, performer, producer, developer or owner is a person of another Party, than it accords to other like digital products.  

2. This Article shall not apply to broadcasting.

Article 1.5: Domestic Electronic Transactions Framework


2. Each Party shall endeavor to:

   (a) avoid any unnecessary regulatory burden on electronic transactions; and

   (b) facilitate input by interested persons in the development of its legal framework for electronic transactions.

---

3 For greater certainty, to the extent that a digital product of a non-Party is a “like digital product”, it will qualify as an “other like digital product” for the purposes of this paragraph.
Article 1.6: Electronic Authentication and Electronic Signatures

1. Except in circumstances otherwise provided for under its law, a Party shall not deny the legal validity of a signature solely on the basis that the signature is in electronic form.

2. No Party shall adopt or maintain measures for electronic authentication that would:
   (a) Prohibit parties to an electronic transaction from mutually determining the appropriate authentication methods for that transaction; or
   (b) prevent parties to an electronic transaction from having the opportunity to establish before judicial or administrative authorities that their transaction complies with any legal requirements with respect to authentication.

3. Notwithstanding paragraph 2, a Party may require that, for a particular category of transactions, the method of authentication meet certain performance standards or is certified by an authority accredited in accordance with its law.

4. The Parties shall encourage the use of interoperable electronic authentication.

Article 1.7: Online Consumer Protection

1. The Parties recognize the importance of adopting and maintaining transparent and effective measures to protect consumers from fraudulent and deceptive commercial activities as referred to in [Article x (Consumer Protection)] when they engage in electronic commerce.

2. Each Party shall adopt or maintain consumer protection laws to proscribe fraudulent and deceptive commercial activities that cause harm or potential harm to consumers engaged in online commercial activities.

Article 1.8: Personal Information Protection

1. The Parties recognize the economic and social benefits of protecting the personal information of users of electronic commerce and the contribution that this makes to enhancing consumer confidence in electronic commerce.

2. To this end, each Party shall adopt or maintain a legal framework that provides for the protection of the personal information of the users of electronic commerce. In the development of its legal framework for the protection of personal information, each Party should take into account principles and guidelines of relevant international bodies.¹

¹ For greater certainty, a Party may comply with the obligation in this paragraph by adopting or maintaining measures such as a comprehensive privacy, personal information or personal data protection laws, sector-specific laws covering privacy, or laws that provide for the enforcement of voluntary undertakings by enterprises relating to privacy.
3. Each Party shall endeavor to adopt non-discriminatory practices in protecting users of electronic commerce from personal information protection violations occurring within its jurisdiction.

4. Each Party should publish information on the personal information protections it provides to users of electronic commerce, including how:

   (a) individuals can pursue remedies; and
   (b) business can comply with any legal requirements.

5. Recognizing that the Parties may take different legal approaches to protecting personal information, each Party should encourage the development of mechanisms to promote compatibility between these different regimes. These mechanisms may include the recognition of regulatory outcomes, whether accorded autonomously or by mutual arrangement, or broader international frameworks. To this end, the Parties shall endeavor to exchange information on any such mechanisms applied in their jurisdictions and explore ways to extend these or other suitable arrangements to promote compatibility between them.

**Article 1.9: Paperless Trading**

Each Party shall endeavor to:

   (a) make trade administration documents available to the public in electronic form; and
   (b) accept trade administration documents submitted electronically as the legal equivalent of the paper version of those documents.

**Article 1.10: Principles on Access to and Use of the Internet for Electronic Commerce**

Subject to applicable policies, laws and regulations, the Parties recognize the benefits of consumers in their territories having the ability to:

   (a) access and use services and applications of a consumer's choice available on the Internet, subject to reasonable network management; 5
   (b) connect the end-user devices of a consumer's choice to the Internet, provided that such devices do not harm the network; and
   (c) access information on the network management practices of a consumer's Internet access service supplier.

---

5 The Parties recognize that an Internet access service supplier that offers its subscribers certain content on an exclusive basis would not be acting contrary to this principle.
Article 1.11: Cross-Border Transfer of Information by Electronic Means

1. The Parties recognize that each Party may have its own regulatory requirements concerning the transfer of information by electronic means.

2. Each Party shall allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business of a covered person.

Article 1.12: Internet Interconnection Charge Sharing

The Parties recognize that a supplier seeking international Internet connection should be able to negotiate with suppliers of another Party on a commercial basis. These negotiations may include negotiations regarding compensation for the establishment, operation and maintenance of facilities of the respective suppliers.

Article 1.13: Location of Computing Facilities

1. The Parties recognize that each Party may have its own regulatory requirements regarding the use of computing facilities, including requirements that seek to ensure the security and confidentiality of communications.

2. No Party shall require a covered person to use or locate computing facilities in that Party's territory as a condition for conducting business in that territory.

Article 1.14: Unsolicited Commercial Electronic Messages

1. Each Party shall adopt or maintain measures regarding unsolicited commercial electronic messages that:

   (a) require suppliers of unsolicited commercial electronic messages to facilitate the ability of recipients to prevent ongoing reception of those messages;

   (b) require the consent, as specified according to the laws and regulations of each Party, of recipients to receive commercial electronic messages; or

   (c) otherwise provide for the minimization of unsolicited commercial electronic messages.

2. Each Party shall provide recourse to suppliers of unsolicited commercial electronic messages that do not comply with the measures adopted or maintained pursuant to paragraph 1.

3. The Parties shall endeavor to cooperate in appropriate cases of mutual concern regarding the regulation of unsolicited commercial electronic messages.
Article 1.15: Cooperation

Recognizing the global nature of electronic commerce, the Parties shall endeavor to:

(a) work together to assist SMEs to overcome obstacles to its use;

(b) exchange information and share experiences on regulations, policies, enforcement and compliance regarding electronic commerce, including:

(i) personal information protection;

(ii) online consumer protection, including means for consumer redress and building consumer confidence;

(iii) unsolicited commercial electronic messages;

(iv) security in electronic communications;

(v) authentication; and

(vi) e-government;

(c) exchange information and share views on consumer access to products and services offered online among the Parties;

(d) participate actively in regional and multilateral fora to promote the development of electronic commerce; and

(e) encourage development by the private sector of methods of self-regulation that foster electronic commerce, including codes of conduct, model contracts, guidelines and enforcement mechanisms.

Article 1.16: Cooperation on Cybersecurity Matters

The Parties recognize the importance of:

(a) building the capabilities of their national entities responsible for computer security incident response; and

(b) using existing collaboration mechanisms to cooperate to identify and mitigate malicious intrusions or dissemination of malicious code that affect the electronic networks of the Parties.

Article 1.17: Source Code

1. No Party shall require the transfer of, or access to, source code of software owned by a person of another Party, as a condition for the import, distribution, sale or use of such software, or of products containing such software, in its territory.
2. Nothing in this Article shall preclude the inclusion or implementation of terms and conditions related to the provision of source code in commercially negotiated contracts; or

3. This Article shall not be construed to affect requirements that relate to patent applications or granted patents, including any orders made by a judicial authority in relation to patent disputes, subject to safeguards against unauthorized disclosure under the law or practice of a Party.
1. INTRODUCTION

The ability of companies and consumers to move data has become paramount in promoting, fostering, and expanding commerce and services around the globe. Many countries have enacted rules that stifle competition and disadvantage American entrepreneurs, by imposing burdensome barriers or overly restricting the free flow of information. This Resolution supports modernization and uniformity of the regulation of business data flows from one country to another country. It also urges the United States to adopt the American Bar Association Model Provisions on Electronic Commerce for International Trade Agreements, dated August 2017, ("the Model Provisions") as the standard template for use in international trade agreements and other relevant international agreements and guidelines, subject to reasonable safeguards such as the protection of consumer data upon its exportation.

The establishment and promotion of a freer and more open Internet will enable entrepreneurial opportunities, expand social-networking, broaden access to a myriad of services and information sources, and stimulate economic growth throughout the world. The Model Provisions focus on protecting the free flow of cross-border data and help to ensure digital products originating from member States of international trade agreements are not at a competitive disadvantage in another member's market.

The Model Provisions are based upon the basic framework of electronic commerce provisions supported by the United States in a recent international trade agreement negotiation, and they take into consideration the fast-changing pace of globalization and technology. For example, the availability of cloud computing and of Internet-based products and services should not require companies and digital entrepreneurs "to build physical infrastructure and expensive data centers in every country they seek to serve." However, as the Office of the U.S. Trade Representative has observed, "many countries have tried to enforce such requirements which add unnecessary costs and burdens on providers and customers alike." The Model Provisions specifically address these localization barriers through specific provisions designed to promote access to networks and efficient data processing. In essence, "fundamental non-discrimination principles are at the core of an efficient global trading system for goods and services," and the Model Provisions ensure that these principles apply to cross-border data.

2. DIGITAL TRADE AND E-COMMERCE

While there is no generally accepted meaning of the terms, "digital trade" and "e-commerce" generally describe transactions that involve, or are enabled by, the Internet. The U.S.

---

3 Id.
4 Id.
International Trade Commission ("USITC") has broadly defined digital trade as "U.S. domestic commerce and international trade in which the Internet and Internet-based technologies play a particularly significant role in ordering, producing, or delivering products and services." The USITC explained that this definition was "adopted to capture a wide variety of economic activities that are facilitated by or occur via the Internet." These can include "orders placed on an e-commerce website; information streams needed by manufacturers to manage global value chains; communication channels such as email and voice over Internet protocol (VoIP); and financial data and transactions relied on for online purchases or electronic banking."

The World Trade Organization (WTO) has defined e-commerce as "the production, distribution, marketing, sale or delivery of goods and services by electronic means." The Organization for Economic Cooperation and Development (OECD) has defined it as "the sale or purchase of goods or services, conducted over computer networks by methods specifically designed for the purpose of receiving or placing of orders." In order to fall under the definition, the goods or services must be ordered by such methods; however, the "payment and the ultimate delivery of the goods or services" do not have to be conducted by such methods. E-commerce can involve several forms, including business-to-business transactions, business-to-consumer transactions, consumer-to-consumer transactions, and business-to-government transactions. In short, any transaction that is facilitated by, or occurs through, the Internet can fall under one of the articulated definitions of digital trade or e-commerce.

3. BENEFITS OF CROSS-BORDER DATA TRANSFERS

An OECD report has found that the "Internet has become a key economic infrastructure, revolutionizing businesses and serving as a platform for innovation." A 2014 McKinsey Global Institute study estimated that global transactions via e-commerce amounted to US$8 trillion per

---

6 Id.
10 Orders made through "telephone calls, facsimile or manually typed e-mail" are excluded from the definition. See id.
11 United Nations Conference on Trade and Development, In Search of Cross-Border E-Commerce Trade Data, April 2016, at 2. These can include online transactions related to goods that are subsequently sold to end-users through retail outlets or the provision of goods are services to other businesses; business to consumer transactions. These can include online sales channels of retail or manufacturing companies of digital products and services or physical goods. See id.
12 These can include sales via "online marketplace platforms" or communities. See id.
13 These can include bids by the government through "e-procurement." See id.
The advancement of Internet-based growth has been coupled with global advances in data collection, retention, and analysis, covering a broad array of sectors. In turn, the need for, and value added from, cross-border information flows have increased significantly.

Both large companies and small-and-medium enterprises (SMEs) benefit from cross-border data flows. Data transfers enable large companies to, among other things, support “diversified supply chains, global talent sourcing, and analysis of large data sets.” Aided by connectivity and critical marketing information, SMEs benefit by the ability to target customers around the world. As such, cross border data flows can help level the playing field for such entities based in smaller towns or remote locations around the world. Indeed, a 2012 study found that SMEs that “rely heavily on Internet services typically have 22% greater revenue growth than those that use the Internet minimally.” All companies (regardless of whether they engage in the sale of goods or services online) can benefit from the ability to transfer records, data, or communications in connection with the traditional goods or services they provide.

A recent study by McKinsey found that cross-border data trade generates greater economic impact relative to trade in traditional goods. These benefits increase the demand for and reliance upon access to data. Along with fueling revenue growth and economic development, cross-border data transfers can advance a variety of public interest or social objectives. A 2014 U.S. Chamber of Commerce study provided six relevant case studies, related to the following: transfer of medical data across borders for “maintenance and repair;” maintenance of accurate databases related to individuals that are in transit or have permanently migrated; facilitation of efficiencies for manufacturing and energy development; management of a global workforce; and the monitoring of “outbreaks and spreads of infectious diseases around the world.”

4. E-COMMERCE PROVISIONS IN TRADE AGREEMENTS OF OTHER COUNTRIES

Several recent trade agreements have included provisions related to e-commerce. Some agreements have been more robust than others in terms of commitments. For example, the e-commerce chapter in the European Union (“EU”)–Canada Comprehensive Economic and Trade Agreement...
Agreement, which was signed in October 2016,\(^23\) does not contain provisions on cross-border data flows. The parties agreed \emph{inter alia} to "promote the development of electronic commerce" and "maintain a dialogue on issues raised by electronic commerce, and committed to "not impose a customs duty, fee, or charge on a delivery transmitted by electronic means;" with an exception for certain internal tax or charges.\(^24\) Notably, in the Trans-Pacific Partnership ("TPP"), Canada agreed to a range of provisions related to e-commerce, which are described in more detail in Section 7(a) below. As such, the omission of these provisions in CETA can reasonably be taken to be indicative of the EU's position on the issue.

By contrast, the e-commerce chapter in the Agreement to Amend the Singapore-Australia Free Trade Agreement ("SAFTA"), which was also signed in October 2016,\(^25\) contains a host of commitments related to \emph{inter alia} data flow transfers, location of source code, consumer protection, customs duties, and electronic authorization.\(^26\) In particular, like the TPP, Article 13.2 provides that "[e]ach Party shall allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business of a covered person," with certain exceptions.\(^27\) In addition, under the e-commerce chapter of the trade agreement between Chile and Uruguay, which was also signed in October 2016,\(^28\) the parties reportedly agreed to "provisions aimed at maintaining a trans[-]-border flow fluid information."\(^29\) In short, several agreements that have been completed after the TPP have incorporated the wide-ranging, robust standards provided in that agreement.

5. E-COMMERCE IN THE WORLD TRADE ORGANIZATION

The WTO came into existence in 1995 without much thought given to electronic commerce, its texts having been negotiated in the late 1980s and early 1990s. But, WTO members recognized the growing importance of electronic commerce in international trade transactions at the organization's second Ministerial Conference in May 1998. At the Conference, Ministers adopted the Declaration on Global Electronic Commerce, which called for the establishment of a "comprehensive work programme to examine all trade-related issues relating to global electronic commerce in the WTO's working group on electronic commerce."


\(^{27}\) Id. at Chapter 14, Article 13.2.


\(^{29}\) Kawesqar, Chancellor Muñoz stresses free trade between Chile and Uruguay: "We are deepened our integration", available at http://www.revistakawesqar.cl/en/canciller-munoz-destaca-tratado-de-libre-comercio-entre-chile-y-uruguay-estamos-profundizado-nuestra-integracion/
commerce[,]." Specifically, the Ministers declared that Members "will continue their current practice of not imposing customs duties on electronic transmissions[,]" and stated that the work program would consider the economic, financial, and development needs of developing countries, and "recognize that work is also being undertaken in other international fora." In September 1998, the General Council adopted the "Work Programme on Electronic Commerce" ("Work Programme"). The Work Programme defines the term "electronic commerce" as "the production, distribution, marketing, sale or delivery of goods and services by electronic means." The Work Programme declares that its scope will also include issues related to the infrastructure for electronic commerce.

The Work Programme includes input from other WTO bodies, as follows:

- The Council for Trade in Services: tasked with examining and reporting on the treatment of electronic commerce within the General Agreement on Trade in Services (GATS), including issues of transparency; domestic regulation and standards; market access commitments regarding the electronic supply of services; use of public communications transport networks; and customs duties.

- The Council for Trade in Goods: directed to examine and report on aspects of electronic commerce relevant to the General Agreement on Tariffs and Trade ("GATT"), including market access for, and access to, products related to electronic commerce; the valuation of imported goods; import licensing; rules of origin; and customs duties.

- The Council for TRIPS (Trade-Related Aspects of Intellectual Property Rights): directed to examine and report on intellectual property issues in electronic commerce, including protection and enforcement of copyrights and trademarks, and new technologies.

- The Committee on Trade and Development: tasked with examining and reporting on the economic and financial needs of developing countries and the development implications of electronic commerce, including the role of electronic commerce in integrating developing countries into the world trading system.

In addition to these four WTO bodies, the WTO General Council oversees the Work Programme and examines, in Dedicated Discussions, issues in electronic commerce that cut across different portfolios. Cross-cutting issues include the classification of an electronic transaction as a trade in goods or a trade in services (where the classification triggers the relevant legal text; GATT or

31 Id.
32 Id.
34 Id.
35 Id., ¶ 2.1.
36 Id., ¶ 3.1.
37 Id., ¶ 4.1.
38 Id., ¶ 5.1.
GATS); the role of electronic commerce in promoting trade in developing countries; the ways in which some countries levy internal taxes on electronic commerce transactions; technological neutrality (treatment that is neutral with respect to the technology (existing or future) used); “likeness” (electronic communication is considered equivalent to paper-based communication); and jurisdiction and applicable law. Most Members agreed that the WTO should not create any “unnecessary obstacles” to the development of e-commerce.

In general, the Work Programme and the Dedicated Discussions have uncovered important and complex issues. However, very little substantive progress has been made on most issues. In July 2015, the General Council issued its latest progress report on the Work Programme. At that date, the General Council had engaged in ten Dedicated Discussions on cross-cutting issues. The report, in keeping with previous status reports, distills the difficulty that the Work Programme has had in making progress clarifying the WTO’s jurisdiction over electronic commerce. In particular, the Work Programme has not yet determined whether GATT, the agreement covering the trade in goods, or GATS, the agreement covering the trade in services, governs electronic transactions. Moreover, if GATS covers the transaction, the Work Programme provides no direction as to which “modes” of trading services and which services commitments apply.

Additionally, the report outlined many complex issues for which Members had yet to reach agreement: some Members wanted the temporary moratorium on customs duties on electronic transmissions to be made permanent, while some Members only wanted the temporary ban extended; some Members wanted to clarify the directive of the Work Programme; Members from some developing countries noted that their internal e-commerce laws were still being drafted and that, therefore, they could not comment on specific Work Programme proposals; and

---

40 Id. at 2.
42 GATS outlines four “modes” of supply of services:
   - Mode 1: “cross-border supply” – services supplied from one country to another;
   - Mode 2: “consumption abroad” – consumers or firms making use of a service in another country;
   - Mode 3: “commercial presence” – a foreign company setting up subsidiaries or branches to provide services in another country;
   - Mode 4: “presence of natural persons” – individuals traveling from their own country to supply services in another.

43 In GATS, member countries provide specific commitments to access to service sectors in their markets. These commitments are listed in schedules and, unless a sector is listed, a member has not agreed to market access in that sector. Members may also agree to certain limitations on access to a service sector. See, e.g., World Trade Organization, Understanding the WTO: Services: Rule for Growth and Investment, available at https://www.wto.org/english/tratop_e/whatiss_e/tifs_e/agrm6_e.htm.
44 Two dispute settlement decisions, however, clarified the issues somewhat by concluding that electronic, cross-border delivery of a service implicates GATS mode 1 commitments (e.g., non-resident service providers supply services cross-border into a Member’s territory). See Panel Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/R, adopted 19 November 2004, para. 3.29 and Appellate Body Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting, para. 215.
some members noted the importance of focusing on small- and medium-sized enterprises, while others noted the importance of issues related to data flows and privacy, among other issues. The report stressed that any progress on issues must be Member-driven and that the time had come to submit concrete proposals.

Despite these open issues, the Work Programme nonetheless appears to be approaching a consensus on the applicability of GATS in disputes involving the electronic delivery of service; that GATS is "technologically neutral" and, therefore, Members’ specific commitments include the electronic supply of services unless specifically stated; and on the applicability of all provisions of GATS to the electronic supply of services.

However, many issues await resolution, including further clarification of whether the cross-border, electronic delivery of a service implicates GATS mode 1 or mode 2 commitments; scheduling of new electronic services that were unknown at the start of the Work Programme; the status of the moratorium on customs duties on electronic transactions; and clarification of the scope of the WTO Annex on Telecommunications with respect to access to and use of internet services.

6. MAJOR U.S. FREE TRADE AGREEMENTS

Two major U.S. free trade agreements widely discussed by the public or news media are the North American Free Trade Agreement ("NAFTA") and United States-Korea Free Trade Agreement ("KORUS FTA"). NAFTA does not have an electronic commerce chapter or provision. However, as discussed in detail below, KORUS FTA contains an article setting forth standards for digital products and electronic signatures.

KORUS FTA, which entered into force on March 15, 2012, provides a recent example of the coverage of electronic commerce within a bilateral free trade agreement. With respect to the trade in digital products, Chapter 15 of the KORUS FTA provides that:

ARTICLE 15.3: DIGITAL PRODUCTS

1. Neither Party may impose customs duties, fees, or other charges on or in connection with the importation or exportation of:

   (a) if it is an originating good, a digital product fixed on a carrier medium; or

---

47 The Telecommunications Annex "requires each Member to ensure that all service suppliers seeking to take advantage of scheduled commitments are accorded access to and use of public basic telecommunications, both networks and services, on reasonable and non-discriminatory basis." World Trade Organization, Explanation of the Annex on Telecommunications, available at https://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_annex_expl_e.htm.
48 Footnotes omitted.
(b) a digital product transmitted electronically.

2. Neither Party may accord less favorable treatment to some digital products than it accords to other like digital products

(a) on the basis that:

(i) the digital products receiving less favorable treatment are created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms in the territory of the other Party, or

(ii) the author, performer, producer, developer, distributor, or owner of such digital products is a person of the other Party; or

(b) so as otherwise to afford protection to other like digital products that are created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms in its territory.

3. Neither Party may accord less favorable treatment to digital products:

(a) created, produced, published, contracted for, commissioned, or first made available on commercial terms in the territory of the other Party than it accords to like digital products created, produced, published, contracted for, commissioned, or first made available on commercial terms in the territory of a non-Party; or

(b) whose author, performer, producer, developer, distributor, or owner is a person of the other Party than it accords to like digital products whose author, performer, producer, developer, distributor, or owner is a person of a non-Party.

The KORUS FTA also clarifies the use of electronic signatures by providing that:

Neither party may adopt or maintain legislation regarding electronic authentication that would:

(a) prohibit parties to an electronic transaction from mutually determining the appropriate authentication methods for that transaction;

(b) prevent parties from having the opportunity to establish before judicial or administrative authorities that their electronic transaction complies with any legal requirements with respect to authentication; or

(c) deny a signature legal validity solely on the basis that the signature is in electronic form. 49
Additionally, the agreement encourages the free flow of digital information across borders:

Recognizing the importance of the free flow of information in facilitating trade, and acknowledging the importance of protecting personal information, the Parties shall endeavor to refrain from imposing or maintaining unnecessary barriers to electronic information flows across borders.\(^{50}\)

KORUS FTA also governs the electronic supply of services delivered or performed electronically in separate chapters related to investment, cross-border trade in services, and financial services.

The following section outlines potential opportunities for including e-commerce commitments, including provisions that promote cross-border data flows and prohibit data localization measures, in ongoing and prospective trade negotiations. These agreements may offer the best prospects for setting enforceable internationally-recognized standards for the movement of electronic information across borders.

### 7. RECENT HISTORY OF KEY U.S. TRADE NEGOTIATIONS

#### a. Trade in Services Agreement

Trade in Services Agreement (TiSA) negotiations, launched in 2013, have taken place among 23 members of the World Trade Organization (WTO)\(^ {51}\) that represent nearly 70 percent of the world’s $55 trillion services market in 2014.\(^ {52}\) As proposed, TiSA would stand alongside and be modeled after the General Agreement on Trade in Services. While GATS predated e-commerce disciplines at the WTO and in other trade agreements, TiSA was envisaged to include e-commerce commitments that would consider new technology and the changes to the way businesses and consumers participate in trade through an increasingly digitized trading system.

As stated by USTR, the United States would pursue “the development of appropriate provisions to support services trade through electronic channels.”\(^ {53}\) Similarly, the EU envisioned that the TiSA E-Commerce Annex would include provisions on cross-border data flows, localization, network access, customs duties, electronic authentication and electronic signatures, online consumer protection and spam, net neutrality, and source code.\(^ {54}\) Accordingly, the United States, “tabled an ambitious proposal to address restrictions on cross-border data flows and the troubling trend toward localization requirements.”\(^ {55}\) In addition, the United States tabled a proposal to

---

\(^{50}\) KORUS FTA, Art. 15.8.

\(^{51}\) https://ustr.gov/tisa/participant-list.

\(^{52}\) https://ustr.gov/TiSA.


limit liability for online services$^{56}$ and U.S. officials signaled they would pursue a data localization provision that would not exclude financial services data.$^{57}$

Ministers from TiSA parties last met informally in 2016 to discuss progress and reaffirmed their commitment to conclude an ambitious agreement.$^{58}$ While the outlook for concluding negotiations is uncertain, cross-border data flows and localization provisions continue to garner high-levels of attention due to the EU’s current position on data protection and privacy rules. To date, the EU has yet to table a proposal for the full suite of e-commerce disciplines.$^{59}$ However, in its 2015 “Trade for All Strategy” the European Commission stated that it would use FTAs and TiSA “to set rules for e-commerce and cross-border data flows and tackle new forms of digital protectionism, in full compliance with and without prejudice to the EU’s data protection and data privacy rules.”$^{60}$ Given additional political uncertainty in the United States related to trade in general, prospects for TiSA’s E-Commerce Annex are unknown at this time. In the absence of the TPP agreement, TiSA may still represent the largest plurilateral opportunity to further expand international rules on digital trade.

b. Transatlantic Trade and Investment Partnership

The United States and the European Union launched negotiations on a comprehensive free trade agreement in 2013. The Transatlantic Trade and Investment Partnership (T-TIP) was envisioned to strengthen what was already the world’s largest trading relationship through additional goods and services trade liberalization, while also addressing regulatory differences that affect transatlantic trade and investment flows. Annually, $260 billion in digital services trade moves between the United States and the EU.$^{61}$

With respect to e-commerce and ICT services, the United States is seeking “to develop appropriate provisions to facilitate the use of electronic commerce to support goods and services trade, including through commitments not to impose customs duties on digital products or unjustifiably discriminate among products delivered electronically; [and to] include provisions that facilitate the movement of cross-border data flows.”$^{62}$ While U.S. negotiators highlighted this area in initial statements, the EU’s negotiating mandate was void of references to data flows or data localization. Instead, the mandate discussed generally the EU’s intent to seek an agreement that would, “provide for the reciprocal liberalization of trade in goods and services as well as rules on trade-related issues, with a high level of ambition going beyond existing WTO commitments.”$^{63}$

Like TiSA, e-commerce discussions in T-TIP have largely been hampered by internal EU deliberations on the appropriate role of privacy and data protection in trade agreements. Even with the resolution and implementation of a U.S.-EU data transfer framework in 2016, EU negotiators have yet been unable to finalize negotiations over data flows. The uncertain political dynamics on trade in the United States and the EU’s lack of progress on tabling a proposal further diminishes the likelihood T-TIP may serve as a vehicle for an ambitious e-commerce chapter.

**c. Potential U.S. Trade Negotiation Opportunities**

Presently, the new Trump Administration has not yet formally proposed the scope and objectives for negotiating new or updating previously negotiated U.S. FTAs, but there is significant potential for including meaningful e-commerce disciplines in these agreements. Most U.S. FTAs include very little on information flows and none guarantee that data flows freely across borders or address data localization measures through enforceable mechanisms. If negotiations launch to update NAFTA or a bilateral trade deal between the United States and United Kingdom, as is widely under discussion, the United States will be well positioned to work toward including data flows and localization language in these agreements. Similarly, if negotiations move forward to update other FTAs or launch new FTAs, new disciplines on data flows and localization may also be considered.

**d. Non-U.S. Trade Negotiations**

1. **Regional Comprehensive Economic Partnership**

The Regional Comprehensive Economic Partnership (RCEP) is a trade agreement currently under negotiation between 16 Association of Southeast Asian Nations (ASEAN) and ASEAN Free Trade Partners (AFPs). RCEP was established to "broaden and deepen the engagement among parties and to enhance parties' participation in economic development of the region." E-Commerce disciplines are under negotiation as partners work toward “[achieving] a modern, comprehensive, high-quality, and mutually beneficial economic partnership agreement among the ASEAN Member States and ASEAN’s FTA partners.” The 16th RCEP Trade Negotiating Committee (TNC) meetings were held in December 2016. The meetings included meetings by the Working Group on Trade in Services and the Sub-Working Group on E-commerce.

While little is known publicly about the textual proposals RCEP partners are exchanging related to e-commerce disciplines, if any, the fact remains that the elimination of restrictions on server localization measures remain critical for powering both goods and services trade in the region. Business groups are actively encouraging negotiators to promote “rules that enable information

---

65 *Id.*
66 *Id.*
68 *Id.*
flows and prohibit data localization.”\[^{69}\] In particular, private sector proposals currently advocate for an agreement that would limit a party from preventing a service provider of another party from transferring information outside the party’s territory, including personal information, and would prohibit any requirements to use or locate computing facilities within a country as a condition for doing business in that country.\[^{70}\]

Given the scope and magnitude of RCEP negotiations, outcomes on data flows or server localization measures would be significant. Unfortunately, due to the relatively closed nature of some RCEP markets—namely China and India—ambitious outcomes on these disciplines may be difficult to realize.

2. EU–Japan Free Trade Agreement

In 2013, the European Union and Japan launched negotiations to pursue a free trade agreement that according to the EU, “is expected to enhance trade and investment relationships between the two parties.”\[^{71}\] Japan is the EU’s second biggest trading partner in Asia after China.\[^{72}\] E-commerce disciplines are under discussion and according to a readout of the 17\(^{th}\) round of talks in September 2016, “no major breakthroughs on e-commerce could be achieved during this round [...] and further discussions on...localization of computing facilities were as yet inconclusive. Parties agreed to continue the discussions intersessionally.”\[^{73}\] While talks continue, EU privacy concerns continue to present challenges for the inclusion of data flows language. Although it is not a prerequisite for negotiating disciplines on data flows, Japan does not have an EU “adequacy decision” that would give Japanese privacy laws equal footing to the EU. Similar to other EU trade negotiations, data flows and localization restrictions continues to be a highly sensitive topic, with unclear prospects for the conclusion of an agreement.

e. Trans-Pacific Partnership (TPP)

While President Obama supported the ratification of the Trans-Pacific Partnership agreement (“TPP”), the Trump Administration has opposed the agreement, in large part, due to concerns related to its potential negative economic impact on jobs and companies within the U.S. On January 20, 2017, the Office of the U.S. Trade Representative (USTR) issued a letter to signatories of TPP that the United States has formally withdrawn from the agreement per guidance from President Trump. The brief letter also encourages future discussions on “measures designed to promote more efficient markets and higher levels of economic growth.”\[^{74}\] Despite the Trump Administration’s recent actions, the TPP agreement has useful provisions related to e-commerce, which have not been the subject of the Administration’s opposition to TPP.

\[^{70}\]Id.
The guiding principle of the TPP Agreement’s e-commerce chapter is that the Internet and digital technologies provide growing opportunities for companies in all sectors and of all sizes to participate in and benefit from international trade. The global reach of the Internet, the exponential generation of data and cross-border data flows, and the growth and proliferation of massive computing power continue to lower the costs of trade and are expanding the universe of what is tradable and who can trade. The TPP’s e-commerce chapter aims to create a new body of trade rules designed to benefit a broad group of traders relying on digital technologies to advance their businesses, from micro-enterprises in Malaysia to app developers in Vietnam to farmers in Canada.

Through the Internet and digital technologies, a company or individual can almost seamlessly trade goods, data-sets, software, digital products and content (e.g. films and programs), and digitally-intensive services. All of this is digital trade. A small company in a far-flung location, if it has Internet access, can potentially use the same suite of services that would also be available to any large multinational company and store and process its data in a global cloud computing center. An individual making a bespoke product or a developer producing an app in one market can access customers in myriad markets at historically low costs because of the Internet and digital technologies.

However, governments, in response to these evolving market and policy dynamics, are attempting to address legitimate public policy objectives through the application of blunt policy instruments. Intentionally or not, governments increasingly are erecting barriers to digital trade and depriving traders and investors of economic opportunities. Examples of such unnecessary barriers that the Model Provisions addresses include restrictions on cross-border data flows, data localization requirements, mandates to transfer source code, and the absence of high standards for data protection and privacy of personal information.

8. PROPOSED MODEL PROVISIONS ON E-COMMERCE

When negotiating the e-commerce provisions in international trade agreements and relevant agreements and guidelines, the United States should include provisions that will not only prevent unnecessary barriers to digital trade from occurring in the parties’ markets but establish policy frameworks to allow digital trade to flourish. In general, this is best accomplished by including digital transactions within the fundamental non-discriminatory principles and exceptions of free trade agreements, rather than drafting language that specifically relates to digital trade. The following are highlights of the key Model Provisions that will be helpful in advancing both high-level objectives noted above. The framework for the proposed provisions is based on Chapter 14 of the TPP, and the relevant material differences between the two sets of provisions are discussed below.75

- **Article 1.3: Customs Duties.** This provision explicitly prohibits the parties from applying customs duties on cross-border data flows (i.e., electronic transmissions). While  

75 The Model Provisions are intended to apply to the broadest range of business sectors. Thus, Article 1.1 does not contain TPP’s carve-out for financial services or financial institutions.
the WTO has had since 1998 a moratorium on the imposition of customs duties on electronic transmissions and digital content, the parties to trade agreements should make that prohibition binding and enforceable. This is a core provision that prevents the parties from ever using such policy tools.

- **Article 1.4: Non-Discriminatory Treatment of Digital Products.** This provision ensures that the fundamental trade principle of national treatment covers digital products, so that such products created in the market of one of the parties are not discriminated against in the markets of another party. This core provision would help to ensure that digital products are not subject to trade barriers.

- **Article 1.6: Electronic Authentication and Electronic Signatures; and Article 1.7: Online Consumer Protection.** Taken together, these provisions enable digital transactions to occur more seamlessly across borders and increase consumer trust in digital trade. Traders want to know that the parties’ markets will recognize electronic signatures and consumers want assurances that their governments will protect them from fraudulent and deceptive online commercial activities. Without trust, digital trade will not grow, so these provisions are critical elements of the proposed digital trade framework.

- **Article 1.8: Personal Information Protection.** This provision is a fundamental, innovative element of the chapter designed to give greater assurances to users and digital traders that parties will protect their personal data and information. The parties would be bound to establish frameworks for the protection of personal information of users of electronic commerce. In the development of these frameworks, they should consider the principles and guidelines of relevant international bodies, such as the OECD Privacy Principles, APEC Privacy Framework, and APEC Cross-Border Privacy Rules System.

- **Article 1.11: Cross-Border Transfer of Information by Electronic Means.** This provision is one of the most crucial elements of the Model Provisions. In obligating the parties to allow the cross-border transfer of information by electronic means, including personal information, the Model Provisions establish a norm that the flow of data across borders, including personal data, enables trade, investment, and economic activity at the global level. Unlike TPP’s Article 14.11, this provision does not include an exception allowing a “Party from adopting or maintaining measures inconsistent with [Article 14.11] to achieve a legitimate public policy objective,” which is consistent with the intent of the Model Provisions to establish an efficient legal approach to allow parties to negotiate and rely upon general exceptions to a trade agreement instead of establishing new provision-specific exceptions. This approach is consistent with existing trade agreements, such as Article XIV of GATS. It also mitigates the risk of creating confusion regarding which exceptions take precedence in dispute settlement proceedings. Additionally, new provision-specific exceptions would set precedent for future agreements, and the Model Provisions address that issue by establishing a framework relying on general exceptions to a trade agreement.

- **Article 1.13: Location of Computing Facilities.** Data localization requirements are policy approaches that an increasing number of governments are using in the name of
protecting personal data, strengthening cybersecurity, accessing data for law enforcement purposes, or bolstering local technology sectors. Such measures are primary examples of barriers to digital trade that restrict data flows, raise costs for local and foreign companies, depress economic activity, and largely do not meet their stated policy objectives. This provision is a critical complement to Model Article 1.11. Also, similar to Model Article 1.11, this provision does not include an exception for public policy objectives for the reasons discussed above.

- Article 1.17: Source Code. Digital product, digitally-intensive services, cloud computing, and other digital technologies rely on software. Some governments are requiring companies as a condition of market access to transfer or provide access to software source code. This provision would expressly prohibit such requirements. In addition, the provision broadly applies to a wide range of software and does not include the mass-market software limitation or critical infrastructure software carve-out contained in Chapter 14 of TPP.

9. CONCLUSION

E-commerce continues to play a vital role in cross-border business transactions. The ability of companies and consumers to move data is critical in promoting, fostering and expanding international commerce and services. The Model Provisions on Electronic Commerce for International Trade Agreements address these localization barriers through specific provisions designed to promote access to networks and efficient data processing. It also ensures that the fundamental non-discrimination principles of an efficient global trading system for goods and services apply to cross-border data by subsuming electronic commerce under the overarching principles of a free trade agreement. Therefore, the American Bar Association strongly urges the United States to adopt the Model Provisions, including its cross-border data flow protections, as a standard template for negotiating electronic commerce provisions in international trade agreements and other relevant international agreements and guidelines.

Respectfully submitted,

Sara P. Sandford
Chair, Section of International Law
August 2017
1. **Summary of Resolution(s).** The Resolution calls for the American Bar Association to urge the United States to adopt the American Bar Association Model Provisions on Electronic Commerce for International Trade Agreements, dated August 2017, and recommends them as a standard template for use in international trade agreements and other relevant international agreements and guidelines.


3. **Has this or a similar resolution been submitted to the House or Board previously?** None known.

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

   The following Resolutions on electronic commerce are relevant:
   
   - The ABA Section of Science & Technology Law, Section of International Law, and Section of Business Law, (collectively the “ABA Sections”) submitted the 1997 Report in support of a Resolution recognizing that electronic commerce is increasingly important and global in nature, requiring international communication and cooperation. It also encourages international discussion and cooperation by the private sector, governments, and international organizations to remove unnecessary legal and functional obstacles to electronic commerce, to establish a legal framework within which global electronic commerce can flourish, and to develop self-regulating practices by the private sector that will protect the rights of individuals and promote the public welfare. 97A114.
   
   - Resolution urging the United States to ratify the United Nations Convention on the Use of Electronic Communications in International Contracts. 06A303
   
   - Resolution urging the U.S. Government to ratify the United Nations Convention on the Use of Electronic Communications in International Contracts. 08A100
   
   - Resolution supporting modernization and simplification of the requirements, procedures, laws and regulations related to verification of signatures in cross-border contexts to increase reciprocal recognition among jurisdictions. 14A114A

   Existing Association policies are not affected by this Resolution if it were adopted. This Resolution would expand the groundwork established by existing Resolutions in promoting the modernization and uniformity of the regulation of electronic commerce in...
international trade agreements, including business data flows from one country to another country.

5. If this is a late report, what urgency exists which requires action at this meeting of the House? Not applicable.

6. Status of Legislation. (If applicable): The law and practices of many countries pertaining to the requirements and procedures related to electronic commerce, including cross-border data flows, in cross-border contexts are evolving.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates: If the U.S. Government considers new international trade agreements or guidelines, or amendments thereof, that would affect electronic commerce, the ABA will be able to share its position based on this subject and other ABA policies.


10. Referrals.
    ABA Cybersecurity Legal Task Force
    Section of Science & Technology Law
    Section of Business Law
    Commission on Interest on Lawyer Trust Accounts

11. Contact Name and Address Information.
    John D. Rosero, Esq.
    Vice Chair, Policy – International Trade Committee
    80 Livingston Ave.
    Roseland, NJ 07068
    (973) 802-6000

    Contact Name and Address Information of Person Presenting Report to the House.
    Jeffrey B. Golden
    3 Hare Court
    Temple
    London
    EC4Y7BJ
    United Kingdom
    44(7785)500811
    jeffreygolden@3harecourt.com
Glenn P. Hendrix  
Arnall Golden Gregory LLP  
Suite 2100  
171 17th Street, N.W.  
Atlanta, GA 30363  
Phone: 404/873-8692  
E-Mail: glenn.hendrix@agg.com

Gabrielle M. Buckley  
Vedder Price P.C.  
222 N LaSalle St, Ste 2400  
Chicago, IL 60601-1104  
(312) 609-7626  
gbuckley@vedderprice.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution calls for the American Bar Association to urge the United States to adopt the American Bar Association Model Provisions on Electronic Commerce for International Trade Agreements, dated August 2017, and recommends them as a standard template for use in international trade agreements and other relevant international agreements and guidelines.

2. Summary of the Issue that the Resolution Addresses

The ability of companies and consumers to move data has become paramount in promoting, fostering, and expanding commerce and services around the globe. Many countries have enacted rules that stifle competition and disadvantage American entrepreneurs, by imposing burdensome barriers or overly restricting the free flow of information. This resolution supports modernization and uniformity of the regulation of business data flows from one country to another country. It also urges the United States to adopt the American Bar Association Model Provisions on Electronic Commerce for International Trade Agreement ("the Model Provisions") as the standard template for use in international trade agreements and other relevant international agreements and guidelines, subject to reasonable safeguards such as the protection of consumer data upon its exportation.

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

The Resolution enables the ABA to urge the United States to adopt the ABA Model Provisions on Electronic Commerce as an effective and efficient means to promote the modernization and uniformity of provisions for electronic commerce, including cross-border data flow, in international trade agreements, taking into account new technologies and associated costs, as well as the need for appropriate protection of data.

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

At the time of the writing of this R&R and summary, we are not aware of any formal reported direct opposition to the approval of this Resolution.
RESOLUTION

RESOLVED, That the American Bar Association urges national governments worldwide to adopt laws to phase out the manufacture, import, and sale of lead paint;

FURTHER RESOLVED, That the American Bar Association supports efforts of the international community, governments, industry, and non-governmental organizations to promote the phase-out of lead paint by no later than 2020; and

FURTHER RESOLVED, That the American Bar Association urges lawyers, law firms, bar associations, and other professional and nonprofit organizations to support adoption and implementation of laws to phase out and eliminate lead paint through pro bono support, educational initiatives, and other appropriate means.
REPORT

I. EXPLANATION OF RECOMMENDATION

Exposure to lead causes severe harm to human health and development, posing risks of permanent damage to the brain and nervous system, decreased IQ and behavioral problems, and harm to kidney function and blood and reproductive systems. Children are especially vulnerable. There is no known level of lead exposure that is considered safe for children. Globally, lead exposure imposes a tremendous burden in terms of impacts on human health and communities. The Institute for Health Metrics and Evaluation (IHME) estimates that in 2015 lead exposure worldwide accounted for 495,550 deaths due to long-term effects on health, with the highest burden in low and middle income countries. IHME also estimates that lead exposure in 2015 accounted for 12.4% of the global burden of idiopathic intellectual disability (i.e., disability other than that from known causes such as genetic factors), 2.5% of the global burden of ischemic heart disease (i.e., coronary artery disease), and 2.4% of the global burden of stroke. Taking into account the neurodevelopmental impacts alone, the global cost of childhood lead exposure in low- and middle-income countries reaches $977 billion dollars a year, equivalent to about 2 to 4% of GDP depending on the region.

Lead in paint remains a leading source of lead exposure risk globally. Although cost-effective alternatives exist and the paint and coating industry is broadly supportive of its phase-out, lead in paint is regulated in only one third of countries around the world. It is primarily lower- and middle-income countries that do not have laws. Laws and regulations banning lead in paint are the most effective means to control this exposure risk. The United States has banned lead paint since 1978; the European Union similarly instituted a ban on lead compounds

1 Institute For Health Metrics And Evaluation GBD Compare, UNIVERSITY OF WASHINGTON (2016), <http://vizhub.healthdata.org/gbd-compare> as reported by the WORLD HEALTH ORGANIZATION in the Lead Paint Alliance Regulatory Toolkit, Module Bi, Health Hazards of Lead (updated February 2017).
3 World Health Organization tracking of lead regulation indicates that only 65 countries have legally-binding restrictions of lead as of February 2017. This tracker does not account for whether the restrictions are adequately stringent. <http://www.who.int/gho/health_safety/lead_paste_regulations/en/>
in paint to control lead exposure risk. Adopting legislation or regulation to phase out lead paint in a form that is clear, readily implemented and enforceable would mark a substantial step toward eliminating the harms of lead exposure, particularly to children. The ABA, with its objective to work for just laws in order to advance rule of law, has a clear role to play. Getting the law right is an essential component of the global solution to lead paint.

By urging national governments to adopt measures to phase out lead paint, the resolution advances rule of law, recognizing the critical role of law to respond to the global problem of lead exposure. The resolution joins the ABA in support of continuing efforts by the international community, including the Global Alliance to Eliminate Lead Paint ("Lead Paint Alliance"), a voluntary initiative led by the World Health Organization and the United Nations Environment Programme. The Lead Paint Alliance has established a goal that by 2020 all countries will have adopted laws to eliminate lead paint. The resolution is also a call to action to lawyers and bar associations to support global efforts to phase out lead paint, including through pro bono activities. ABA support for efforts to advance better legal frameworks to address the harms of lead exposure is a natural extension of its work to advance rule of law in countries around the globe — many of which likely lack adequate lead paint laws.

Further, the resolution is aligned with and advances the implementation of a 2003 resolution (reaffirmed in 2013) supporting the concept of sustainable development, which resolved, inter alia, that the ABA recognizes that "good governance and the rule of law are essential to achieving sustainable development" and that the ABA "should consider and promote sustainable development principles in the work of its entities." ABA support for laws to phase out lead paint promotes sustainable development in furtherance of existing ABA policy.

II. BACKGROUND: Impacts of and Measures to Control Lead Exposure

Lead is present in a number of man-made products, including paints with added lead compounds. Lead is intentionally added to paint as a pigment, a drying agent, or an anti-corrosive. Globally, lead paint is a major remaining source of lead exposure for children, particularly in developing countries. In some countries, lead exposure from paint is estimated to account for 90% of childhood lead poisoning. Human health problems, societal costs, environmental contamination, and broader social and environmental justice impacts result from lead paint use.

8 P. Giorence et al., Identifying Sources of Lead Exposure for Children, with Lead Concentrations and Isotope Ratios, working draft to be published in 7 JOURNAL OF OCCUPATIONAL AND ENVIRONMENTAL HYGIENE 253 (2010).
a. Human Health Effects:

Lead is a toxic metal that has the potential to harm physical and mental development. Lead paint can result in exposure to lead for many years after it has been applied to a surface, due to paint weathering, chipping or peeling that releases lead into dust and soil in and around homes, schools and other locations.9 

Studies have shown that exposure to lead raises an individual’s susceptibility to kidney disease, cardiovascular and reproductive problems, and causes dramatic neurological damage. The effects of lead exposure can range from high blood pressure to mental incapacitation and even death, depending on the age of the individual, amount of exposure and other factors. Young children can suffer profound and permanent adverse health effects from exposure to lead, particularly affecting the development of the brain and nervous system, and pregnant women have a high risk of experiencing a complicated pregnancy and damage to the developing fetus.10 

Widespread production or use of lead paint also creates occupational safety issues for adults who work in paint production factories or in building, renovation, and demolition activities.

Lead paint has the greatest potential for toxic effects on children.11 Global and U.S. studies have determined that young children are more vulnerable to lead poisoning than adults, and are particularly vulnerable to lead paint exposure for several reasons: 1) children’s proximity to the ground and hand-to-mouth activity increases their contact with lead paint dust particles, which are easily ingestible; 2) children accumulate higher doses of lead relative to their lower body weights; and 3) a child’s developing system is highly sensitive to lead toxicity.12 In addition, lead paint tastes sweet, thus encouraging children to put lead paint chips and toys covered with lead paint or lead dust into their mouths.13

The United States Centers for Disease Control and Prevention has concluded that there is no known level of lead exposure that is considered safe.14 Even when children are exposed to small amounts of lead, there can
be a wide range of effects on their brain and neurological systems, causing children to appear hyperactive or irritable. Both long and short term exposure to lead will put children at risk for developmental and learning deficiencies, delayed growth, and sensory failure. These effects are often permanent.15

b. Harm to Communities

Beyond the public health impacts, lead exposure takes a serious toll on communities. Lead paint exposure also imposes socio-economic burdens, reducing economic growth and driving up crime and other forms of conflict.16 Multiple studies indicate that there is a causal link between lead exposure and increased violent crime rates.17 A 2010 study links lead exposure to aggressive neurobehavioral performance, while initial data from an ongoing study indicates that lead exposure may damage a portion of the brain aligned with aggression control.18 The increased aggressive behavior, in turn, is linked to an increase in crime and economic losses for the community.19

Lead exposure both impairs intelligence and slows or halts certain cognitive capabilities.20 Cognitive ability affects school performance, academic attainment, and entry into the labor market. Reduction in
cognitive ability from exposure to lead paint reduces economic productivity, profits and tax revenues, and increases crime rates.\textsuperscript{21}

In the United States, the legacy of lead paint used for housing prior to a ban in 1978 has fallen most heavily upon poor and minority communities, particularly those in areas with old deteriorating housing stock.\textsuperscript{22} The American Bar Association has previously recognized that lead paint exposure poses an environmental justice concern in the U.S.\textsuperscript{23} \textsuperscript{24} In the absence of effective regulation, lead paint is also a significant environmental justice issue in middle- and low-income countries, with the devastating effects of lead exposure falling disproportionately on communities that are already vulnerable and that lack the resources to manage its effects.

c. Environmental Contamination

Over time lead paint can chip and peel and contaminate dust and soil. These lead-contaminated dust and soil particles can move through ecosystems and cause contamination of vegetation, groundwater, surface water and air. Lead contamination imposes stress on ecosystems, destroying microorganisms and slowing decomposition of soil material and harming certain plants and invertebrates.\textsuperscript{25} \textsuperscript{26}

d. The Benefits of Measures to Control Lead Content in New Paints Far Outweigh their Costs

Lead poisoning is often preventable through lead control measures, which have significantly reduced population-level blood lead concentrations in the U.S. and other countries where such measures are in place. The benefits of government action to limit the lead content in new

\textsuperscript{21} Alexandra Katsiri, \textit{Levels of Lead in Children's Blood}, European Environment and Health Information Center, \textit{WORLD HEALTH ORGANIZATION EUROPE} (2010).
paints include the avoidance of future costs due to new cases of lead poisoning, resulting in increased health care costs, decreased productivity and increased crime rates, as well as the avoidance of future costs to safely remove old lead paint after its application in order to prevent new or continuing lead exposure from that source.

The cost for manufacturers to switch to using non-lead additives is relatively low, especially for decorative paint for use on houses and public buildings. Non-lead alternatives to some lead pigments have been available for many decades, including common compounds such as titanium dioxide and zinc oxide. Lead-containing additives used as paint pigments, driers, and anti-corrosive agents are a small component of paint, and contribute relatively little to its cost, making lead-free paint generally cost-competitive.27 Numerous paint testing studies conducted in 46 middle- and low-income countries around the globe found that at least a few local paint companies are producing lead-free paint in every country, demonstrating that alternatives to lead paint are currently available.28

On the other side of the ledger, the costs of lead exposure are monumental. A 2009 study estimated that the economic cost of lead poisoning in children in the United States from existing old, or “legacy,” lead paint in housing can be broken down into the following categories: health care ($11-$53 billion), lifetime earnings ($165-$233 billion), tax revenue ($25-$35 billion), special education ($30-$146 million), and attention deficit–hyperactivity disorder ($267 million).29 30 Studies of the global costs of lead paint tend to consider only a subset of these costs. A recent study, analyzing only the costs of lost IQ points, found the global cost of childhood lead exposure from all sources in low- and middle-income countries to reach $977 billion dollars a year. The economic impact of only this one aspect of the health impacts of lead amounts to nearly 2 to 4% of GDP depending on the region; in some countries in Africa, the economic cost of lost IQ points due to childhood lead exposure exceeds annual development assistance.31 As noted above, lead paint is a major source of childhood lead exposure globally, and in some countries, lead paint is the largest source of lead poisoning.

In the face of clear evidence of the tremendous human and economic harms of exposure to lead in paint, many countries have adopted some form of regulatory measures to reduce or eliminate lead paint. The International Lead Poisoning Elimination Network, for instance, has developed a lead paint elimination toolkit to assist countries in assessing the costs and benefits of lead paint elimination.27 The toolkit includes case studies and best practices from countries that have implemented lead paint regulations.

---

27 Alternatives to Lead in Paint INTERNATIONAL POPS ELIMINATION NETWORK (2016). Presentation based on the Lead Paint Alliance Regulatory Toolkit, Module E.

28 The various studies have tested paints available on the market, and assessed the percentage of paints containing less than 90 or 600 parts per million (PPM) of lead, which generally indicates that no lead compounds were added to the paint. Global Lead Paint Elimination Report, INTERNATIONAL POPS ELIMINATION NETWORK (October 2016).

29 Gould, supra, note 6.


31 Attina, supra, note 2.
of ban on lead in paint. The United States banned lead in consumer paint in 1978; Canada did so in 1976. Australia has restricted lead paint since 1970. In Europe, some countries adopted restrictions on lead paint use as far back as the early 1900s; in 1989, the European Union adopted a region-wide ban. Moreover, as more information has become available regarding health problems caused by even low levels of exposure to lead, some countries have adopted increasingly stringent limits on the allowable percentage of lead contaminants in paint. For example, the U.S. tightened its restriction on lead in paint from 600 parts per million (ppm) in 1978 to 90 ppm by 2009.

The experiences of industrialized nations leave little doubt that banning lead in new paint is the best preventive solution to reducing lead paint exposures. The cost of removing existing lead paint from homes or other sources after application is large, with estimates of lead hazard controls (including removal) for existing lead paint in housing in the United States ranging from $1-11 billion. But even these significant legacy costs of removal or otherwise remediating the hazards of existing lead paint in the U.S. are dwarfed by the benefits of reducing childhood lead exposure in a ratio of 1:17 to 1:22. For middle- and low-income countries that have not yet banned lead paint, the answer is even more clear-cut: adopting legislation to ban lead paint will generate societal benefits far exceeding any costs.

III. INTERNATIONAL RESPONSE TO LEAD PAINT: A Call to Action

Paints containing lead are still widely manufactured and sold for use in many developing countries, and international activities are increasingly focused on the goal of eliminating lead paint as a significant global source of lead poisoning. In 2002, the World Summit on Sustainable Development included in its implementation plan a call to “phase-out lead in lead-based paints and other sources of human exposure and work to prevent, in particular, children’s exposure to lead and to strengthen monitoring and surveillance efforts and the treatment of lead poisoning.” In 2008, the Intergovernmental Forum on Chemical Safety adopted the “Dakar Resolution for Eliminating Lead in Paints.” This was followed in 2009 by a resolution of the International Conference on Chemicals Management, which created a global partnership “to promote phasing out the use of lead in paints” as

---

32 Many, but not all, of these measures focus target only “decorative” paints (also referred to as architectural, household or consumer paint).
35 Gould, supra, note 6.
an important contribution to the resolution of the World Summit on Sustainable Development and to the Strategic Approach to International Chemicals Management.\textsuperscript{37}

To implement the resolution of the International Conference on Chemicals Management, international organizations, national governmental bodies, nongovernmental organizations, and the private sector have joined together in a voluntary partnership called the Global Alliance to Eliminate Lead Paint (Lead Paint Alliance). To facilitate achievement of this goal, the United Nations Environment Program (UNEP), the World Health Organization (WHO) and other Lead Paint Alliance partners are developing a “Guidance and Sample Law for Regulating Lead Paint” to assist national governments in adopting laws to eliminate lead paint. The Guidance and Sample Law will offer model provisions that can be adapted to a country’s national legal context.

a. Global Alliance to Eliminate Lead Paint (Lead Paint Alliance)

The Lead Paint Alliance is jointly led by UNEP and WHO. It is a voluntary international initiative aiming to prevent children’s exposure and to minimize occupational exposure to lead paint by promoting the phase-out of paints containing lead. The Lead Paint Alliance is guided by an advisory committee consisting of representatives of national governments, the private sector, UN bodies, and nongovernmental organizations. The United States chairs the advisory group, through the U.S. Environmental Protection Agency and the U.S. Centers for Disease Control and Prevention.

The Lead Paint Alliance has an aspirational goal of all countries having laws in place by 2020 to control lead in paint.\textsuperscript{38} Through the engagement of the Lead Paint Alliance and other supporting organizations, progress is being made toward this goal. Since 2013, the Lead Paint Alliance has sponsored an annual International Lead Poisoning Prevention Week of Action to raise awareness of lead exposure risks, with a special focus on lead paint. A number of countries have recently adopted or are in the process of adopting new laws to restrict lead paint, including India, Thailand, Cambodia, Ethiopia and Cameroon. In addition, the East African Community is in the process of amending its mandatory regional standards to further restrict the use of lead paint that its five member states (Kenya, Tanzania, Uganda, Rwanda and Burundi) are required to implement in their national regulatory systems.\textsuperscript{39}

\textsuperscript{37} Operational Framework for the Global Alliance to Eliminate Lead Paint, UN Environment Programme and the World Health Organization (March 2011).
\textsuperscript{39} Global Lead Paint Elimination Report, supra, note 28.
b. Private Sector Support for Elimination of Lead Paint

The private sector is playing a critical role in advancing the goals of the Lead Paint Alliance. The International Paint and Printing Ink Council (IPPIC), an association comprised of national paint and coating manufacturer’s organizations that includes the American Coatings Association, is a member of the Lead Paint Alliance advisory committee. IPPIC issued a policy statement in 2009 supporting the widespread adoption of measures to regulate the use of lead in paint and printing ink, and called upon its member organizations to partner with the Lead Paint Alliance. 40

Support is also growing among industry groups primarily operating in middle and low-income countries. Support from local industry is needed to encourage governments to pass laws to control lead in paint. For example, the Thai Paint Manufacturers Association, representing key exporters in the region, issued a letter of support for a ban on lead in decorative paints in 2012. 41 By 2016, Thailand had adopted legal limits restricting lead paint. 42 Within the past year, several companies and numerous national and regional paint associations from all over the world have joined the Alliance. 43

While further action is needed across the paint and coatings industry, individual paint manufacturers are also stepping up to advance the goals of the Lead Paint Alliance. 44 A leading multinational paint manufacturer in Switzerland, AkzoNobel, has called for elimination of lead paint for all uses by all manufacturers. 45 PPG, a Pittsburgh-based global producer, announced in 2016 its plan to eliminate the use of lead additives in all its products by 2020. 46

c. Guidance and Sample Law for Regulating Lead Paint

Existing regulations of lead paint around the world take a number of forms and vary in scope. A control measure can restrict the total lead content in the product (e.g., limiting it to 90 ppm), the soluble lead content

---

44 Firms Phase Out Lead From Paints, CHEMICAL WATCH: GLOBAL RISK & REGULATION NEWS, <https://chemicalwatch.com>
of a product (i.e., the amount of lead extracted under a particular acid test), or particular lead additives (e.g., restrict lead sulfates and lead carbonates). Each of these types of restrictions on lead in paint can vary in stringency, setting higher or lower acceptable limits of lead in paint. A regulatory regime may include testing and/or certification of the lead content of paint products in order to ensure compliance. A phase-out may incorporate a delay in the effective date of the restriction and/or make provision for stocks of lead paint that have already entered into commerce. In addition, some countries regulate lead only in paints and coatings for residential use (often called decorative, architectural, or consumer paints), while others also cover industrial uses.

To assist countries in navigating these regulatory choices and tailoring a control measure to the national context, UNEP, WHO and other partners in the Lead Paint Alliance are developing a Guidance and Sample Law. The Guidance and Sample Law are intended to help governments without lead paint laws to adopt clear, effective and readily implementable and enforceable measures to control lead paint exposures. The Guidance is a tool to support drafting measures that: 1) clearly define regulated substances, limits, and activities, 2) set effective dates of new requirements, 3) establish a mechanism to promote compliance, and 4) set clear consequences for non-compliance. The guidance is scheduled to be finalized in early summer 2017.

IV. ROLE OF THE ABA

The first element of the resolution urges national governments, the entities best-placed to regulate lead paint, to adopt laws to control the risks of lead paint exposure. Around the world, only about a third of countries currently regulate lead paint. Urging action to adopt lead paint laws is an important first step to addressing the global health threat from lead paint.

While calling on governments to adopt a phase out of the manufacture, import, and sale of lead paint that would prevent the introduction of new lead paint into commerce, the resolution does not proscribe the form or scope of measures to achieve that objective. A variety of approaches can effectively advance the aim of preventing children’s exposure and minimizing occupational exposures to lead paint, and national governments are in the best position to tailor a measure to the national context. The report identifies a forthcoming resource, the Lead Paint Alliance’s Guidance and Sample Law, to assist national authorities in developing appropriate measures.

The second element of the resolution voices ABA support for the goal endorsed by the Lead Paint Alliance to attain a phase out of lead paint by 2020. By recognizing this goal, the resolution emphasizes the urgency of action. While achieving the global adoption of controls on lead paint by all national governments by 2020 presents a significant challenge, the aspirational goal galvanizes enhanced
action and provides an important target date to focus momentum. Where every year of avoided exposure may amount to significant benefits to childhood health and development, there is value to encouraging early actions.

Finally, the third element of the resolution aims to mobilize the tremendous legal resources of the ABA to support the achievement of the goal to eliminate lead paint globally. Legal professionals can play a critical role in advancing this goal. The Lead Paint Alliance recognizes that, while many countries are willing to adopt lead paint regulation, they lack the legislative authority and/or the regulatory experience needed to do so. Expert assistance to national governments can help overcome a key barrier to developing measures to control lead paint risks. The American Bar Association can help to direct legal resources to respond to this need for technical support. The ABA International Legal Resource Center, in collaboration with the UN Development Programme (UNDP), provides such technical legal assistance, and has previously supported assessment and reform of environmental laws. The resolution provides an opportunity to enhance ABA impact through existing mechanisms such as the International Legal Resource Center, drawing in new experts to provide needed pro bono support and raising the profile of such work with potential partners and recipients.

In addition, ABA members, law firms, ABA entities, and/or partner professional organizations may be in a position to support educational activities to promote awareness of the risks of lead paint exposure and encourage adoption of national measures to control the risks of lead paint exposure. The ABA Rule of Law Initiative, with in-country representatives and strong networks among local stakeholders, is a significant resource to support implementation of the resolution. The ABA Section of International Law committees, which foster partnerships and develop programs in other jurisdictions, are another important asset in encouraging widespread adoption of national lead paint laws.

Through the resolution, the ABA advances its Goal IV on rule of law, by supporting the adoption of just laws. The resolution builds upon and is responsive to a 2007 ABA resolution, which urged governments and other actors to consider and integrate Rule of Law initiatives with global environmental issues, and a predecessor 2003 ABA resolution (reaffirmed in 2013), calling on the ABA to consider and promote sustainable development principles in the work of its entities. The resolution encourages ABA entities, ABA members, and partner bar and other professional associations to advance rule of law and sustainable development principles in the context of the global risks of lead paint.
Respectfully submitted,

Sara P. Sanford
Chair, Section of International Law
August 2017
GENERAL INFORMATION FORM

Submitting Entity: Section for International Law

Submitted By: Sara P. Sandford, Chair, Section of International Law

1. Summary of Resolution(s).

The resolution urges national governments to adopt measures to control the risks of lead paint by phasing out its manufacture, import, and sale, and voices support for efforts to achieve worldwide adoption of such measures by 2020. The language of the resolution is formulated to track the aims of the “Lead Paint Alliance,” a voluntary initiative led by the World Health Organization and the United Nations Environmental Programme, which includes representatives from the paint and coatings industry, NGOs, and the U.S. government. The resolution also aims to mobilize ABA members, ABA components, and other affiliates to support adoption of lead paint laws through awareness-raising and educational activities and pro-bono technical support.

2. Approval by Submitting Entity.

The Council of the Section of International Law approved this recommendation and resolution at its Meeting on April 29, 2017.

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

No.

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

The Resolution is consistent with and mutually supportive of three existing ABA policies:
- Rule of Law and Global Environmental Issues (07A110A);
- Sustainable Development (91A10B); and

The Resolution would serve as a tangible example of the importance and impact of incorporating Rule of Law initiatives with global environmental issues, as called for by Resolution 07A110A. Second, the Resolution would demonstrate the ABA’s continued commitment to sustainable development and incorporating that framework into the ABA’s support for good governance and the rule of law. The Resolution thus advances core elements of Resolution 91A10B. Finally, the Resolution would manifest the concern for environmental equality espoused in Resolution 93A109, by placing a spotlight upon and seeking to address an environmental harm that falls disproportionately on the most vulnerable in middle- and low-income nations.

5. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A
6. **Status of Legislation.** (If applicable) N/A

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

   We have already initiated discussions with two key ABA partners regarding implementation of the policy, the ABA Rule of Law Initiative (ROLI) and the ABA International Legal Resources Center (ILRC). If the policy is adopted, ROLI believes it can support implementation of the resolution, particularly through its representatives in-country. In some countries, there may be scope to incorporate outreach and awareness-raising about lead paint laws into ROLI’s engagement with local stakeholders.

   ILRC also sees a potential role to support implementation of the policy. We will explore opportunities to ensure adequate resources, in the form of a committed roster of experts, is available to provide technical support regarding lead paint laws. Furthermore, we will reach out to UNDP to discuss ways to increase provision of technical support regarding lead paint on a wider, more programmatic basis. If we successfully identify means for ROLI and/or ILRC to support the policy, UNEP North America has indicated it would be eager to highlight these efforts as voluntary pledges from the private sector at the UNEP General Assembly or other relevant fora.

   Finally, in developing the Resolution and Report, we worked with ten different Committees (including one Taskforce) from across multiple sections of the ABA, including the Section for International Law, the Section for Energy, Environment, and Resources, and the Civil Rights and Social Justice Section. We would continue to engage with these supporting Committees to explore opportunities to implement the policy through ABA programs and cooperation with other bar associations and ABA partners.

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

   No direct cost. We would seek to implement the policy within the existing budget of the ABA components, and may seek outside support where appropriate to supplement those resources. We expect the primary indirect cost of implementation to be staff time at ROLI and ILRC.

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

   N/A.

10. **Referrals.**

    This Resolution and Report is supported by two additional Sections of the ABA. On April 21, 2017 the Executive Committee of the Section for Energy, Environment, and Resources voted to support the policy, and subsequently ratified that decision at its Council Meeting on May 6, 2017. On April 28, 2017, the Section of Civil Rights and Social Justice Council
voted to support the policy, conditional on certain stylistic edits that have since been adopted.

Further referrals are being undertaken to the Tort Trial and Insurance Practice Section, Young Lawyers Division, Solo and Small Firm and General Practice Division, Section of Real Property Trust and Estate Law, Section of State and Local Government Law, and ABA Rule of Law Initiative.

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)
   Kim Smaczniak
   205 Dale Drive
   Silver Spring, MD 20910
   kimsmaczniak@gmail.com
   716-923-3186

   Steve Wolfson
   U.S. Environmental Protection Agency
   Office of General Counsel – International Law Group
   WJC North, Room 7506C
   wolfson.steve@epa.gov
   202-564-5411

12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)
   Kim Smaczniak
   Vice-Chair, Rule of Law, International Environmental Law Committee
   205 Dale Drive
   Silver Spring, MD 20910
   kimsmaczniak@gmail.com
   716-923-3186

   Jeffrey B. Golden
   3 Hare Court
   Temple
   London
   EC4Y 7BJ
   United Kingdom
   44(7785)500811
   jeffreygolden@3harecourt.com
Glenn P. Hendrix
Arnall Golden Gregory LLP
Suite 2100
171 17th Street, N.W.
Atlanta, GA 30363
Phone: 404/873-8692
E-Mail: glenn.hendrix@agg.com

Gabrielle M. Buckley
Vedder Price P.C.
222 N LaSalle St, Ste 2400
Chicago, IL 60601-1104
(312) 609-7626
gbuckley@vedderprice.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution urges national governments to adopt measures to control the risks of lead paint by phasing out its manufacture, import, and sale, and voices support for efforts to achieve worldwide adoption of such measures by 2020. The language of the resolution is formulated to track the aims of the "Lead Paint Alliance," a voluntary initiative led by the World Health Organization and the United Nations Environmental Programme, which includes representatives from the paint and coatings industry, NGOs, and the U.S. government. The resolution also aims to mobilize ABA members, ABA components, and other affiliates to support adoption of lead paint laws through awareness-raising and educational activities and pro-bono technical support.

2. Summary of the Issue that the Resolution Addresses

Lead exposure causes severe harm to human health and development, particularly to children. Although exposure to lead in paint remains a leading source of exposure globally, only one third of countries in the world have adopted laws to address lead in paint. Primarily low- and middle-income countries lack such laws. The consequences of lead exposure are tremendous – in some regions the neurodevelopmental impacts alone amount to two to four percent of GDP. Adopting legislation or regulation to phase out lead paint in a form that is clear, readily implemented and enforceable would mark a substantial step toward eliminating the harms of lead exposure, particularly to children.

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

This resolution enables the ABA to urge national governments to adopt laws to phase out lead paint, and helps to focus the resources of ABA components to support governments' and other stakeholders' efforts to achieve global adoption of such measures by 2020.

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

The Rules and Calendar Committee met May 20-21, 2017 and recommended certain changes to the resolution. These changes were adopted as proposed, with one exception. The Committee recommended deleting the term "national" in the first clause of the resolution. ("That the American Bar Association urges national governments worldwide to adopt laws to phase out the manufacture, import, and sale of lead paint;") We decline to adopt this recommendation in order to clarify that the ABA is urging only "national," rather than sub-national governments such as states, provinces, municipalities, etc., to adopt measures to address lead paint. National governments are the governmental body best-placed to regulate lead paint hazards through restrictions on manufacture, import, and sale. Restrictions on trade by sub-nationals is sub-optimal for a number of reasons, including lack of expertise and implementation/enforcement authority among sub-national authorities and increased economic costs due to patchwork regulation.
RESOLVED: That the American Bar Association amends the black letter of Rule 7 of the Model Rules for Lawyer Disciplinary Enforcement as follows (insertions underlined, deletions struck through):

**RULE 7. ROSTER OF LAWYERS**

Disciplinary counsel shall maintain or have ready access to current information relating to all lawyers subject to the jurisdiction of the board including:

(a) full name and all names under which the lawyer has been admitted or practiced;
(b) date of birth;
(c) current law office business address, and telephone number, and email address;
(d) current residence address;
(e) date of admission in the state;
(f) date of any transfer to or from inactive status;
(g) all specialties in which certified;
(h) other jurisdictions in which the lawyer is admitted and date of admission;
(i) location the name of the financial institution and account numbers for each account in which clients' funds are held by the lawyer holds the funds of clients or third persons in connection with a representation;
(j) the name and business address of the lawyer(s) and any other individual(s) with authority to disburse funds from each account in which the lawyer holds the funds of clients or third persons in connection with a representation;
(k) the name and business address of the lawyer(s) responsible for complying with the applicable rules governing trust accounts, and of any other individual(s) to whom the lawyer delegates tasks related to the operation of such accounts;
(l) nature, date, and place of any discipline imposed and any reinstatements in any other jurisdiction; and
(m) date of death; and
(n) the universal lawyer identification number [together with the jurisdiction's prefix or suffix number, if any, issued by the court].
Overview

It is an unfortunate fact that some lawyers continue to misappropriate client or third person funds. For example, according to the most recent ABA Survey of Lawyers’ Funds for Client Protection (2011-2013), U.S. jurisdictions’ lawyers’ funds for client protection (“client protection fund”) collectively paid out in claims approximately $32.4 million in 2011, $27.4 million in 2012, and $36.6 million in 2013.1 Preliminary results for the 2017 Survey of Lawyers’ Funds for Client Protection (2014-2016) indicate that large payouts due to the misappropriation of client funds continues. The Pennsylvania Lawyers Fund for Client Protection reported losses of over $3.8 million in 2014 and $4.4 million in 2016.2 The Illinois Client Security Fund paid $1.3 million in 2014 and over $3 million in 2016.3 Every U.S. jurisdiction has and administers a client protection fund to reimburse victims for losses caused by the dishonest conduct of lawyers occurring in the course of the client-lawyer or other fiduciary relationship.

This Resolution, jointly proposed by the ABA Standing Committee on Client Protection and the ABA Standing Committee on Professional Discipline, seeks to amend the black letter of Rule 7 (Roster of Lawyers) of the ABA Model Rules for Lawyer Disciplinary Enforcement (MRLDE). Currently, Rule 7 sets forth the minimum information that disciplinary counsel shall maintain or have ready access to for all lawyers subject to a jurisdiction’s disciplinary authority.4 This information is generally collected as part of the jurisdiction’s annual registration process, and it is the individual lawyer’s responsibility to ensure the information remains current.5 In addition to providing identifying information (e.g., name, date of birth, law office and residential addresses, and bar admission information), MRLDE 7 currently states that lawyers must provide the “location and account numbers in which client funds are held by the lawyer.”6

If adopted, the proposed amendments would update and minimally expand the type of information that lawyers provide and disciplinary agencies can access as part of the annual licensing registration process, thereby enhancing the ability of lawyer regulators to promptly and effectively address lawyer misappropriation of funds belonging to clients or third persons. For example, the Resolution proposes that lawyers be required to provide their email address(es), as well as the name and business address of anyone to whom the lawyer delegates tasks related to the operation of a trust account. The proposed changes are simple but necessary, and are in the best interest of the public and the profession. They are consistent with the requirements of Rule 1.15 of the ABA Model Rules of Professional Conduct and other longstanding ABA policies described below.

---

1 See ABA Survey of Lawyers’ Funds for Client Protection (2011-2013), http://www.americanbar.org/content/dam/aba/events/professional_responsibility/2016%20Meetings/Forum/Materials/Hot%20Topics%20for%20Client%20Protection%20Funds/3_survey_of_lawyers_funds_2011_2013.authcheckdam.pdf. This number reflects the cumulative amount of claims paid by the 36 U.S. jurisdictions that reported claims information. The actual amount paid for all U.S. jurisdictions is higher.
3 Id.
4 MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 7 (2002).
6 See MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 7(i) (2002).
While House of Delegates’ approval is required for changes to the black letter of the MRLDE, House action is not required for changes to the accompanying Commentary. In order to fully inform the House regarding the proposed changes to the black letter of Rule 7, the Client Protection and Discipline Committees have included in the Resolution the text of what will be accompanying changes to the Commentary to MRLDE 7. The Discipline and Client Protection Committee broadly disseminated for comment within and outside the ABA drafts of this Resolution and the accompanying Report. The Committees thank those who provided helpful comments, and as of the time of the filing of this Resolution, they were aware of no opposition.

Current ABA Policies

The safekeeping of money and property belonging to clients or third persons is a fundamental ethical and fiduciary obligation of lawyers. Rule 1.15 of the ABA Model Rules of Professional Conduct (“MRPC”), in relevant part, requires lawyers to maintain such funds in trust accounts, separate from their own monies, to preserve “complete records” with respect to trust accounts, and to “render a full accounting” for the receipt and distribution of the monies from those accounts. Every United States jurisdiction, including territories, has included in their professional conduct rules the requirements of MRPC Rule 1.15. Most jurisdictions include in those rules a requirement that lawyers maintain such records for a certain period of years, and that lawyers make the records and books of such accounts readily available upon demand for production by disciplinary agencies.  

The ABA has long been a leader in adopting policies that are implemented by jurisdictions to prevent and mitigate losses caused by the dishonest conduct of lawyers in handling funds of clients or third persons. In 1988, the ABA adopted the Model Rules for Trust Account Overdraft Notification8 requiring financial institutions to notify the state lawyer disciplinary agency when an overdraft on a trust account occurred. The Model Rule for Payee Notification9 adopted in 1991, requires insurers to provide written notice to a claimant that payment for the claim has been forwarded to the claimant’s lawyer. In 1993, the ABA adopted the Model Rule for Random Audit of Lawyer Trust Accounts10, which authorizes a jurisdiction’s lawyer disciplinary agency to conduct audits of lawyers’ trust accounts, selected at random, without needing a basis to believe that misconduct has occurred. In August 2010, the ABA House of Delegates adopted the ABA Model Rules for Client Trust Account Records11 to delineate the types of records that lawyers must maintain in order to comply with the recordkeeping obligations outlined in the MRPC. In jurisdictions that have adopted similar policies, these measures have proven effective in deterring

---

7 See ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 29 (2002); see also, ABA CPR Policy Implementation Committee chart, Rule 1.15 Safekeeping Property (Dec. 12, 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpe_1_15.pdf.
8 See ABA MODEL RULES FOR TRUST ACCOUNT OVERDRAFT NOTIFICATION, http://www.americanbar.org/content/aba/groups/professional_responsibility/resources/client_protection/over.html.
9 See ABA MODEL RULE FOR PAYEE NOTIFICATION, http://www.americanbar.org/content/aba/groups/professional_responsibility/resources/client_protection/pay.html.
10 See ABA MODEL RULE FOR RANDOM AUDIT OF TRUST ACCOUNTS, http://www.americanbar.org/content/aba/groups/professional_responsibility/resources/client_protection/audit.html.
11 See ABA MODEL RULES FOR CLIENT TRUST ACCOUNT RECORDS, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rules_on_client_trust_account_records.pdf.
and detecting the mishandling of funds even before clients or third persons file complaints with disciplinary agencies. These requirements have provided useful guidance to lawyers about proper accounting procedures, and are not considered to be a regulatory burden.\(^\text{12}\)

**Proposed Amendments**

In addition to updating Rule 7 to include lawyers providing an email address, the proposed amendments would expand the scope of trust account information that a lawyer must submit as part of the annual registration process. The proposed amendment to Rule 7(i) clarifies that lawyers should provide the name of the financial institution, in addition to the account number, for each account in which the lawyer holds client or third person funds in connection with a representation. The proposed amendments to Rule 7(j) would require lawyers, as part of their annual registration, to provide the name and business address not only of the lawyer(s) with authority to disburse funds from trust accounts, but of any others to whom the lawyer has delegated authority to disburse funds from each trust account where client or third person funds are held in connection with a representation. This proposed amendment would make MRLDE 7 consistent with Rule 2(a) of the Model Rules for Client Trust Account Records, which provides that “a lawyer admitted to practice law in this jurisdiction or a person under the direct supervision of the lawyer” (emphasis added) can be an authorized signatory on the client trust account.\(^\text{13}\)

Similarly, new Rule 7(k) would require lawyers, as part of their annual registration, to provide the name and business address of the lawyer responsible for complying with the applicable rules governing client trust accounts as well as that information relating to any individual to whom the lawyer delegates tasks relating to the operation of such accounts, such as bookkeeping duties. New Rule 7(k) recognizes the reality that many law firms use the services of outside accountants or other firm employees to conduct monthly and annual account reconciliations. Any such delegation of tasks must be done in compliance with Rules 5.1 and 5.3 of the ABA Model Rules of Professional Conduct.

Data collected by the Client Protection and Discipline Committees when preparing this Resolution revealed that twenty-four jurisdictions already require lawyers to provide similar trust account information on their annual registration statement.\(^\text{14}\) In twenty-one of these jurisdictions, lawyers must report the name on their trust account, the account number, and the name of the financial institution.\(^\text{15}\) In a few of these jurisdictions, more detailed information in the registration

\(^{12}\) AM. BAR ASS’N COMM’N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, LAWYER REGULATION FOR A NEW CENTURY (1992),


\(^{13}\) See ABA MODEL RULES FOR CLIENT TRUST ACCOUNT RECORDS R. 2(a) (2010).

\(^{14}\) The Client Protection and Professional Discipline Committees distributed an informal survey to the 51 U.S. disciplinary jurisdictions inquiring about the type of information collected about lawyer trust accounts. Thirty-two jurisdictions responded, including four New York jurisdictions.

\(^{15}\) AL, AZ, AR, CO, DE, ID, IL, IA, LA, ME, MD, MA, MN, NE, NM, ND, OR, RI, TN, VT, and WY require lawyers to report on the annual registration statement the name on the trust account, the account number, and the name of the financial institution. Wisconsin requires only the bank name.
statements is required, including the name of each lawyer responsible for depositing and disbursing funds, as well as the names of individuals responsible for reconciling the accounts.\textsuperscript{16}

The proposed changes to MRLDE would not create an undue burden for lawyers, are protective of clients and the public, and help lawyer regulators as they continue to work to minimize instances of lawyer misappropriation of monies held in trust accounts and hold lawyers accountable via discipline when appropriate. These changes also enhance the efficient use of disciplinary resources in cases where the risk to the public is high, by allowing disciplinary counsel to readily access critical information when investigating allegations of dishonest conduct resulting in misappropriation of client or third person funds. This is especially relevant when the lawyer who is alleged to have committed the misconduct is not necessarily the lawyer whose name appears on the trust account, or in small or solo firms, for example, where nonlawyer employees are often, by necessity, authorized signatories on trust accounts. The proposed amendments also allow disciplinary counsel to readily access trust account information when necessary for a more effective accounting and distribution of client funds if the lawyer dies, is missing, or becomes incapacitated.\textsuperscript{17} These changes will also help lawyers comply with the “complete records” requirement in Rule 1.15 of the ABA Model Rules for Professional Conduct.

**Commentary**

The House of Delegates does not adopt the Commentary to the MRLDE. If the proposed amendments are adopted, the Commentary to MRLDE 7 will be amended as follows:

**COMMENTARY**

A permanent registration system should be established from which the agency can determine whether an individual is licensed to practice in the state, is living or deceased, and where the individual is located, and information regarding all accounts in which the lawyer holds client or third person funds in connection with a representation. Such information maintained via the registration system should include the name of any individual(s) authorized to disburse funds from such accounts or who are designated by the responsible lawyer to perform tasks related to the operation of such accounts. Such tasks could include performing bookkeeping functions. The lawyer’s assignment of such tasks must be done in accordance with Rules 5.1 and 5.3 of the Model Rules of Professional Conduct. The registration records may be maintained by the court, a court-designated agency, or in unified bar states by the state bar association. Disciplinary counsel should have ready access to the records.

The individual lawyer has the responsibility of keeping his or her registration information current, and should be required to promptly inform the registration agency of any change. Generally, the current business address listed in the roster is the lawyer’s legal address for purposes of service of process and any other notices. See Rule 13.

\textsuperscript{16} Arizona and Delaware require lawyers to report the name of each lawyer responsible for depositing and disbursing funds (as does Maryland) and the names of individuals responsible for reconciling the accounts.

\textsuperscript{17} See MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 28 (2002).
Registration records should be updated to include information if the lawyer is deceased or no longer engaged in the practice of law. When a lawyer has disappeared or is deceased or disabled, the lawyer's relatives or law partners or associates in the firm, corporation, or agency in which the lawyer was employed should report that fact to the registration agency. See Rule 28(A).

Upon the convening of a hearing on formal charges against a lawyer, disciplinary counsel should require the lawyer to verify the accuracy of the information contained in the roster, and to correct any part thereof which is out of date.

A coordinated system of assigning a universal registration number is urgently needed to make interstate reciprocal enforcement of discipline effective.

**Conclusion**

For the reasons set forth above, the Client Protection and Discipline Committees respectfully request that the House of Delegates adopt these proposed changes to MRLDE 7.

Respectfully submitted,

Frank X. Neuner, Chair  
ABA Standing Committee on  
Client Protection  

August 2017
GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Client Protection
Standing Committee on Professional Discipline

Submitted By: Frank X. Neuner, Jr., Chair, Standing Committee on Client Protection

1. Summary of Resolution(s). The Resolution, jointly proposed by the ABA Standing Committee on Client Protection and the ABA Standing Committee on Professional Discipline, seeks to amend the black letter of Rule 7 (Roster of Lawyers) of the ABA Model Rules for Lawyer Disciplinary Enforcement (MRLDE). The proposed amendments would update and minimally expand the type of information that lawyers provide and disciplinary agencies can access as part of the annual licensing registration process to include the lawyer’s business email address, the name of the financial institution and the account number for each account in which the lawyer holds client or third person funds in connection with a representation, the name and business address of the lawyer(s) or other individual(s) with authority to disburse funds from trust accounts, and the name and business address of the lawyer responsible for complying with the applicable rules governing client trust accounts and any individual to whom the lawyer delegates tasks relating to the operation of such accounts, such as bookkeeping duties.


3. Has this or a similar resolution been submitted to the House or Board previously? The proposed amendments have not previously been submitted to the House of Delegates or the Board of Governors.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? Rule 1.15 of the ABA Model Rules of Professional Conduct, in relevant part, requires lawyers maintain client and third-party funds in trust accounts, separate from their own monies, to preserve “complete records” with respect to trust accounts, and to “render a full accounting” for the receipt and distribution of the monies from those accounts. The ABA Model Rules for Client Trust Account Records requires lawyers to delineate the types of records that lawyers must maintain in order to comply with the recordkeeping obligations outlined in the Model Rules of Professional Conduct. The proposed amendments are consistent with the requirements of Rule 1.15 of the ABA Model Rules of Professional Conduct and the ABA Model Rules for Client Trust Account Records.

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

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

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. The Standing Committees on Client Protection and Professional Discipline will
circulate the amended policy to the highest court of appellate jurisdiction and lawyer regulatory authorities in each U.S. jurisdiction with recommendations to adopt the amendments.

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

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

10. **Referrals.** The Resolution was forwarded to ABA Committees and Commissions, ABA Section and Division Chairs, presidents of state and local bar associations through The Bridge, and affiliated organizations including the Association of Professional Responsibility Lawyers, the National Organization of Bar Counsel, and the National Client Protection Organization, and circulated on various Center of Professional Responsibility list serves.

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

Selina S. Thomas  
Client Protection Counsel  
American Bar Association  
321 N. Clark Street, 17th Floor  
Chicago, IL 60654  
312/ 988-6721  
Selina.thomas@americanbar.org

Ellyn S. Rosen  
Regulation and Global Initiatives Counsel  
ABA Center for Professional Responsibility  
321 North Clark Street  
17th Floor  
Chicago, IL 60654-7598  
312/988-5311  
Ellyn.Rosen@americanbar.org

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

Frank X. Neuner, Jr.  
NeunerPate  
One Petroleum Center  
1001 West Pinhook Road, Suite 200  
Lafayette, LA 70503  
Phone: 337 237 7000  
Cell: 337 654 4424  
fneuner@neunerpate.com
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

The Resolution, jointly proposed by the ABA Standing Committee on Client Protection and the ABA Standing Committee on Professional Discipline, seeks to amend the black letter of Rule 7 (Roster of Lawyers) of the ABA Model Rules for Lawyer Disciplinary Enforcement (MRLDE). The proposed amendments would update and minimally expand the type of information that lawyers provide and disciplinary agencies can access as part of the annual licensing registration process to include the lawyer's business email address, the name of the financial institution and the account number for each account in which the lawyer holds client or third person funds in connection with a representation, the name and business address of the lawyer(s) or other individual(s) with authority to disburse funds from trust accounts, and the name and business address of the lawyer responsible for complying with the applicable rules governing client trust accounts and any individual to whom the lawyer delegates tasks relating to the operation of such accounts, such as bookkeeping duties.

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

The proposed amendments are part of the ongoing effort to minimize instances of lawyer misappropriation of monies held in trust accounts and hold lawyers accountable via discipline when appropriate.

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

The proposed amendments allow disciplinary counsel to readily access critical information when investigating allegations of dishonest conduct resulting in misappropriation of client or third person funds. This is especially relevant when the lawyer who is alleged to have committed the misconduct is not necessarily the lawyer whose name appears on the trust account or where nonlawyer employees are authorized signatories on trust accounts. The proposed amendments also allow disciplinary counsel to readily access trust account information when necessary for a more effective accounting and distribution of client funds if the lawyer dies, is missing, or becomes incapacitated. These changes will also help lawyers comply with the “complete records” requirement in Rule 1.15 of the ABA Model Rules for Professional Conduct. The proposed amendments would not create an undue burden for lawyers and are protective of clients and the public.

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

The submitting entities were not aware of any opposition at the time of filing.
RESOLVED, That the American Bar Association accredits the Privacy Law program of the International Association of Privacy Professionals of Portsmouth, New Hampshire for a five-year term as a designated specialty certification program for lawyers.
REPORT

Background and Synopsis of the Resolutions

The United States Supreme Court held in *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91 (1990), that states may not constitutionally impose a blanket prohibition on a truthful communication by a lawyer that he or she is certified as a specialist by a *bona fide* organization. Following the *Peel* decision, legal specialty groups began developing programs to certify attorneys as specialists.

An August, 1992, House resolution (1992-AM-128) revised Model Rule of Professional Conduct 7.4 ("Communication of Fields of Practice and Specialization"). It now provides: "(d) A lawyer shall not state or imply that a lawyer is *certified as a specialist* in a particular field of law, unless: (1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and (2) the name of the certifying organization is clearly identified in the communication" (emphasis added). This created a need for the Association to develop accreditation standards to ensure that (a) private organizations that certify lawyers as specialists are "bona fide," and (b) their certification programs are robust. A national accreditation mechanism administered by the Association according to uniform standards, it was believed, would be an efficient and effective means of dealing with a multiplicity of organizations that were offering, or planning to offer, certification programs.

Importantly, lawyers may practice in a field of law without certification. Rule 7.4 applies only to a claim by an attorney that he or she is *certified as a specialist*, and requires that such claim be truthful, and that the certification be *bona fide*.

At the 1993 Midyear Meeting, the House adopted Standards for Accreditation of Specialty Certification Programs For Lawyers (the "Standards") and delegated to the Standing Committee on Specialization the task of developing and conducting a process to accredit (and re-accredit) legal specialist certification programs sponsored by private national organizations. At the 1999 Annual Meeting, the House extended the initial period of accreditation approved in the Standards from three years to five.

In many states today, specialist certification programs now *must* be accredited by the Association, approved by state regulatory authorities, or both, before lawyers may publicize their certification.

Section 4 of the Standards requires that a certifying organization applying for accreditation by the Association demonstrate to the Standing Committee on Specialization its program's compliance with several requirements to help guarantee the *bona fides* of the organization and its program. The Standards say that accreditation "shall be granted" if the certifying organization shows that the program complies with the Standards' detailed accreditation requirements.¹ This is consistent with *Peel*, which provided that a claim by an attorney that he or she is certified as a

¹ Those accreditation requirements are set out below as an Appendix to this Report.
legal specialist by an organization is not misleading if the organization and its program have rigorous standards.

Pursuant to the Association’s current accreditation Standards and procedures, the Standing Committee has reviewed, and hereby unanimously recommends the approval of, an application submitted by the International Association of Privacy Professionals (“IAPP”) for accreditation of its Privacy Law Specialist certification program. The Standing Committee has determined that the IAPP is a bona fide organization and that its lawyer specialty certification program rigorously meets all of the Association’s Standards.

**Organization Description**

According to the Standing Committee on Specialization’s Governing Rules (“Rules”), applicants for specialty certification accreditation are reviewed to determine whether their “organizational features, operational methods and certification standards comply with the requirements of the Standards.”

The Standing Committee on Lawyer Specialization therefore undertook to review the IAPP’s organizational structure and viability as well as its organizational features and operational methods for certifying attorneys as specialists. Among the factors the Standing Committee considered, consistent with Rule 6-4.2, were the IAPP’s governing structure and supporting documents, its financial viability, and biographical information regarding the IAPP’s governing board and senior staff. Rule 6-4.2 (a-d).

The IAPP has been organized under IRS Rule 501(c)(6) as a not-for-profit professional membership association since 2000. It currently has nearly 30,000 members in approximately 90 countries worldwide. The IAPP estimates that 30-40 percent of these members are attorneys. A section of the IAPP, known as the Privacy Bar Section, was recently formed to address the unique needs of the growing number of attorney members in the IAPP.

The IAPP is financially viable as demonstrated by its financial statements. It employs over 100 full time employees. It has a Board of Directors comprised of attorneys, chief legal counsel, chief privacy officers, and former regulators. Board members include lead in-house counsel and privacy officers at such organizations as Google, Bank of America, Intel, LinkedIn, Mastercard, GE Digital, Naspers, Northrop Grumman, DHL, and Promontory. The IAPP’s Chief Executive Officer and President, its Vice President for Research and Education, and its Research Director are also attorneys.

In addition to hosting events and publishing articles and research reports on the rapidly-changing field of privacy law, the IAPP also offers certifications. The Certification Director has a Ph.D. in English and a staff of three additional full-time, credentialed employees with considerable experience in exam writing and deployment. The volunteer Certification Advisory Board consists of nine accomplished privacy professionals representing a variety of business sectors, four of whom are practicing attorneys. They guide the operations of the IAPP’s certification efforts and ensure the impartiality of the program.
In February 2016, the IAPP submitted a Notice of Intent to apply for accreditation of its Privacy Law Specialist certification program. The Notice of Intent was accompanied by an Application for Accreditation and the appropriate application fees of $4,500.

The Standing Committee has determined that the IAPP is a bona fide organization with the capacity to administer a lawyer specialist certification program.

Program Description

The IAPP offers several privacy certifications. The longest-standing and most popular is the Certified Information Privacy Professional (CIPP). As the field and the IAPP have developed, and as privacy and data protection law have grown globally, the IAPP has offered a variety of certifications including CIPP/United States (CIPP/US), CIPP/ U.S. Government (CIPP/G), CIPP/Canada (CIPP/C); CIPP/Europe (CIPP/E), and CIPP/Asia (CIPP/A). The IAPP also offers a certification in the technology associated with privacy practice, known as the Certified Information Privacy Technologist (CIPT) certification, and a certification associated with creating and monitoring a privacy program as an in-house privacy professional or on behalf of an institutional client (the Certified Information Technology Manager or CIPM certification). Each certification requires passage of an examination and maintenance of continuing education over time.

The IAPP has awarded many attorneys with the CIPP/US and other certifications for several years, although the exam is available to non-attorneys as well. The IAPP sought and in 2015 obtained accreditation for four of its certifications from the American National Standards Institute (ANSI), including the ones required for Association accreditation. ANSI accreditation demonstrates that the IAPP’s exams and its procedures for awarding certification meet the highly rigorous standards set forth in ISO/IEC 17024:2012.

When the IAPP applied for accreditation from the Association, it created a program designed to match the Standards for Accreditation of Specialty Programs for Lawyers. The IAPP’s initial application materials set forth a program requiring attorneys seeking Privacy Law Specialist certification to: (a) successfully pass the CIPP/US exam; and (b) successfully pass either the CIPM or the CIPT exam. The Bodies of Knowledge for each of these exams are attached to this Report. These exams were sent for review to Professor Dennis Hirsch, who is Professor of Law and Director of the Program on Data and Governance at The Ohio State University Moritz College of Law. Professor Hirsch is widely published in the fields of privacy and cybersecurity law, including European data protection law and comparative information privacy law. He holds degrees from Columbia University and Yale Law School. Professor Hirsch provided the Standing Committee with a favorable review of the exams.

The IAPP’s Privacy Law Specialist certification program also requires, consistent with the accreditation Standards, that attorneys submit evidence of at least 36 hours of participation in qualified continuing legal education in the field of Privacy Law for the 3-year period preceding the application. Qualified CLE programs include those offered by Association sections and task forces. Applicants must also submit at least five but no more than eight peer references attesting to the applicant’s qualifications and involvement in the practice of privacy law. “Peers” include
other attorneys, clients, regulators, or judges who can personally attest to the applicant’s qualifications.

Because none of the IAPP’s required exams contained a section covering ethics and professional responsibility, however, the Standing Committee noted this as a deficiency in the IAPP’s application. The IAPP thereafter created an exam specifically covering ethics and professional responsibility issues to be administered exclusively to attorneys seeking the Privacy Law Specialist certification. Prof. Hirsch provided a favorable review of that exam.

Finally, applicants must demonstrate current and ongoing “substantial involvement” in the practice of Privacy Law. The Standing Committee noted some deficiencies in the IAPP’s initial application regarding its definition of “substantial involvement” in the practice of Privacy Law. In particular, the Standing Committee felt the IAPP needed to be more specific in the types of activities and areas of law in which attorneys must be engaged to qualify for the certification. The IAPP amended and clarified its definition and the Standing Committee ultimately concluded that the following definition meets the Standards for accreditation:

**Definition of “substantial involvement in the practice of Privacy Law”:**

Applicant must demonstrate (in a manner that does not reveal confidential and privileged information) that Applicant has been actively engaged in the practice of privacy law either as a transactional lawyer, in privacy program management, privacy litigation or regulatory practice, or a combination of these. Active engagement in information security law will also be considered provided Applicant demonstrates its connection to and role in the privacy specialist certification practice area.

Applicant must demonstrate that Applicant has both quantitative and qualitative substantial involvement in the field. In particular, Applicant must declare and demonstrate through narrative description and through support letters that at least one-quarter (25%) of Applicant’s full-time practice in each of the prior three years has been devoted to the practice of privacy law. In the narrative description, Applicant must provide specific examples of his or her engagement with the following types of privacy law practice activities:

*For outside counsel and in-house lawyers with principally a transactional practice, at least 15% of Applicant’s full time practice must include:*  
- Preparation and review of privacy notices compliant with state, federal and/or international laws and regulations, and reflective of an organization’s privacy practices, and privacy and security policy development, including development of information handling, sharing, storage, training, and security policies and programs (at least 5% of a full-time law practice);  
- Contract development, negotiation, and compliance, which may include review of vendor, purchase, procurement, or acquisition contracts as well as drafting and negotiation of contracts for inclusion of privacy and security provisions (at least 5% of full time law practice); and
Privacy advice in compliance with state and federal laws, including legal advice on privacy by design in product design or services (at least 5% of full-time law practice).

Some elements of the 25% minimum may also include:

- Conducting Privacy Impact Assessments and providing advice in connection with them;
- Risk assessment with regard to use and potential misuse of personally identifiable information, and corresponding legal advice to clients and organizational leadership;
- Counseling on cross-border data transfers, and other compliance with international privacy laws pertaining to data transfer (such as drafting Binding Corporate Rules, standard contractual contacts, certifying to US-EU Safe Harbor/Privacy Shield, and the like);
- Counseling on cybersecurity issues, breach preparedness, and breach remediation;
- Legislative or regulatory public policy engagement, which may include drafting of position papers or opinions, and interaction with legislative or regulatory bodies, which develop laws or regulate privacy practices;
- Advice about cyber insurance and negotiating cyber insurance policies.

For attorneys primarily engaged in data breach response, adversarial proceedings and/or litigation, at least 20% of Applicant’s full time practice must include:

- Internal breach investigation and evaluation, involving managing internal investigations of data breaches and evaluating risks for mitigation and policy development, as well as engaging and overseeing the work of forensic teams, preparing breach notification letters, and working with regulators (at least 10% of full time law practice);
- Litigation of data protection and data breach matters in state, federal, international, and administrative tribunals (at least 5% of full time law practice); and
- Regulatory investigations and defense, including federal, state, or international filings of regulatory inquiries or responses to regulatory inquiries of privacy and data protection practices (at least 5% of full time law practice).

Some elements of the 25% minimum may also include:

- Privacy tort litigation such as litigation of consumer protection / privacy statutes that provide a private right of action (federal and state), including without limitation rights of publicity, rights against publication of false information, intrusion on seclusion, or public disclosure of private facts; and
- Advice about cyber insurance and negotiating cyber insurance policies.

In sum, the IAPP’s Privacy Law Specialist certification program meets the Standards for Accreditation of Specialty Certification Programs for Lawyers by requiring that an applicant:

1. Be an attorney admitted in good standing in at least one U.S. state.
3. Hold one of the following: current CIPM® or CIPT® certification.
4. Pass an IAPP examination on professional responsibility in the practice of Privacy Law.
5. Demonstrate current and ongoing “substantial involvement” in the practice of Privacy Law.
6. Submit evidence of at least 36 hours of participation in qualified continuing legal education in the field of Privacy Law for the 3-year period preceding the application date.
7. Provide at least 5 but no more than 8 peer references attesting to applicant’s qualifications and “substantial involvement” in the practice of Privacy Law. “Peers” are other attorneys, clients, regulators, or judges who can personally attest to applicant’s qualifications.

Accreditation and Evaluation Procedures for the Privacy Law Application

In evaluating the application, the Standing Committee followed the Governing Rules it adopted on March 2, 1993, as amended from time to time since.

In order to ensure that every accredited program continues to comply with Association Standards, the Standing Committee required that the following accompany all reaccreditation applications:

i. Current versions of the applicant’s governing documents, including articles of incorporation, bylaws, and resolutions of the governing bodies of the applicant or any parent organization, which resolutions relate to the standards, procedures, guidelines or practices of the applicant’s certification programs.

ii. Biographical summaries of members of the governing board, senior staff and members of advisory panels, certification committees, examinations boards and like entities involved with the certification process, including specific information concerning the degree of involvement in the specialty area of persons who review and pass upon applications for certification;

iii. All materials furnished to lawyers seeking certification, including application forms, booklets or pamphlets describing the certification program, peer reference forms, rules and procedures, evaluation guides and any other information furnished to the public or the media regarding the certification process;

iv. A copy of the recent examinations given to applicants for specialty certifications, along with a description of how the exam was developed, conducted and reviewed; a description of the grading standards; and the names of persons responsible for determining pass/fail standards.

In addition, the Standards include non-discrimination provisions requiring that a program not condition the grant of certification to a lawyer on the lawyers “membership in any organization or completion of educational programs offered by any specific organization” [Section 4.04(B)]; and that a program “not discriminate against any lawyers seeking certification on the basis of race, religion, gender, sexual orientation, disability, or age” [Section 4.04(C)].

The Standing Committee confirms that the IAPP’s application contained the requisite materials and met the requisite standards.
Accreditation Application and Examination Review Panelists

The Accreditation Review Panel appointed by the Standing Committee on Specialization consisted of a chair and two other members, as well as the appointed examination reviewer (Prof. Hirsch). Because the Committee’s reaccreditation procedures provide certifying organizations the opportunity to object for cause to the appointment of examination reviewers and the Accreditation Review Panel members, the IAPP was provided notice, in writing, of the names and affiliations of the members of the Accreditation Review Panel and the examination reviewer prior to appointment. The Accreditation Review Panel members and examination reviewer were:

Shontrai DeVaughn Irving (Hammond, Indiana), Chair, Privacy Law Application Review Panel. Mr. Irving is the Chair of the Standing Committee on Specialization. He teaches Business Law at Purdue University’s Calumet’s School of Business.

The Hon. Melissa May (Indianapolis, Indiana), Member, Privacy Law Application Review Panel. Judge May sits on the Fourth District of the State of Indiana’s Court of Appeals in Indianapolis. She is also the Special Adviser to the Standing Committee on Specialization.

Wendy Weiss (Trenton, New Jersey), Member, Privacy Law Application Review Panel. Ms. Weiss is Court Executive at the New Jersey Supreme Court Board on Attorney Certification.

Examination Reviewer: Prof. Dennis Hirsch (Columbus, Ohio), Mr. Hirsch is Professor of Law and Director of the Program on Data and Governance at The Ohio State University Moritz College of Law.

Respectfully submitted,

Shontrai Irving, Chair
Standing Committee on Specialization
August 2017
Appendix – ABA Standard for Accreditation of Specialty Certification Programs for Lawyers, Section 4

SECTION 4: REQUIREMENTS FOR ACCREDITATION OF CERTIFYING ORGANIZATIONS

In order to obtain accreditation by the Association for a specialty certification program, an Applicant must demonstrate that the program operates in accordance with the following standards:

4.01 Purpose of Organization -- The Applicant shall demonstrate that the organization is dedicated to the identification of lawyers who possess an enhanced level of skill and expertise, and to the development and improvement of the professional competence of lawyers.

4.02 Organizational Capabilities -- The Applicant shall demonstrate that it possesses the organizational and financial resources to carry out its certification program on a continuing basis, and that key personnel have by experience, education and professional background the ability to direct and carry out such programs in a manner consistent with these Standards.

4.03 Decision Makers -- A majority of the body within an Applicant organization reviewing applications for certification of lawyers as specialists in a particular area of law shall consist of lawyers who have substantial involvement in the specialty area.

4.04 Uniform Applicability of Certification Requirements and Nondiscrimination
   (A) The Applicant's requirements for certifying lawyers shall not be arbitrary and shall be clearly understood and easily applied. The organization may only certify those lawyers who have demonstrably met each standard. The requirements shall be uniform in all jurisdictions in which the Applicant certifies lawyers, except to the extent state or local law or regulation imposes a higher requirement.
   (B) Membership in any organization or completion of educational programs offered by any specific organization shall not be required for certification, except that this paragraph shall not apply to requirements relating to the practice of law which are set out in statutes, rules and regulations promulgated by the government of the United States, by the government of any state or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.
   (C) Applicants shall not discriminate against any lawyers seeking certification on the basis of race, religion, gender, sexual orientation, disability, or age. This paragraph does not prohibit an Applicant from imposing reasonable experience requirements on lawyers seeking certification or re-certification.

4.05 Definition and Number of Specialties -- An Applicant shall specifically define the specialty area or areas in which it proposes to certify lawyers as specialists.
   (A) Each specialty area in which certification is offered must be an area in which significant numbers of lawyers regularly practice. Specialty areas shall be named and described in terms which are understandable to the potential users of such legal services, and in terms which will not lead to confusion with other specialty areas.
   (B) An Applicant may seek accreditation to certify lawyers in more than one specialty area, but in such event, the organization shall be evaluated separately with respect to each specialty program.
(C) An Applicant shall propose to the Standing Committee a specific definition of each specialty area in which it seeks accreditation to certify lawyers as specialists. The Standing Committee shall approve, modify or reject any proposed definition and shall promptly notify the Applicant of its actions.

4.06 Certification Requirements -- An Applicant shall require for certification of lawyers as specialists, at a minimum, the following:

(A) Substantial Involvement -- Substantial involvement in the specialty area throughout the three-year period immediately preceding application to the certifying organization. Substantial involvement is measured by the type and number of cases or matters handled and the amount of time spent practicing in the specialty area, and require that the time spent in practicing the specialty be no less than twenty-five percent (25%) of the total practice of a lawyer engaged in a normal full-time practice.

(B) Peer Review -- A minimum of five references, a majority of which are from attorneys or judges who are knowledgeable regarding the practice area and are familiar with the competence of the lawyer, and none of which are from persons related to or engaged in legal practice with the lawyer.

(1) Type of References -- The certification requirements shall allow lawyers seeking certification to list persons to whom reference forms could be sent, but shall also provide that the Applicant organization send out all reference forms. In addition, the organization may seek and consider reference forms from persons of the organization's own choosing.

(2) Content of Reference Forms -- The reference forms shall inquire into the respondent's areas of practice, the respondent's familiarity with both the specialty area and with the lawyer seeking certification, and the length of time that the respondent has been practicing law and has known the applicant. The form shall inquire about the qualifications of the lawyer seeking certification in various aspects of the practice and, as appropriate, the lawyer's dealings with judges and opposing counsel.

(C) Written Examination -- An evaluation of the lawyer's knowledge of the substantive and procedural law in the specialty area, determined by written examination of suitable length and complexity. The examination shall include professional responsibility and ethics as it relates to the particular specialty. On written request from an Applicant, the Standing Committee may allow the Applicant to certify up to twelve lawyers who create and grade the initial version of the examination required under this paragraph without requiring those lawyers to take and pass the examination. Such written request to the Standing Committee shall include the names and addresses of the lawyers, and shall expressly state that they have created and graded, or will grade, the initial version of the examination required under this paragraph, and that they otherwise meet the certification requirements described in 4.06(A), (B), (D), (E), and (F).

(D) Educational Experience -- A minimum of 36 hours of participation in continuing legal education in the specialty area in the three-year period preceding the lawyer's application for certification. This requirement may be met through any of the following means:

(1) Attending programs of continuing legal education or courses offered by Association accredited law schools in the specialty area;

(2) Teaching courses or seminars in the specialty area;

(3) Participating as panelist, speaker or workshop leader at educational or professional conferences covering the specialty area; or

(4) Writing published books or articles concerning the specialty area.
(E) Good Standing -- A lawyer seeking certification is admitted to practice and is a member in good standing in one or more states or territories of the United States or the District of Columbia.

(F) Affirmation of Compliance -- A lawyer seeking certification shall affirm in a manner satisfactory to Applicant that the lawyer's practice in the specialty area is consistent with the lawyer's status as a certified specialist.

4.07 Impartial Review -- The Applicant shall maintain a formal policy providing lawyers who are denied certification an opportunity for review by an impartial decision maker.

4.08 Requirements for Re-Certification -- The period of certification shall be set by the Applicant, but shall be no longer than five years, after which time lawyers who have been certified must apply for re-certification. Re-certification shall require similar evidence of competence as that required for initial certification in substantial involvement, peer review, educational experience evidence of good standing, and affirmation of compliance.

4.09 Revocation of Certification -- The Applicant shall maintain a procedure for revocation of certification. The procedures shall require a certified lawyer to report his or her disbarment or suspension from the practice of law in any jurisdiction to the certifying organization.
GENERAL INFORMATION FORM

Submitting Entity: American Bar Association Standing Committee on Specialization

Submitted By: Shontra D. Irving, Chair

1. Summary of Resolution(s).

The Resolution grants accreditation to the Privacy Law certification program of the International Association of Privacy Professionals for a 5-year term.

2. Approval by Submitting Entity.

At its meeting on October 22, 2016, the Standing Committee on Specialization considered the application of the International Association of Privacy Professionals for accreditation and voted unanimously that it submit a resolution to the House of Delegates for consideration at the 2017 Midyear Meeting. After discussion with interested entities, the Committee on Specialization withdrew the original resolution from consideration at the 2017 Midyear Meeting, contemplating re-submission at the 2017 Annual Meeting. On May 4, 2017, the Committee unanimously approved this Resolution for submission to the House of Delegates at the 2017 Annual Meeting.

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

Yes. A similar resolution was submitted and withdrawn at the 2017 Midyear Meeting.

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

At its August 1992 meeting, acting upon a recommendation proposed by 16 state and local bar associations, the House of Delegates passed a resolution calling for the Association to establish standards for accrediting private organizations that certify lawyers as specialists and to establish and maintain a mechanism to accredit such organizations that meet those standards. In February 1993, the House of Delegates adopted the Standards for Accreditation of Specialty Certification Programs for Lawyers, and delegated to the Standing Committee on Specialization the task of evaluating organizations that apply to the Association for accreditation, and to periodically review accreditation after its initial grant.

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

Not Applicable.

6. Status of Legislation. (If applicable)

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

Implementation will be self-executing if the program is accredited by the House of Delegates.

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

There are no costs associated with the accreditation of specialty certification programs as proposed in the recommendation.

9. Disclosure of Interest. (If applicable)

None.

10. Referrals.

As required by the Standards, this Resolution has been referred for comment to interested entities of the Association:

The Section of Science and Technology Law; the Section of Labor and Employment Law; the Litigation Section; the Business Law Section; the International Law Section; the Health Law Section; the Forum on Communications Law; the Tort Trial and Insurance Practice Section; the Solo, Small Firm and General Practice Division; and the Cybersecurity Legal Task Force.

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

Shontrai D. Irving
Chair, Standing Committee on Specialization
Purdue University Calumet
2200 169th Street
Hammond IN 46323
Phone: 812-219-8697
Email: Shontrai.Irving@Purduecal.edu

Martin Whittaker
Staff Counsel, Standing Committee on Specialization
321 North Clark Street
Chicago IL 60654
Phone: 312-988-5309
Email: Martin.Whittaker@Americanbar.org

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

Shontrai D. Irving
Chair, Standing Committee on Specialization
Purdue University Calumet
2200 169th Street
Hammond IN 46323
Phone: 812-219-8697
Email: Shontrai.Irving@Purduecal.edu
EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution will grant accreditation to the Privacy Law certification program of the International Association of Privacy Professionals.

2. Summary of the Issue that the Resolution Addresses

To respond to a need to regulate certifying organizations, the House of Delegates adopted standards for accreditation of specialty certification programs for lawyers, and delegated to the Standing Committee the task of evaluating organizations that apply to the ABA for accreditation and reaccreditation. This Resolution acquits the Standing Committee’s obligation to periodically review programs that the House of Delegates has accredited and recommend their further reaccreditation or revocation of accreditation.

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

The recommendation addresses the issue by implementing previous House resolutions calling on the ABA to evaluate specialty certification organizations that apply for accreditation.

4. Summary of Minority Views

The Council of the Section of Science and Technology Law has created a working group to examine the existing privacy certification credentials offered by the IAPP, the contemplated program IAPP is seeking to have accredited, and to report to the Council regarding the suitability of “Privacy Law” as a distinct practice area suitable for certification of practitioners as experts. Communication among that working group of the Section Council, members of the Specialization Committee, and officers of the IAPP has been ongoing since the filing of this Resolution for House consideration, and all interested persons are working to resolve the Section Council’s questions and concerns.
RESOLUTION

1 RESOLVED, That the American Bar Association adopts the *ABA Criminal Justice Standards Relating to Dual Jurisdiction Youth*, dated August 2017.
PART 1. DEFINITIONS AND GENERAL PRINCIPLES

STANDARD 1.1 DEFINITIONS

For the purpose of these Standards, the listed terms are defined as follows:

(a) "Behavioral Health Services" are a continuum of services for individuals at risk of, or suffering from mental health or substance abuse conditions.

(b) "Best Interest Advocate" is an individual, not functioning or intending to function as a lawyer, appointed by the court to assist the court in determining the best interests of the youth.

(c) "Child Welfare System" is the legal structure including courts, residential facilities, foster care placements, and services designed to promote the well-being of youth alleged or found to be status offenders or to be abused, neglected, abandoned, homeless, or exploited, by ensuring safety, achieving permanency, improving well-being, and building the family's capacity to care for their youth successfully.

(d) "Collateral Consequences" are consequences flowing from arrest or adjudication, other than the direct dispositional order, that may impact opportunities for future education, financial aid, employment, housing, immigration status, public benefits, or other individual rights, services, or benefits.

(e) "Congregate Care Facility" is a housing facility in which each individual has a private or semi-private bedroom but shares with other residents a common dining room, recreational room, or other facilities.

(f) "Critical Youth Services" are services required for the well-being of youth, including supervision, housing, clothing, nutrition, education, recreation, and physical and behavioral healthcare.

(g) "Cultural Competence" is an ability to understand, communicate with, and effectively interact with people across different cultures and socio-economic backgrounds.

(h) "Data" is information that is captured for aggregate reporting purposes but does not identify individuals.

(i) "Delinquency" is any behavior that would be a crime if committed by an adult.

(j) "Defense Counsel" is a lawyer hired or appointed to represent a youth's expressed interest in a delinquency proceeding.
(k) "Dependency Case" is a legal proceeding involving youth and parents in the child welfare system.

(l) "Dependency Counsel" is a lawyer hired or appointed to represent a youth's expressed legal interests in a dependency case.

(m) "Diversion" is the referral of an accused youth, without adjudication of criminal or delinquency charges, to a youth service agency or other program, accompanied by a formal termination of all legal proceedings against the youth in the juvenile justice system upon successful completion of the program requirements.

(n) "Dual-Status Youth" are youth under the concurrent jurisdiction of the child welfare system and the juvenile justice system.

(o) "Dual-Status Docket" is a specialized docket within the Family Court that exercises jurisdiction over youth who are concurrently involved in the juvenile justice and child welfare systems.

(p) "Family Court" is a court with jurisdiction over one or more of the following cases involving: delinquency; abuse and neglect; status offenses; the need for emergency medical treatment or behavioral health crisis intervention; voluntary and involuntary termination of parental rights proceedings; adoption proceedings; appointments of legal guardians for juveniles; intrafamily criminal offenses; proceedings in regard to divorce, separation, annulment, alimony, custody, and support of juveniles; proceedings under the Uniform Interstate Family Support Act.

(q) "Information" is any communication - recorded or unrecorded, record, or material that may identify individuals.

(r) "Juvenile Justice System" is the legal structure including law enforcement agencies, courts, detention facilities, probationary and re-entry services for diverting, detaining, adjudicating, supervising and discharging youth alleged or found to be delinquent.

(s) "Juvenile Court" is the court and court personnel responsible for diverting, adjudicating, detaining, confining, and supervising youth alleged or found to be delinquent.

(t) "Minor Delinquent Behavior" is conduct that does not rise to the level of significant or repeated harm to others, significant or repeated property loss or damage, or a threat of significant harm to others.

(u) "Outcome" is a pre-defined, objective measure of change of limited scope.

(v) "Records" are all reports, pleadings, court orders, and other documents prepared or gathered in connection with Juvenile and Family Court proceedings.

(w) "School Resource Officer" is a certified, sworn police officer employed by a local police agency but assigned to work in a school.
(x) "Staff-secure facility" is a facility that houses a small number of residents who have the freedom to enter or leave the premises.

(y) "Status Offense" is conduct that is prohibited only for persons under the age of majority, such as truancy, curfew violations, or running away from home.

(z) "Youth" is a person who has not yet attained the age of majority or otherwise is not subject to the jurisdiction of the criminal court; or who, as a result of a delinquency petition, remains subject to the juvenile court's jurisdiction.

(aa) "Youth-Serving Agency or System" is an agency or system of agencies responsible for providing child welfare services, critical youth services, or behavioral health services.

**STANDARD 1.2 GENERAL PRINCIPLES**

(a) All youth need and deserve adequate care, education, and physical and behavioral health services.

(b) Child welfare and other youth-serving agencies should not refer a youth for law enforcement intervention for minor delinquent behavior.

(c) Cooperation between the juvenile justice system and other youth-serving systems is essential in differentiating between conduct that warrants intervention by the juvenile justice system and conduct that does not warrant such intervention, developing protocols that discourage inappropriate referrals to juvenile court, and developing positive support systems and behavioral strategies that reduce referrals to juvenile court.

(d) Information-sharing between and among juvenile justice and other youth-serving agencies should be regulated to accommodate the youth's need for coordinated services, as well as the youth's need for privacy and protection against self-incrimination.

(e) Locked and staff-secure facilities should only be used after arrest, during the court process, or as a dispositional option when needed for the protection of the community or to reduce a risk of flight.

(f) Services provided to youth removed from their home or community should be provided in the least restrictive setting and a setting that is close to family, consistent with public safety and the safety of the youth.

(g) Youth receiving critical youth services, child welfare services, or behavioral health services should be entitled to continuity in those services in the least restrictive setting consistent with public safety when they are removed from their home to the custody of the juvenile or criminal justice systems.

(h) Services for youth involved in the juvenile or criminal justice systems should be provided by appropriate youth-serving agencies in the community. When a youth is in detention or custody,
the youth should receive services comparable to those they would receive in the community, in a setting that is close to family.

(i) Youth should have an opportunity to be heard, through the aid of counsel, regarding any decision that affects their physical placement, need for and selection of services, and general well-being.

(j) The juvenile justice system should ensure that youth needing services from both the child welfare and juvenile justice systems receive the most appropriate services without adversely affecting the severity or duration of the youth’s detention, placement, or probation supervision.

(k) Arrangements for follow-up treatment, services, placement, and protection that the youth will need once released from custody should be made during the period of their confinement, be in place upon their release, and not delay release.

(l) The child welfare system and agencies should not terminate services or close a youth’s dependency case solely because the youth was arrested or adjudicated in the juvenile or criminal justice system.

(m) Parents, guardians, and caretakers of youth involved in the juvenile justice system are entitled to respect and the opportunity to participate in decision-making involving the youth if appropriate for the youth’s legal interests, safety, and well-being.

(n) Youth released from custody should be reunited with their parents when in the youth’s best interests; when reunification is not in the youth’s best interest, the youth should be placed in the care of other appropriate relatives, the child welfare system, or other appropriate systems.

PART II: SYSTEMS COLLABORATION AND COORDINATION OF SERVICES FOR DUAL-STATUS YOUTH

A. STATE STRUCTURE AND LEGISLATION

Standard 2.1 Legislative Provisions for Effective Care of Dual-Status Youth

(a) State laws and policies should ensure that dual-status youth continue to receive critical youth services despite the youth’s involvement in the juvenile justice system.

(b) State and federal laws should eliminate funding barriers and statutory restrictions that inhibit dual-status youth from accessing state and federal funding allocated for youth in the child welfare system.

(c) State laws should mandate and facilitate interagency planning, coordination and accountability between and among agencies that have a legal obligation to each youth.
(d) Mandatory arrest provisions in domestic violence and criminal justice statutes should not mandate arrests for youth who engage in minor delinquent behavior in congregate care facilities in the child welfare, juvenile justice, or other youth-serving systems.

**STANDARD 2.2 STRUCTURE OF STATE JUVENILE JUSTICE AND CHILD WELFARE SYSTEMS**

(a) State systems should be structured so that:

i. a single state agency is responsible for the licensing and regulation of programs for status offenders and delinquent and dependent youth and for ensuring that all residential facilities meet minimum licensing standards;

ii. non-secure juvenile justice programs have access to and may utilize child welfare funding, partially covered by federal support, for family-based care and small group placements that will support youth in less restrictive, community-based settings while affording them additional protections under federal law;

iii. child welfare services are available to juvenile courts and the courts may at any appropriate stage of the juvenile court proceedings enter any order authorized for a dependent youth; and

iv. dependent youth who are not adjudicated delinquent should not be placed in residential facilities that are primarily for the care of delinquent youth.

(b) State systems should engage behavioral health, education, and child welfare agencies and ensure that crisis intervention and other services are implemented to avoid the need for arrest and referral to the juvenile justice system.

(c) States should ensure that congregate care facilities in the child welfare, juvenile justice, and other youth-serving systems are able to meet the needs of the youth they serve, including addressing minor delinquent behavior, without relying on law enforcement for discipline.

**B. FAMILY COURT ORGANIZATION, POLICIES, AND PROCEDURES**

**STANDARD 2.3 JUVENILE COURT POLICIES, PROTOCOLS, AND RULES**

(a) Juvenile and Family Courts should establish policies and protocols that ensure the fair treatment of dual-status youth in diversion, detention, adjudication, and disposition decisions and eliminate practices that result in the unnecessary detention, adjudication, or prolonged incarceration of youth who are or should be served by the child welfare system.

(b) Juvenile and Family Courts should establish policies and protocols for delinquency complaints involving youth referred by or receiving services from the child welfare or other youth-serving systems. Such policies and protocols should:

i. recognize the *in loco parentis* role of the child welfare agency and require the agency to fulfill the role a responsible parent would be expected to fulfill when a youth comes into contact with the juvenile justice system;
ii. limit secure confinement to situations in which the youth meets detention criteria
applied to other youth and ensure that a youth who does not have an in-tact home
to which to return is not securely detained solely as a result of the youth’s family
status;

iii. set strict timelines for the completion of the juvenile intake process;

iv. establish a process to determine whether a youth is better served in the juvenile
justice system, the child welfare system, or by concurrent jurisdiction of the two;

v. develop procedures for providing accommodations to youth with disabilities;

vi. permit concurrent jurisdiction by the child welfare and juvenile justice systems
when appropriate, and

vii. provide that a youth’s arrest or adjudication of delinquency will not result in
the closure of a child welfare case or the termination of services from other youth-
serving agencies solely because of the youth’s involvement in the juvenile justice
system.

(c) Consistent with standards concerning information sharing and confidentiality in these
standards and state and federal laws governing confidentiality and privilege, juvenile courts
should develop policies and protocols for the prompt notification of a youth’s caregiver,
child welfare caseworker, and attorney, and for the involvement of other youth-serving
agencies as appropriate when a youth is arrested or referred to the juvenile court.

STANDARD 2.4 JUVENILE COURT LEADERSHIP

Juvenile courts should exercise leadership in developing working relationships and
protocols with community agencies serving youth and families with multiple legal issues
and in need of services from multiple systems.

STANDARD 2.5 JUVENILE AND CRIMINAL COURT JURISDICTION

(a) State laws governing the transfer of youth from juvenile court to adult court or from
adult court to juvenile court should require probation officers, prosecutors, and juvenile
court judges to consider the dual-status youth’s need for services from the child welfare
and other youth-serving agencies in determining whether transfer is appropriate. The
attorney for the youth should have an opportunity to present evidence as to the youth’s
need for child welfare services.

(b) Juvenile courts should consider whether the child welfare and other youth-serving
systems have fulfilled their duties to a youth before considering whether to transfer the
youth to criminal court and should establish protocols to ensure that youth who receive
services from multiple systems are not disadvantaged in discretionary transfer decisions
solely due to their involvement in other systems.

(c) Consistent with public safety, state laws should permit transfer of youth from the
criminal court to the juvenile court when the youth needs services from the child welfare,
juvenile justice, or other youth-serving agencies.
(d) If a youth is transferred or has a case originally filed in criminal court, the youth should still be eligible for child welfare services, including social service placements and programs.

**STANDARD 2.6 DEPENDENCY JURISDICTION**

(a) Dependency courts should develop protocols that:

i. acknowledge the *in loco parentis* role of the child welfare agency and require the agency to fulfill the role a responsible parent would be expected to fulfill when a youth comes into contact with the juvenile justice system;

ii. ensure that a youth's arrest or adjudication of delinquency will not result in the closure of a child welfare case or the termination of services from other youth-serving agencies solely because of the youth's involvement in the juvenile justice system;

iii. prevent the use of civil and criminal contempt violations in the child welfare system as a basis for a delinquency petition;

iv. facilitate coordination, planning and accountability when the child welfare and juvenile justice systems have concurrent jurisdiction over the youth;

v. ensure that a youth's defense counsel receives notice when the youth becomes involved in the child welfare system; and

vi. ensure that a youth's dependency counsel receives notice when the youth becomes involved in the juvenile justice system.

(b) State laws should ensure that youth have a right to defense counsel and a court hearing at which they have the right to testify, present evidence, and cross-examine witnesses on the youth's need for child welfare services and whether their dependency case will be terminated after an arrest or referral to juvenile or criminal court.

**STANDARD 2.7 DOCKETING PROCEEDINGS INVOLVING DUAL-STATUS YOUTH**

(a) In scheduling delinquency and other Family Court proceedings, clerks and other court personnel should be attentive to the youth's and family's obligation to appear in other legal proceedings. Court personnel should communicate with the youth and family to reduce multiple trips to court and court-related appointments and to avoid scheduling conflicts, school absences, and other avoidable inconveniences.

(b) Consistent with standards related to information sharing and confidentiality in these Standards and state and federal laws governing confidentiality and evidentiary privilege, juvenile court staff should have access to the docket of all Family Court cases so they can identify youth and families with multiple legal proceedings within the court.

(c) The same judge should consider all legal issues that involve the same family; however, to ensure fundamental fairness, each youth should have:
(d) Juvenile and Family Courts should develop policies that allow for the consolidation of post-adjudication matters involving dual-status youth. The policies should be consistent with the following principles:

i. When feasible, a single judge should hear all dispositional and post-dispositional matters involving dual-status youth.

ii. After a youth has been adjudicated delinquent, the youth’s juvenile court dispositional proceedings should be consolidated with child welfare and other Family Court proceedings concerning the youth.

iii. The court should ensure continuity of legal representation for the youth throughout all phases of the delinquency matter, including disposition.

iv. The court should require that representatives responsible for case management and supervision of the youth in the child welfare and juvenile justice systems attend the consolidated proceeding.

v. The court should ensure, to the extent consistent with the missions of the child welfare and juvenile justice systems, that youth and family case plans be aligned in terms of goals, permanency planning, services, and responsibility for implementation.

(e) To the extent possible, services and other legal proceedings in the child welfare system should not be delayed pending resolution of a delinquency case, unless the youth or the youth’s defense counsel believes such a delay is necessary.

**STANDARD 2.8 DESIGNATED DUAL-STATUS DOCKETS**

(a) A jurisdiction should have authority to create a specialized dual-status docket for youth involved in both the juvenile and the child welfare systems, if it finds that the traditional juvenile court cannot effectively address cases involving youth with particular needs or characteristics.

(b) Dual-status dockets should be developed and implemented by an interdisciplinary team that includes representatives from the judiciary, prosecution, defense bar, best interest advocates, families, and relevant service providers.
(c) Youth assigned to a dual-status docket should have access to services from all systems that have expertise related to the youth's needs.

(d) Dual-status dockets should provide an opportunity for youth to be diverted from the juvenile justice system or benefit from alternatives to detention at the pre-trial and disposition stage of the delinquency case.

(e) Judges presiding over dual-status dockets should utilize incentives for positive behavior, graduated responses to negative behavior, close judicial oversight, a team approach, coordination of services, and meaningful re-entry strategies.

(f) Judges presiding over dual-status dockets should ensure that any sanctions imposed serve a rehabilitative purpose.

(g) Courts with a dual-status docket should have rigorous intake and screening procedures to ensure the Court accepts only those youth who are appropriate for the dual-status docket.

(h) The interdisciplinary team responsible for developing a dual-status docket should adopt policies and protocols that ensure that:

i. the youth's due process rights are protected at all stages of the delinquency case, including the youth's right to a fair and impartial hearing at the adjudicatory and disposition stages of the case;

ii. the parents' due process rights are protected at all stages of the dependency case, including the parents' right to a fair and impartial hearing to adjudicate any allegation of abuse or neglect;

iii. the youth and the youth's defense counsel have a right to be heard and participate in all decisions regarding the youth's placement and service plan;

iv. youth and parents with disabilities receive accommodations necessary to ensure meaningful participation at all stages of the case; and

v. when the youth is not diverted from the juvenile justice system before adjudication, the youth's dependency case should not be consolidated with a delinquency case on a dual-status docket unless and until there is an adjudication of delinquency.

(i) Dual-status dockets should be presided over by a judge instead of a referee, master, or magistrate.

(j) A judge presiding over a dual-status docket should have authority to dismiss the delinquency petition for a youth who has successfully completed the requirements set by the dual-status court.
C. INTERSTATE COOPERATION

STANDARD 2.9 DUAL-STATUS YOUTH CROSSING STATE AND LOCAL JURISDICTIONS

(a) Courts and state legislatures, individually or with neighboring states, should develop policies and procedures consistent with the Interstate Compact for Juveniles, the Interstate Compact on the Placement of Children, and the Uniform Child Custody and Jurisdiction Act that will facilitate cooperation by justice system personnel and youth-serving agencies in addressing cross-jurisdictional issues.

(b) Policies and procedures for cross-jurisdictional cooperation should focus on:

i. reducing delay, uncertainty, and unnecessary detention of youth,
ii. providing prompt resolution of legal matters involving dual-status youth,
iii. expediting the necessary transport of dual-status youth across jurisdictions, and
iv. avoiding scheduling conflicts for youth and families with legal obligations in multiple jurisdictions.

(c) Policies and procedures should adopt a presumption that legal proceedings will take place in the jurisdiction where the youth has the most significant ties.

(d) Policies and procedures to facilitate cross-jurisdictional cooperation should abide by principles of confidentiality and privacy.

D. INFORMATION SHARING AND DATA COLLECTION

STANDARD 2.10 PURPOSES OF INFORMATION SHARING AND DATA COLLECTION

(a) Information sharing and data collection are necessary for any effective collaboration and coordination of services for dual-status youth.

(b) States should authorize and facilitate the sharing of information about individual youth between and among multiple systems and agencies to

i. reduce duplication of assessments and services for the youth and the youth's family,
ii. enhance understanding of the youth's strengths, interests, preferences, needs, and
iii. improve individual case planning and decision-making for the youth.

(c) States should authorize and facilitate the collection of data for aggregate reporting on the characteristics of dual-status youth and the processes for handling those youth.

(d) States should use data:

i. to improve the policies, practices, and coordinated responses of agencies responsible for the care of and provision of services to dual-status youth, and
ii. to evaluate the need for and effectiveness of programs and practices designed to achieve improved outcomes for youth.

STANDARD 2.11 POLICIES AND PROCEDURES FOR CONFIDENTIALITY DURING INFORMATION SHARING

(a) All states should develop and require the use of protocols for information sharing about individual dual-status youth from arrest to termination of jurisdiction.

(b) All agreements or protocols to share information between the juvenile justice system and other youth-serving systems and agencies should ensure that information-sharing protocols provide appropriate protection for the privacy of youth and their families and follow federal and state law and ethical requirements regarding confidentiality of privileged information.

(c) All agreements or protocols should specify the purposes of information sharing and limit the information shared to the specified purposes.

(d) States should limit the use of information about the youth’s involvement in multiple systems to the coordination of case management and the continuity and integration of services and treatment. Protocols should:

i. prohibit the unauthorized disclosure of, or unauthorized access to, information relating to the dual-status youth, and

ii. develop quality control measures that minimize the inadvertent disclosure of information relating to the youth.

(e) Absent an explicit exception under applicable state and federal law, juvenile justice agencies and professionals should always obtain informed written consent from the youth and the parent or guardian of the youth, before sharing personally identifiable information between agencies serving the youth. Youth, parents, or guardians with disabilities should receive accommodations necessary to provide informed consent.

(f) Any written consent for information sharing should state the purpose of sharing, the specific information to be shared, and the timeframe within which the information will be shared.

(g) Information about dual-status youth should be shared with and used by youth-serving agencies in a manner that complies with state and federal laws governing confidentiality, including re-disclosure and privilege, and protects the youth’s right against self-incrimination and right to due process as a respondent or defendant in any delinquency, criminal, summary offense, status offense, or child welfare case.

(h) Juvenile justice officials sharing information about dual-status youth should ensure that any youth-serving agency and system receiving that information is aware of and adheres to rules and standards governing confidentiality of Family Court records, including
restrictions on the dissemination of physical and behavioral health records and limitations on the use of records for specified purposes.

(i) The juvenile court and other youth-serving agencies should develop docketing, filing, and records-disclosure systems that will allow court staff to redact and separate records and information that may be disclosed from those that may not be disclosed pursuant to state and federal confidentiality laws.

STANDARD 2.12 DATA COLLECTION FOR LAW, POLICY, AND PROGRAM DEVELOPMENT

(a) Courts, legislatures, and state agencies should develop a system for collecting, reporting, and sharing data regarding dual-status youth to achieve one or more of the purposes identified in Standard 2.10 of these standards.

(b) Courts, legislatures, and state agencies should use data collection to improve outcomes for dual-status youth and to reduce unnecessary referral to and penetration into the juvenile and criminal justice systems.

(c) Lawyers, judges, and other government agents should ensure that data collection protocols comply with applicable rules regarding confidentiality.

(d) Courts and state legislatures should periodically review the aggregate data collected to determine how to allocate resources to youth-serving agencies and systems within the jurisdiction, to improve procedures for handling youth who engage in delinquent behavior while in the care or custody of a youth-serving agency, and to improve the continuity of care for youth in multiple youth-serving systems.

STANDARD 2.13 ACCESS TO COURT RECORDS

(a) The use of and access to Family Court records should be strictly controlled to limit the risk of unnecessary and harmful disclosure.

(b) Court records involving youth alleged or adjudicated delinquent or dependent should normally be closed to the general public.

(c) Juvenile justice officials who disclose information about dual-status youth should ensure that all recipients of that information are informed of all rules and standards governing confidentiality of Family Court records.

(d) Courts and state legislatures should develop and enforce meaningful sanctions for the unlawful dissemination of Family Court records.

(e) Juvenile justice professionals who disclose information about dual-status youth should separate records that may be disclosed from those that may not be disclosed and redact disclosed records accordingly.
Defense counsel in any juvenile or criminal case in which a youth is involved should normally have access to all Family Court records involving the youth.

The Family Court should avoid standing orders or policies that grant the public, court staff, juvenile justice officials, or other youth-serving agencies broad access to any category of records generally found within a Family Court file. Instead, the Court should develop policies and protocols to grant access to such records only after a judicial officer or appropriate designate makes an individualized analysis of a records request.

**STANDARD 2.14 WAIVERS OF CONFIDENTIALITY**

(a) Juvenile justice or other youth-serving agency officials may ask a youth to waive confidentiality protections.

(b) A youth's waiver is valid only if it is made knowingly, intelligently, and voluntarily.

(c) If a youth has appointed or retained counsel, agency officials should permit the youth an opportunity to consult with counsel before waiving any confidentiality protections. Waivers obtained without such an opportunity should be considered presumptively invalid.

(d) In advising a youth regarding a possible waiver of confidentiality, the youth's lawyer should ensure the youth understands privilege, the youth's rights with respect to consent and confidentiality, and the potential consequences of waiving confidentiality or privilege in releasing information to others.

(e) Agency officials should allow a youth to consult with a parent or guardian before waiving any confidentiality protections; but a parent cannot waive the youth's rights or privileges. In a delinquency proceeding, the decision to waive should be the youth's.

(f) Any written waiver form should use youth-appropriate language and be written in a language the youth speaks or understands. If a youth has limited literacy, any waiver should be obtained and recorded in a manner that is understandable to the youth.

(g) A youth may negotiate the terms of the waiver to limit the time, scope or purpose of the waiver.

(h) A parent or guardian may waive confidentiality protections for records involving the parent.

E. CROSS-SYSTEM TRAINING

**STANDARD 2.15 NEED FOR CROSS-SYSTEM TRAINING**

(a) Family Courts and youth-serving agencies should promote training for all professionals in the juvenile justice and child welfare systems to reduce inappropriate referrals to the juvenile justice system.
(b) Training should include:

i. the scope and availability of services and means for accessing services from the child welfare, behavioral health, physical health, public benefits, Family Court, and education systems;

ii. information regarding any memoranda of understanding or other agreements between and among the various youth-serving agencies regarding the provision of services for youth;

iii. laws, rules, and procedures applicable to confidentiality and privilege;

iv. the role of the youth’s defense counsel and best interest advocate for the youth;

v. child and adolescent development, brain development, disabilities, trauma, and resiliency development;

vi. sexual orientation and gender identity;

vii. cultural competence;

viii. racial bias;

ix. evidence-based research on the effectiveness of services and programs in achieving good outcomes for youth in the juvenile justice and child welfare systems;

x. family and youth engagement; and

xi. the immigration consequences of the youth’s involvement in the child welfare or juvenile justice system.

PART III: ARREST AND REFERRALS TO THE JUVENILE JUSTICE SYSTEM

STANDARD 3.1 GUIDELINES FOR CHILD WELFARE AGENCIES

(a) Child welfare agencies should adopt policies discouraging staff from referring youth to the juvenile justice system for minor delinquent behavior.

(b) Child welfare agencies should have protocols for responding to delinquent and status offense behavior by youth in their care. These protocols should:

i. be developed in consultation with representatives of other youth-serving agencies, including the juvenile court, probation, behavioral health, schools, law enforcement, prosecution, defense, best interest advocates, and community service providers;

ii. set forth the specific procedures to be followed when a youth violates rules of a program or placement or engages in behavior that poses a threat to others in a program or placement;

iii. specify behavioral support or staffing strategies that agencies should utilize instead of referral to law enforcement;

iv. be in writing, made available to agency staff and youth served by the agency, and be incorporated into any agency staff training; and

v. provide for periodic review and revision of the protocols.

(c) Staff in child welfare or other youth-serving agencies and facilities should be trained in crisis intervention techniques, including strategies to de-escalate youth behavior arising out of behavioral health or other disability-related needs, and such techniques should be employed first, before any law enforcement referral.
Public child welfare agencies that contract with private service providers should, in the contracts, set forth the circumstances under which those agencies may refer youth to law enforcement and provide guidance on alternatives to law enforcement and juvenile court referrals in case of a behavioral crisis or placement concerns.

**STANDARD 3.2 RESPONSIBILITIES OF LAW ENFORCEMENT IN RESPONDING TO REFERRALS INVOLVING DUAL-STATUS YOUTH**

(a) In deciding whether to arrest, divert, warn, detain, or refer a youth to the juvenile court, law enforcement officers should:

i. have a presumption against arresting youth who have been referred from the child welfare system to the juvenile justice system for minor delinquent behavior; and

ii. consider whether the youth is or can be engaged with other youth-serving systems or agencies that will work to ensure the youth’s appearance in court, divert the youth from custody or supervision, and minimize the youth’s risk to public safety.

(b) Law enforcement agencies should develop inter-agency crisis intervention strategies that discourage arrests of youth experiencing emergency behavioral health crises that do not create a serious risk to public safety.

(c) If a youth needs emergency psychiatric or other behavioral health intervention, law enforcement officers should contact a behavioral health mobile crisis team; if such a team is not available, the officers should take the youth into custody without arrest and transport them to an appropriate crisis intervention facility.

(d) When a youth appears to be homeless, a runaway, or declines to give home contact information, the law enforcement agency should determine whether the youth is under the care or supervision of the child welfare agency, and if not should determine whether the youth should be referred to an appropriate youth-serving agency.

(e) Law enforcement should notify the caregiver or welfare caseworker of any youth who is arrested while committed to a child welfare agency.

**STANDARD 3.3 RESPONSIBILITIES OF LAW ENFORCEMENT, SCHOOLS, AND JUVENILE COURTS IN RESPONDING TO SCHOOL-RELATED CONDUCT**

(a) The primary authority responsible for school climate, discipline, and school safety is the school principal. Police should not be deployed in schools absent a significant showing of a demonstrable, time-limited need to protect students. If police are to be deployed in schools, memoranda of understanding and guidelines regarding their interaction with school officials and the scope and parameters of their authority should be established consistent with the principles set forth in these standards.
(b) Law enforcement, including school resource officers (hereinafter SROs) should not arrest or refer youth to the juvenile justice system for minor delinquent conduct at school and should not have primary responsibility for the enforcement of school discipline.

(c) Law enforcement personnel interacting with youth in schools should interact with students in ways that foster positive relationships and promote a better understanding of each other and should not be limited to arrest and law enforcement.

(d) Schools should adopt written policies and establish protocols limiting the presence and use of SROs in accordance with the principles set forth in section (e) below. Law enforcement, including SROs, should not be assigned within schools on a permanent basis, and school and law enforcement officials should periodically reassess the need for law enforcement presence and use.

(e) Formal law enforcement intervention includes issuance of a citation, ticket, or summons, filing of a delinquency petition, referral to a probation office, searches, use of restraints, or actual arrest. Law enforcement officials should not initiate formal law enforcement intervention for school-related conduct except as permitted in written protocols developed in accord with principles set forth in section (f) below.

(f) Law enforcement agencies should work with school officials to develop written protocols to ensure that referrals to the juvenile court from schools are not for behavior that is more appropriately handled by the school. Such protocols should:

1. allow law enforcement officials, including SROs, to transport a truant youth back to school without an arrest or referral to the juvenile justice system, and encourage school officials to develop educational programs, social services, and public health responses to truancy in lieu of arrest;
2. promote programs that are preventive, educational, and recreational to guide young people away from negative behaviors;
3. develop guidelines that limit disruption in educational placement or receipt of educational services resulting from law enforcement intervention;
4. encourage schools to implement disciplinary practices that:
   a. are age and developmentally-appropriate;
   b. are culturally competent;
   c. engage the youth and family;
   d. take into account that a student’s behavior may be related to a disability.
5. reject zero tolerance policies and mandatory suspension, expulsion, arrest, or referrals of students to juvenile or criminal court without regard to the circumstances or nature of the offense or the student’s disability or history.

(g) Students should be involved in the development of school-law enforcement protocols and memoranda of understanding.

(h) Law enforcement personnel, including SROs, who may have contact with students, especially those students who may be involved in the child welfare system, should receive extensive training that includes the following topics:
i. youth and adolescent development and psychology;
ii. the effects of neglect, abuse, and trauma, including the exposure to violence;
iii. the effects of disabilities on behavior and the effects of medication taken to ameliorate the symptoms of disabilities;
iv. common disabilities for youth and the protections afforded to youth under the Individuals with Disabilities Education Act (IDEA);
v. conflict resolution, peer mediation, and restorative justice techniques;
vi. cultural competence and gender and sexuality sensitivity;
vii. research-based practices in de-escalation and alternative responses to the use of restraints against youth except in situations involving an arrest and serious and immediate threat to the physical safety or health of a member of the school community.

(i) Both school districts and law enforcement should maintain data to assist in evaluating the presence and use of law enforcement, including SROs. Each data point should be disaggregated by offense, student's age, grade level, race, sex, disability status, eligibility for free or reduced lunch, English language proficiency, and disposition. Data collection should include the number of:
   i. law enforcement personnel, including SROs, deployed to each school;
   ii. school-based arrests (arrests of students that occur on school grounds during the school day or on school grounds during school-sponsored events) at each school;
   iii. referrals to the juvenile justice system for each school;
   iv. citations, summons or other actions taken by police personnel for each school; and
   v. suspensions, in and out of school, and expulsions at each school.

(j) Juvenile courts and law enforcement should not inform a school of a student's involvement in the court system for conduct which occurred off school grounds unless the conduct is likely to have an impact on school safety.

(k) Juvenile courts should annually review all data collected on school-based referrals to identify high rates of referral from particular schools or for a particular youth demographic. If referrals are for a disproportionately high rate of referral for youth of color, the juvenile court and law enforcement officials should work with schools to develop protocols that will reduce unnecessary or inappropriate referrals from the schools and reduce disproportionality.

(l) Legislatures should repeal or amend laws, including zero tolerance laws that require schools to refer youth to law enforcement agencies for minor delinquent behavior.

(m) Legislatures should protect the confidentiality of Family Court records by amending statutes that require courts and/or law enforcement agencies to notify schools about arrests to prohibit such notification unless the student conduct is likely to have an impact on school safety.
STANDARD 3.4 RESPONSIBILITIES OF CHILD WELFARE AND JUVENILE JUSTICE AGENCIES IN ADDRESSING THE EDUCATIONAL NEEDS OF DUAL-STATUS YOUTH

(a) Child welfare and juvenile justice agencies should work with local school districts to develop inter-agency agreements that:

i. allow youth to remain in the same school, when practicable, even when the agency places a youth outside the school district area,
ii. ensure the timely transfer of education records and credit information to whatever school a youth will attend, and
iii. ensure a seamless re-entry of students discharged from a child welfare or juvenile justice placement back to the youth’s home school.

(b) Child welfare and juvenile justice agencies should work with the relevant school district to ensure that every youth in out-of-home placement receives an education appropriate for the youth’s grade level, special educational needs, and academic or career goals.

PART IV: JUVENILE INTAKE AND DETENTION

STANDARD 4.1 RESPONSIBILITIES OF PROBATION OFFICES AT INTAKE

(a) Probation staff should develop written protocols to guide intake decisions and guard against the inappropriate processing of dual-status youth in the juvenile justice system. Protocols should:

i. encourage the diversion of dual-status youth who engage in minor delinquent behavior from the juvenile justice system; and
ii. encourage the delivery of services through youth-serving systems other than the juvenile justice system.

(b) Consistent with Standard 2.11 of these standards concerning Information Sharing, probation staff should examine relevant databases to determine whether a youth or a youth’s family is or has been involved in other youth-serving systems.

(c) In deciding whether to recommend action or inaction by the juvenile court for a youth referred from the child welfare system, probation staff should consider:

i. the seriousness of the offense;
ii. any information about the youth’s mental health status, treatment history, prescribed medications, educational status, and care and supervision by other youth-serving agencies and systems;
iii. whether and to what extent the alleged behavior was related to the youth’s disabilities, mental health issues, exposure to violence, prior placement deficiencies, substance abuse, or other identifiable factors;
iv. whether the child welfare system made reasonable efforts to improve the youth’s placement or services and prevent the referral to juvenile court;
v. whether services for the youth or family, such as crisis intervention or respite, could alleviate the need for a delinquency court referral; and
vi. whether the juvenile justice system has non-confinement placements that are appropriate for the youth.

(d) Probation staff should not recommend a delinquency petition if the youth's conduct is more appropriately addressed by another youth-serving agency or system. Probation staff should avoid:

i. duplication of services when the youth is already receiving or may receive similar services from a less restrictive, less coercive agency outside of the juvenile justice system; and

ii. processing the youth in the juvenile justice system when the juvenile justice system cannot effectively serve the youth because of the youth's developmental limitations, disabilities, or other cognitive or mental health impairments.

(e) Probation staff should refer dual-status youth for community-based services that are suitable for the youth's age, ethnicity, gender or sexual identity, cognitive disability, and developmental stage.

STANDARD 4.2 RESPONSIBILITIES OF JUDGES AND PROBATION OFFICES IN RECOMMENDING DETENTION OR RELEASE

(a) Probation offices should adopt written protocols and develop risk assessment instruments to guide detention and release decisions involving dual-status youth.

(b) In deciding whether to recommend detention or release for youth referred from the child welfare system, probation staff should use the same criteria applied to other youth. Those criteria should be objective and determine whether the youth poses a risk of danger to the community or failing to appear. Other criteria should include:

i. the existence of services available from other youth-serving agencies to address the youth's needs and reduce the youth's risk of flight or risk to public safety; and

ii. whether detention will jeopardize placement or services provided by other youth-serving agencies.

(c) Probation staff should not recommend detention:

i. because the youth is awaiting suitable placement in the child welfare system;

ii. as a respite for caregivers in the child welfare system; or

iii. when other youth-serving systems are providing or can provide placement and services that protect the court's and the public's interests.

(d) The intake officer should not recommend detention in a facility that cannot adequately meet a youth's special, physical, or behavioral health needs.

(e) If a youth is detained, probation staff should, consistent with Standard 2.12 of these standards concerning Information Sharing:

i. advise other agencies currently serving the youth that detention is temporary, and seek to preserve the placement and services the youth is receiving from those agencies;
ii. provide detention staff with information about the youth's strengths, interests, preference, educational needs, and physical or behavioral health needs; and 
iii. facilitate communication between the detention staff and other agencies serving the youth.

**STANDARD 4.3 DIVERTING DELINQUENCY TO DEPENDENCY AND MAINTAINING DUAL JURISDICTION**

(a) Juvenile court judges have authority to divert a delinquency petition to a child welfare or status offense petition.

(b) The decision to dismiss or divert should be made as early as possible.

(c) A judge presiding over child welfare proceedings should be authorized, when the youth is facing delinquency proceedings or has been adjudicated delinquent, to keep the child welfare matter open so the youth may receive necessary child welfare services.

**4.4 JUDICIAL RESPONSIBILITIES REGARDING DETENTION**

(a) In deciding whether to order detention or release for youth referred from the child welfare system, the juvenile court judge should use the same criteria applied to other youth. Those criteria should be objective and determine whether the youth poses a risk of danger to the community or failing to appear. Other criteria should include:

i. the existence of services available from other youth-serving agencies to address the youth's needs and reduce the youth's risk of flight or risk to public safety; and 
ii. whether detention will jeopardize placement or services provided by other youth-serving agencies.

(b) The juvenile court judge should not order detention:

i. because the youth is awaiting suitable placement in the child welfare system;
ii. as a respite for caregivers in the child welfare system; or
iii. when other youth-serving systems are providing or can provide placement and services protect the court's and the public's interests.

(c) The juvenile court judge should not order detention in a facility that cannot adequately meet a youth's physical or behavioral health needs.

(d) A judge who has concurrent jurisdiction over delinquency and child welfare matters may order the appropriate child welfare agencies to:

i. arrange a suitable nonsecure placement for a youth as an alternative to detention in the juvenile justice system; or 
ii. continue providing services for a youth in detention.
(a) Juvenile justice professionals should develop protocols to ensure that pregnant or parenting youth in the juvenile justice system have:
   i. basic support and critical services to reduce the risk that they will engage in abusive or neglectful behavior toward their own children;
   ii. physical and behavioral health services commonly provided for high risk pregnancy and child-rearing;
   iii. alternatives to detention and pretrial release and disposition plans that address the youth's needs in caring for their own children;
   iv. opportunities for detained youth to visit with and engage their children; and
   v. opportunities for parenting, financial management, and independent living skills training.

(b) When addressing alleged behavior by pregnant or parenting youth, juvenile justice professionals should seek to minimize harm to the health of the youth's child and minimize disruption in the child's living arrangements.

(c) Juvenile justice professionals should give special consideration to alternatives to detention during a youth's pregnancy and at least the first year of the newborn's life.

(d) When a judge detains a pregnant youth, juvenile justice professionals should address special prenatal needs of the youth by ensuring:
   i. adequate prenatal care, including regular doctor visits, child-birth classes, and dietary supplements;
   ii. sanitary living conditions to reduce the risk of trauma and infection;
   iii. access to reproductive health counseling; and
   iv. no use of physical restraints during the term of pregnancy unless there are serious and immediate risks to the safety of the youth or others, in which case the least restrictive means of restraint should be used.

(e) During labor and delivery for detained youth, juvenile justice authorities should ensure that:
   i. the detained youth is transported to an appropriate medical facility without delay, and
   ii. shackles or other restraints are not used.

(f) After delivery, juvenile justice professionals should allow the mother and child to be together at least the first year, in the least restrictive placement possible. Professionals should:
   i. develop re-entry plans that focus specifically on pregnant and parenting youth;
   ii. ensure that parenting youth are provided appropriate postnatal care and services, including parenting classes, continued doctor visits, and behavioral health services as appropriate;
iii. facilitating placements that permit the child to reside with a parent or, if not possible or in the best interests of the child, facilitate visits between the youthful parent and their child, including overnight and contact visits; and
iv. facilitate visits with family or other caregivers providing care for the youth’s child.

(g) Any diversion, disposition, and re-entry plan developed for pregnant or parenting youth should seek to reduce the chance that the youth’s child will be placed in the child welfare system.

PART V: REFERRING YOUTH FOR SERVICES

STANDARD 5.1 ACCESSING BEHAVIORAL HEALTH SERVICES

(a) To reduce the high rates of mental health and substance abuse conditions among dual-status youth, every jurisdiction should have a system that:
   i. provides for early identification of youth in the child welfare and juvenile justice systems who have mental health or substance abuse conditions;
   ii. seeks to prevent the unnecessary involvement in the juvenile justice system of children who need mental health or substance abuse services;
   iii. provides for timely access by youth in the child welfare system to appropriate mental health treatment by qualified professionals within the least restrictive setting that is consistent with public needs and reduces the risk of delinquent behavior by these youth.

(b) A comprehensive system to address youth with mental health or substance abuse disorders should provide:
   i. screening and assessment at entry and key points in the child welfare and juvenile justice processes;
   ii. a continuum of evidence-based services at all stages of the youth’s involvement in the child welfare and juvenile justice systems, including short-term interventions and crisis services, ongoing supportive services, and continuity of care;
   iii. family involvement in the least restrictive setting;
   iv. protections against self-incrimination when youth participate in court-ordered mental health or substance abuse screening, assessment, and treatment; and
   v. sustainable funding mechanisms to support the above.

(c) Juvenile justice authorities should have authority to obtain services from other youth-serving systems, including state and local child welfare, physical and behavioral health, physical health, educational, and alcohol and drug abuse treatment systems.

(d) Juvenile and child welfare courts should have authority to obtain services for youth with mental health and substance abuse conditions without having to alter the legal custody of the youth or transfer jurisdiction to another court or system.
PART VI: DELINQUENCY ADJUDICATION OF DUAL-STATUS YOUTH

STANDARD 6.1 DUE PROCESS AT ADJUDICATORY HEARING

(a) Charges of delinquency should be adjudicated at a full due process hearing by a judge who is a neutral fact-finder. The juvenile court judge should:

i. not be influenced by knowledge of or prior interactions with the youth or the youth’s family in a dependency case or other legal matters;
ii. make a determination of delinquency based on admissible evidence in the delinquency record; and
iii. not review information relating to the youth’s involvement in a dependency case unless:
   a. review is requested by a party to the delinquency case, and
   b. the information is relevant and appropriate for judicial review under applicable rules of evidence.

STANDARD 6.2 LEGAL REPRESENTATION IN A DELINQUENCY CASE

(a) Youth charged with delinquency are entitled to competent, loyal, and zealous representation by defense counsel. A “best interests” advocate for a child in a dependency proceeding should not also serve as the youth’s defense counsel in a delinquency case.

(b) Incriminating statements made by a youth to a best interest advocate who is not bound by the rules of the attorney-client confidentiality should be inadmissible in a delinquency hearing absent a knowing, voluntary, and intelligent waiver.

PART VII: DISPOSITION OF DELINQUENCY CASES

STANDARD 7.1 INFORMATION GATHERING AND INFORMATION SHARING FOR DISPOSITION

After adjudication, records relating to a youth’s child welfare case may be reviewed by the juvenile court to:

i. avoid conflicting court orders;
ii. ensure effective case management; and
iii. assist in the development of an effective disposition plan.

STANDARD 7.2 DISPOSITION PROCESS

(a) If a youth is adjudicated delinquent, the court should hold a full due process hearing to determine the youth’s appropriate disposition. The youth’s disposition hearing should be consolidated with child welfare proceedings involving the youth if the court determines that such proceedings will advance the best interests of the youth and promote efficient and effective coordination of services. Youth and family members with disabilities should receive accommodations necessary for meaningful participation in the proceedings.
(b) Risk or needs assessment tools used in disposition planning for dual-status youth should be validated and targeted to achieve the youth’s best long-term interests in either the child welfare or delinquency system.

(c) Results of any risk or needs assessment tools should be in writing and provided to the parties, and any persons who administered the tool should be available for examination by the parties.

(d) Jurisdictions should develop protocols and teams to aid disposition planning for dual-status youth. Such teams should include representatives from youth-serving agencies necessary to address the youth’s needs, as well as the youth, the youth’s parents, guardian or caretaker, defense counsel, best interest advocate, service provider, and representatives from the state, such as a probation officer or prosecutor.

(e) When a youth participates in a disposition team meeting, the youth should be advised that the team will consider any information the youth provides in making placement decisions.

(f) The juvenile court judge should:
   i. designate a lead agency responsible for coordinating services for the youth;
   ii. direct that disposition team meetings be completed before disposition, and expedited when a youth is detained pending disposition; and
   iii. order that the team prepare a written disposition report with a statement of reasons explaining how the recommendations will advance the best interests of the youth and the goals of the state’s juvenile justice code. That report should be distributed to all parties including the youth and defense counsel in advance of the disposition hearing. The author of the report should be available for examination at or before the hearing.

(g) All parties should be permitted to review and respond to any information or testimony that will be or is presented to the court at the disposition hearing.

**STANDARD 7.3 POSTPONEMENT OF DISPOSITION**

(a) The court may temporarily postpone disposition in a delinquency case, and recommend referral to the appropriate child welfare agency that can serve the youth with minimal risk to public safety, when a delinquent youth is in immediate need of services from or awaiting placement by the child welfare system. Any such referral should be expedited if possible.

(b) The child welfare system should develop processes for expediting cases for delinquent youth who are pending disposition in a delinquency proceeding.
STANDARD 7.4 DISPOSITION OPTIONS

(a) Courts ordering disposition for dual-status youth should be aware of and utilize all disposition options that are legislatively available for youth in the child welfare and delinquency systems.

(b) The juvenile court should order the least restrictive disposition that furthers the best interests of the youth and the goals of the juvenile justice system.

(c) Disposition options should include:
   i. termination of the delinquency jurisdiction;
   ii. referral to other youth-serving systems;
   iii. maintaining dual jurisdiction; or
   iv. disposition within the delinquency system while providing access to other youth-serving services, systems or agencies.

(d) Juvenile courts should have authority to
   i. review service, rehabilitative, and disposition plans developed in the child welfare system;
   ii. modify child welfare plans that are in conflict with the goals of the juvenile justice system; and
   iii. require child welfare and juvenile justice agencies to coordinate planning to satisfy their obligations to the youth.

(e) All youth who are adjudicated delinquent should have access to the same publicly-funded services that are available to non-delinquent youth.

(f) Juvenile court judges and probation officers should assist youth in obtaining services from other youth-serving systems and develop protocols for expeditious service delivery from such systems and agencies.

STANDARD 7.5 DISPOSITION ORDERS

(a) Disposition orders that place the youth out of the home should include:
   i. a plan to maintain the youth’s connection to parents, caregivers, or others who are important to the youth;
   ii. a reunification or permanency plan that seeks to reunite the youth with family, caregivers or other significant supportive adult, to identify some other permanent stable living arrangement; and
   iii. a re-entry and discharge plan that specifies where and how, after release from detention or residential placement, the youth will be educated, work, and receive appropriate services.

(b) Disposition orders should set forth the services expected from each agency and set regular status review hearings to assess compliance with the order.
STANDARD 7.6 MODIFICATION OF DISPOSITION ORDERS

(a) Juvenile courts should have authority to review and modify if necessary, any component of a disposition order for dual-status youth.

(b) Courts should not modify any disposition ordered until after notice to, and opportunity to be heard by, all parties.

(c) After disposition, any party in a delinquency case should have authority to petition the court, and the court should have authority to:
   i. reduce the restrictiveness or duration of disposition when more appropriate and less restrictive options have become available; or
   ii. increase the restrictiveness or duration of disposition only when the youth has violated the terms or conditions of disposition and the services being provided are not adequately addressing the youth’s needs or ensuring public safety and no equally or less restrictive options are available.

(d) The court should not have authority to increase the restrictiveness or duration of disposition for a dual-status youth until after a full due process hearing, with counsel and an opportunity for the youth to be heard. Youth and family members with disabilities should receive accommodations necessary for meaningful participation in the proceedings.

(e) Absent informed consent by the youth, neither the restrictiveness nor the duration of disposition should be increased just to ensure the youth’s access to funding.

PART VIII: POST-DISPOSITION AND RE-ENTRY

STANDARD 8.1 KEY PRINCIPLES GOVERNING RE-ENTRY AND DISCHARGE PLANNING

(a) Re-entry into the community and discharge from the juvenile justice system should be planned to include coordination with the child welfare system and ensure that dual-status youth receive all services they may need and all benefits to which they may be entitled.

(b) Re-entry and discharge planning should provide youth with a stable residential placement with appropriate services, support, and supervision from the child welfare and juvenile justice systems to promote their success in the community after discharge.

(c) Re-entry and discharge planning should:
   i. require the juvenile justice system to begin re-entry and discharge planning at or before disposition and complete it well in advance of the re-entry or discharge;
   ii. identify and implement services that, at a minimum, address continuity of education (including special education), housing, employment, and the need for physical and behavioral health services; and that are timely and coordinated across systems and agencies;
   iii. allow the filing of a petition for dependency, voluntary placement, or re-entry into foster care before a youth’s 18th birthday, or whatever older age state law
permits, if it appears the youth will need housing or other services when juvenile court jurisdiction terminates;

iv. specify that delay in identifying, securing, or arranging appropriate post-discharge services may not be relied on to extend the duration of a residential placement; and

v. allow the youth and the youth’s family and counsel to participate fully in the development and periodic reviews of the re-entry plan.

**STANDARD 8.2 IMPLEMENTATION OF RE-ENTRY AND DISCHARGE PLAN**

(a) Youth discharged from residential placement but remaining under supervision of either the child welfare or delinquency system should have case managers assigned and trained to ensure timely and coordinated implementation of the youth’s re-entry and discharge plan.

(b) Each agency with responsibility to the youth should:

i. participate in a discharge planning meeting with other service providers at least thirty (30) days in advance of the anticipated discharge date;

ii. ascertain, before discharge, the youth’s strengths, interests, preferences and needs regarding services;

iii. identify and secure, before discharge, a residence for the youth, to avoid delay in discharge; and

iv. assist youth in obtaining important documents (such as identification or driver’s license and birth certificates) as well as coverage for essential services such as healthcare.

**PART IX: APPEALS**

**STANDARD 9.1 RIGHT TO APPEAL**

(a) Dual-status youth should have the same right to appeal any order of the Family Court as any other youth. The right to appeal should include a review of the facts, law, and disposition order. Procedural safeguards should exist to ensure that youth are not penalized due to delays and other consequences arising out the youth’s involvement in multiple legal matters.

(b) A youth involved in multiple legal matters should be entitled to appellate review of, at a minimum:

i. all orders of a juvenile or dependency court that dispose of any portion of any case or matter;

ii. inconsistent orders in the youth’s delinquency, dependency or other matters; and

iii. orders that do not embody the least restrictive alternative to achieve the best interests of the youth and the goals of multiple systems.
(a) At the conclusion of any judicial proceeding involving dual-status youth and their families, the judge should:
   i. prepare a final written order delineating the court’s rulings, the facts found, the law applied, the disposition ordered, and the reasons therefore;
   ii. advise the youth (and family) of the right to appeal;
   iii. advise the parent or guardian of the right to appeal in dependency proceedings; and
   iv. inquire of the youth’s financial status, appoint appellate counsel if youth is indigent, or instruct defense counsel to secure the appointment of appellate counsel.

(b) At or before the conclusion of the matter, the youth and the youth’s counsel should be entitled to a copy of any document in the court file, as well as a verbatim transcript or recording of any relevant hearing.

PART X: RECORDS EXPUNGEMENT

STANDARD 10.1 EXPUNGEMENT OF JUVENILE AND FAMILY COURT RECORDS

(a) Expungement of delinquency records should require the complete deletion of records from all files and databases in all courts as well as any agency that obtained the records from the juvenile justice system.

(b) Youth entitled to expungement of delinquency records should retain that right even when the youth is under the jurisdiction of other youth-serving agencies or systems.

(c) The juvenile court should establish procedures to ensure effective notification to other youth-serving agencies and systems that a youth’s delinquency records should be expunged.

(d) In jurisdictions where the juvenile court or law enforcement agency is required to notify a youth’s school of an arrest, adjudication, or disposition, the juvenile court should also be required to notify the school when any juvenile court record has been expunged, and the school should be required to destroy its records relating to any expunged matter.

PART XI: RESPONSIBILITIES OF PROSECUTING ATTORNEYS

STANDARD 11.1 POLICIES AND PROTOCOLS

(a) Prosecutors should develop policies to guide intake decisions involving dual-status youth. Such policies should encourage diversion or non-intervention for youth who engage in minor delinquent behavior and who can obtain appropriate services from other youth-serving agencies and systems.

(b) Prosecutors should, in conjunction with state and local law enforcement officers and youth-serving agencies, develop policies governing referrals to the juvenile justice system.
from other youth-serving agencies and systems. Such policies should seek to reduce referrals to the juvenile justice system for minor delinquent behavior.

**STANDARD 11.2 TRAINING**

Prosecutors should participate in cross-system training as set forth in Standard 2.15 of these standards concerning the Need for Cross-System Training.

**STANDARD 11.3 CHARGING DECISIONS**

(a) Consistent with Standard 2.11 of these standards concerning Information Sharing, when youth are referred to the juvenile justice system, prosecutors should review available Family Court records to determine whether the youth or the youth’s family is or has been served by other youth-serving systems.

(b) The prosecutor should not file a delinquency petition:

i. when the alleged delinquent behavior is minor and the youth can obtain appropriate services from other agencies;

ii. when it is clear that the youth did not have the mental capacity, cognitive ability, or intent necessary to be held responsible for his behavior; or

iii. to secure services or placement for a youth when a delinquency charge would not otherwise be warranted,

(c) The prosecutor should not prosecute delinquent behavior in juvenile or criminal court when the prosecutor determines that the purposes of the delinquency process can be accomplished outside of the juvenile or criminal justice system.

(d) The prosecutor should make every effort to ensure that a delinquency petition will not result in the termination or disruption of appropriate services for the youth from other youth-serving systems. The prosecutor should discourage other government attorneys handling dependency cases from closing dependency proceedings just because a delinquency petition is filed.

**STANDARD 11.4 COMMUNICATING WITH VICTIMS**

The prosecutor should advise victims, to the extent required by law or permitted under confidentiality laws or rules, of circumstances involving dual-status youth that lead to specific charging decisions and proposed resolutions. The prosecutor should advise victims of statutory, rule or other limitations on disclosure of information about the accused youth.

**STANDARD 11.5 DIVERSION**

(a) The prosecutor should consider information regarding the youth’s access to services from the child welfare system when deciding whether to divert a youth from the juvenile justice system.
(b) If the prosecutor decides to divert a dual-status youth from the juvenile justice system, the prosecutor should:

i. refer the youth to a program suitable for the youth’s age, ethnicity, culture, gender or sexual identification, disability, and developmental or cognitive ability; and

ii. consider diversion programs that allow the youth to participate in community service in lieu of a delinquency petition.

STANDARD 11.6 DETENTION

(a) In deciding whether to request detention of an accused youth, the prosecutor should:

i. not seek detention for alleged minor delinquent behavior; and

ii. consider whether other youth-serving agencies outside the juvenile justice system can protect the youth and serve public safety.

(b) The prosecutor should not seek detention just because no suitable child welfare placement has been identified.

(c) The prosecutor should not seek detention when detention will likely cause the youth to lose placement or services from other youth-serving systems and public safety can be served without detention.

STANDARD 11.7 COMMUNICATING AND COORDINATING WITH YOUTH-SERVING AGENCIES

(a) If the prosecutor declines to file a delinquency petition, the prosecutor should communicate that decision to any referring agency.

(b) The prosecutor should develop policies to govern the effective referral of youth to the child welfare system and other youth-serving agencies.

STANDARD 11.8 DISPOSITION AND POST-DISPOSITION PLANNING

(a) The prosecutor should participate in placement, re-entry, and disposition planning team meetings consistent with Standard 7.2 of these standards concerning the Disposition Process.

(b) The prosecutor should not seek an out-of-home placement when the youth’s supervision and service needs can be met in the community.

(c) After disposition, the prosecutors should periodically review the case.

i. If it appears that additional or alternate services are needed to meet the needs of the youth or to ensure public safety, the prosecutor may seek to modify the dispositional plan as described above.

ii. If it appears that the youth no longer needs care and rehabilitation from the juvenile court and does not pose a risk to public safety, the prosecutor should file a request to terminate the delinquency disposition early.
PART XII: RESPONSIBILITIES OF DEFENSE COUNSEL

STANDARD 12.1 ETHICAL OBLIGATIONS OF DEFENSE COUNSEL

(a) Defense counsel representing dual-status youth should abide by all applicable professional and ethical obligations for defense counsel generally.

STANDARD 12.2 TRAINING

Defense counsel should participate in cross-system training consistent with Standard 2.13 of these standards concerning Access to Court Records.

STANDARD 12.3 INVESTIGATION AND CONFIDENTIALITY WAIVERS

(a) Consistent with Standard 2.14 of these standards concerning Waivers of Confidentiality, defense counsel and dependency counsel should advise the youth in age-appropriate language, and when permitted and appropriate, inform the youth's parent or guardian, about the need for a signed waiver to allow counsel access to child welfare records and the implications of such waiver. Youth, parents, or guardians with disabilities should receive accommodations necessary to provide informed consent to the waiver.
   i. The juvenile justice system should provide, and defense counsel should obtain, necessary interpretive services. Defense counsel should ensure that any written waiver form and other documents are appropriately translated.
   ii. When the youth is developmentally or cognitively limited or limited in his or her literacy skills, counsel should explain and obtain the waiver in a manner the youth can best understand.

(b) Defense counsel should gather and review all information that would likely affect the youth's custody, legal status, or services in the juvenile justice system.

STANDARD 12.4 PRE-PETITION ADVOCACY BY DELINQUENCY COUNSEL

(a) Defense counsel should advise the youth regarding the possibility of initiating a referral from the juvenile justice system to the child welfare system and the possible implications of such a referral.

(b) Defense counsel should provide decision-makers all relevant information militating against, and advocate against, the filing of a delinquency petition and the inclusion of particular charges in a petition with the youth's voluntary and informed consent. Defense counsel should consider and recommend alternatives to provide needed services for the youth and, if necessary, to protect the public.

(c) Defense counsel should communicate with the youth's dependency counsel and the youth's best interest advocate when the youth consents and such communication would not undermine the youth's rights in the delinquency case.
112A

**STANDARD 12.5 ADVOCACY AT DETENTION HEARING**

(a) In and before a detention hearing, defense counsel should present facts and arguments to support placement in the community or in the custody of youth-serving agencies, if consistent with the youth's objectives. Facts and arguments should include evidence from youth-serving agencies regarding the availability of specific placements or services.

(b) If the youth is detained or sent to another out-of-home placement, defense counsel should advocate for comparable or better education, physical or behavioral health, and other services than the youth had been receiving prior to the placement.

(c) If the youth is ordered detained, defense counsel should, as soon as possible provide detention or shelter care staff with information about the youth's needs and advocate for the proper care and safety of the youth.

**STANDARD 12.6 DISPOSITION ADVOCACY**

(a) Defense counsel representing dual-status youth should zealously advocate for the youth's stated objectives at all stages, including any multi-agency planning team meeting or disposition hearing.

(b) Counsel should protect the youth's due process interests, including in cases when the disposition hearing is consolidated with other Family Court proceedings.

(c) If necessary to advance the youth's objectives, counsel should challenge any evidence or reports submitted to the juvenile court at the disposition hearing, including items submitted by the multi-agency team.

**STANDARD 12.7 POST-DISPOSITION ADVOCACY**

(a) Defense counsel's advocacy on behalf of dual-status youth should not end at the entry of a disposition order. Counsel should maintain contact with both the youth and the agency or agencies responsible for implementing the court's order, and:

i. counsel the youth and inform the youth's family concerning the order and its implementation;
ii. ensure the timely and appropriate implementation of the order; and
iii. ensure the youth's rights are protected as the youth's disposition is implemented.

(b) Defense counsel should monitor the implementation of the youth's disposition order.

i. If it appears that additional or different services are needed to meet the needs of the youth, counsel should seek to modify the dispositional plan or order, as consistent with the youth's stated interests.
ii. If it appears the youth no longer needs rehabilitative services from the juvenile court and does not pose a risk to public safety, defense counsel should seek to modify or terminate disposition early.
(c) Relevant government jurisdictions should ensure that defense counsel have the authority and funding to continue representation after disposition consistent with these standards.

**STANDARD 12.8 APPELLATE ADVOCACY**

(a) After adjudication and disposition, defense counsel should

i. explain to the youth the meaning and consequences of the court's judgment and the youth's right to appeal any delinquency disposition or other court orders;

ii. give the youth a professional judgment as to whether there are meritorious grounds for appeal and the probable results of an appeal; and

iii. explain to the youth the advantages and disadvantages of an appeal.

(b) Defense counsel should take whatever steps are necessary to protect the youth's right to appeal any illegal disposition or other court order, as consistent with the youth's stated objectives.

PART XIII: RESPONSIBILITIES OF DETENTION AND RESIDENTIAL STAFF

**STANDARD 13.1 POLICIES AND PROTOCOLS**

(a) Lawyers in the juvenile justice system should advocate for comparable or better treatment and services in juvenile detention settings than the youth would receive if allowed to remain in the community.

(b) Detention and residential facility staff should develop internal policies to eliminate barriers in detention to the provision of appropriate services to dual-status youth in detention. Such internal policies should, at a minimum:

i. ensure regular communication between detention and residential staff and child welfare and other youth-serving agencies and service providers with a legal obligation to the youth;

ii. ensure that youth are transported to and from provider appointments, if safety and flight risks can be managed during transport;

iii. develop or revise visitation policies to allow foster parents, guardians, family members, significant others, and representatives from the child welfare agencies and service providers to visit youth in detention; and

iv. provide private and appropriate physical space for youth to meet with foster parents, guardians, family members, significant others, and representatives from the child welfare agencies and service providers.
REPORT

History of the ABA Standards for Criminal Justice

The idea of developing the *ABA Standards for Criminal Justice* was formulated in 1963. The various chapters in the first edition of the Standards were approved by the ABA House of Delegates between 1968 and 1973. They were described by Chief Justice Warren Burger as the "single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history".

Beginning in 1978, the ABA House of Delegates approved revisions to the Standards. Publications of its second edition occurred in 1980. Since that time, periodic changes have been made to the Standards and publication of these Prosecution Function and Defense Function Standards would begin the Fourth edition of the Standards.

Overview of the Recommended Changes

It has been over 20 years since the third edition of the Prosecution Function and Defense Function Standards were passed by the ABA House of Delegates. In that time there have been many changes in the way that criminal cases are tried. These updated Standards reflect these changes and create best practices in consideration of those changes. In addition to several new Standards noted in the Table of Contents, every Standard has been revised since the previous edition.


These chapters covers the function of prosecutors and defense counsel. The recommended revisions represent a comprehensive examination of Chapter Three and Four of the *ABA Standards for Criminal Justice*, Third Edition, now more than two decades old.

Background

The proposed black letter standards in these chapters emerge from an effort of more than eight years, begun with the work of an updating task force in March 2006. The Task Force was appointed by the Criminal Justice Standards Committee, a Standing Committee of the Criminal Justice Section. The Task Force, which focused on the standards relating to the prosecution and defense function first met in March 2006 to chart direction. After 11 meetings the Task Force submitted a draft to the Criminal Justice Section Standards Committee in May 2009. After 13 Standards Committee meetings, the draft was submitted to the Criminal Justice Section Council for review at
the Spring 2013 Meeting. After four Council meetings the Criminal Justice Section Council approved these revised Standards at its April 2014 meeting.

The final proposed standards are, accordingly, the result of careful drafting and extensive review by representatives of all segments of the criminal justice system – judges, prosecutors, defense counsel, court personnel and academics active in criminal justice teaching and research. Circulation of the standards to a wide range of outside expertise also produced a rich array of comment and criticism which has greatly strengthened the final product.

Proposed Amendments

Since these chapters were last amended, there have been dramatic developments in the area of legal ethics. Thousands of new judicial decisions have been handed down. Hundreds of new books and articles touching upon the ethics of our profession have been published. Indeed, the proper role and function of prosecutors and defense counsel has been a particularly topical focus of discussion, debate and controversy in recent years.


By examining the use of the delinquency system for youth who would be better served in other systems, these Standards hope to encourage thoughtful reconsideration of the practices that result in the unnecessary referral of youth to juvenile courts. They seek to prescribe circumstances under which youth should be diverted from juvenile court, or served by it more effectively. Moreover, these Standards seek to answer questions like: What do we expect juvenile court to deliver in terms of services, risk management or public policy that other systems cannot? When referrals are made to juvenile court, how should the juvenile justice professionals assist in determining whether the referral is appropriate? When youth with multiple needs are appropriately under juvenile court jurisdiction, how can their needs be met so that society’s interest in protection is satisfied while giving these youth the best opportunity to become productive citizens?

Referral to Juvenile Court

These Standards first address how the juvenile court, through judicial leadership, prudent prosecutorial discretion, thoughtful defense advocacy, and appropriate probation decisions, can control the entry of youth into the juvenile justice system. The Standards provide guidance to judges and juvenile court personnel on when and how youth who are referred by and would be better served by other systems should be diverted from the juvenile court.
Youth who are appropriately in Juvenile Court

These Standards also address the court's obligation to ensure that youth who are appropriately before the juvenile court receive services from other systems, including, where appropriate, services that are normally provided by the child welfare system. The Standards address the juvenile court's continuing responsibility to determine whether, how, and for how long delinquent youth are served by more than one system.

Youth Returning to the Community from Placement and Exiting the Juvenile Justice System

Finally, these Standards address the responsibility of the juvenile justice system as a whole to plan and facilitate re-entry for youth who are dual status, regardless of who has responsibility for that function.

* * *

These Standards thus set forth a framework for how juvenile justice system professionals should make decisions about and serve youth who are referred by other systems, are involved with more than one system at a time, or have needs that should be met by more than one system.

We begin in Part I with definitions of key terms and a statement of general principles.

Part II addresses structural issues that are important to system collaboration. These include the need for a sound legislative framework, cross-system protocols, and guidance on court docketing when youth and families must attend multiple hearings and administrative proceedings. Recognizing the inherent tension between the youth's right to privacy and confidentiality and the need for information sharing and data collection about youth who are involved in multiple systems, this Part also attempts to guide juvenile justice professionals in determining whether, when and how to share and collect information.

Part III covers the many issues related to control of juvenile court jurisdiction. This part gives special attention to reducing unnecessary referrals from schools and child welfare agencies.

Part IV augments Part III by providing standards for juvenile court personnel to follow when they receive referrals of youth who are, or who are likely to become, involved with more than one system. The Standards discuss how court personnel can reject inappropriate referrals and encourage personnel to pay special attention to appropriate referrals of dual-status youth.

Part V guides court personnel in obtaining services from other systems to avoid juvenile court involvement, or to provide better treatment for youth who are appropriately in the juvenile justice system.
Parts VI and VII address adjudication and disposition of dual-status youth, paying particular attention to the guarantees of due process and the need for loyal and engaged defense advocates.

Part VIII deals with the unique problems of re-entry, while Part IX examines appeals. Part X provides guidance on juvenile records and expungement. Parts XI and XII cover ethical obligations of prosecuting attorneys and defense counsel, respectively.

Respectfully submitted,
Matthew Redle
Chair, Criminal Justice Section
August, 2017
GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section
Submitted By: Matthew Redle, Chair

1. **Summary of Resolution(s).** This resolution adopts the *ABA Criminal Justice Standards Relating to Dual Jurisdiction Youth.*

2. **Approval by Submitting Entity.** This resolution was passed by the Criminal Justice Council at the Spring Council meeting in Jackson Hole, Wyoming in May, 2017.

3. **Has this or a similar resolution been submitted to the House or Board previously?** No.

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

   The Juvenile Justice Standards (currently under revision) and the existing ABA policy on dual status youth address these issues, but these standards seek to harmonization and update both the existing standards and the previous resolution.

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

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

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

   These standards will be used to support ABA Governmental Affairs Office Lobbying efforts, as well as to guide practitioners in the juvenile justice system. These standards will also be used to support amicus briefs.

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

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

10. **Referrals.**

    Standing Committee on Legal Aid & Indigent Defense
    Commission on Disability Rights
    Special Committee on Hispanic Legal Rights & Responsibilities
    Commission on Homelessness and Poverty
    Center for Human Rights
    Commission on Immigration
    Racial & Ethnic Diversity
    Racial & Ethnic Justice
Youth at Risk
Young Lawyer’s Division
Civil Rights and Social Justice
Government and Public Sector Lawyers
Health Law
International Law
National Conference of Federal Trial Judges
National Conference of State Trial Judges
Law Practice Division
Litigation
Science & Technology
Commission on Sexual Orientation and Gender Identity
Center for Children and the Law

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

Sara Elizabeth Dill
ABA Criminal Justice Section
1050 Connecticut Avenue NW, Suite 400
Washington, D.C. 20036
T: (202) 662-1511
E: sara.dill@americanbar.org

Kristin Henning
Georgetown Law
111 F Street, N.W.
Washington, D.C. 20001
(202) 662-9592
hennink@georgetown.edu

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

Stephen Saltzburg
2000 H Street, NW
Washington, D. C. 20052
T: 202-994-7089
E: ssaltz@law.gwu.edu

Neal Sonnett
2 South Biscayne Blvd., Suite 2600
Miami, Florida 33131-1819
T: 305-358-2000
Cell: 305-333-5444
E: nrslaw@sonnett.com
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

This resolution adopts the ABA Criminal Justice Standards Relating to Dual Jurisdiction Youth.

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

This resolution adopts the ABA Criminal Justice Standards Relating to Dual Jurisdiction Youth, creating standards to address the unique situations for juveniles caught in two court systems at the same time, and 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.
Standard 3-1.1   The Scope and Function of These Standards

(a) As used in these standards, “prosecutor” means any attorney, regardless of agency, title, or full or part-time assignment, who acts as an attorney to investigate or prosecute criminal cases or who provides legal advice regarding a criminal matter to government lawyers, agents, or offices participating in the investigation or prosecution of criminal cases. These Standards are intended to apply in any context in which a lawyer would reasonably understand that a criminal prosecution could result. The burden to justify any exception should rest with the lawyer seeking it.

(b) These Standards are intended to provide guidance for the professional conduct and performance of prosecutors. They are written and intended to be entirely consistent with the ABA’s Model Rules of Professional Conduct, and are not intended to modify a prosecutor’s obligations under applicable rules, statutes, or the constitution. They are aspirational or describe “best practices,” and are not intended to serve as the basis for the imposition of professional discipline, to create substantive or procedural rights for accused or convicted persons, to create a standard of care for civil liability, or to serve as a predicate for a motion to suppress evidence or dismiss a charge. For purposes of consistency, these Standards sometimes include language taken from the Model Rules of Professional Conduct; but the Standards often address conduct or provide details beyond that governed by the Model Rules of Professional Conduct. No inconsistency is ever intended; and in any case a lawyer should always read and comply with the rules of professional conduct and other authorities that are binding in the specific jurisdiction or matter, including choice of law principles that may regulate the lawyer’s ethical conduct.

(c) Because the Standards for Criminal Justice are aspirational, the words “should” or “should not” are used in these Standards, rather than mandatory phrases such as “shall” or “shall not,” to describe the conduct of lawyers that is expected or recommended under these Standards. The Standards are not intended to suggest any lesser standard of conduct than may be required by applicable mandatory rules, statutes, or other binding authorities.

(d) These Standards are intended to address the performance of prosecutors in all stages of their professional work. Other ABA Criminal Justice Standards should also be consulted for more detailed consideration of the performance of prosecutors in specific areas.

Standard 3-1.2   Functions and Duties of the Prosecutor

(a) The prosecutor is an administrator of justice, a zealous advocate, and an officer of the court. The prosecutor’s office should exercise sound discretion and independent judgment in the performance of the prosecution function.
(b) The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances. The prosecutor should seek to protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and defendants.

(c) The prosecutor should know and abide by the standards of professional conduct as expressed in applicable law and ethical codes and opinions in the applicable jurisdiction. The prosecutor should avoid an appearance of impropriety in performing the prosecution function. A prosecutor should seek out, and the prosecutor's office should provide, supervisory advice and ethical guidance when the proper course of prosecutorial conduct seems unclear. A prosecutor who disagrees with a governing ethical rule should seek its change if appropriate, and directly challenge it if necessary, but should comply with it unless relieved by court order.

(d) The prosecutor should make use of ethical guidance offered by existing organizations, and should seek to establish and make use of an ethics advisory group akin to that described in Defense Function Standard 4-1.11.

(e) The prosecutor should be knowledgeable about, consider, and where appropriate develop or assist in developing alternatives to prosecution or conviction that may be applicable in individual cases or classes of cases. The prosecutor's office should be available to assist other groups in the community efforts in addressing problems that lead to, or result from, criminal activity or perceived flaws in the criminal justice system.

(f) The prosecutor is not merely a case-processor but also a problem-solver responsible for considering broad goals of the criminal justice system. The prosecutor should seek to reform and improve the administration of criminal justice, and when inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, the prosecutor should stimulate and support efforts for remedial action. The prosecutor should provide services to the community, including involvement in public service and Bar activities, public education, community service activities, and Bar leadership positions. A prosecutorial office should support such activities, and the office's budget should include funding and paid release time for such activities.

Standard 3-1.4 The Prosecutor's Heightened Duty of Candor

(a) In light of the prosecutor's public responsibilities, broad authority and discretion, the prosecutor has a heightened duty of candor to the courts and in fulfilling other professional obligations. However, the prosecutor should be circumspect in publicly commenting on specific cases or aspects of the business of the office.

(b) The prosecutor should not make a statement of fact or law, or offer evidence, that the prosecutor does not reasonably believe to be true, to a court, lawyer, witness, or third party, except for lawfully authorized investigative purposes. In addition, while seeking to accommodate legitimate confidentiality, safety or security concerns, a prosecutor should correct a prosecutor's representation of material fact or law that the prosecutor reasonably believes is, or
later learns was, false, and should disclose a material fact or facts when necessary to avoid assisting a fraudulent or criminal act or to avoid misleading a judge or factfinder.

(c) The prosecutor should disclose to a court legal authority in the controlling jurisdiction known to the prosecutor to be directly adverse to the prosecution's position and not disclosed by others.

Standard 3-1.7 Conflicts of Interest

(a) The prosecutor should know and abide by the ethical rules regarding conflicts of interest that apply in the jurisdiction, and be sensitive to facts that may raise conflict issues. When a conflict requiring recusal exists and is non-waivable, or informed consent has not been obtained, the prosecutor should recuse from further participation in the matter. The office should not go forward until a non-conflicted prosecutor, or an adequate waiver, is in place, or a court orders continued representation.

(b) The prosecutor should not represent a defendant in criminal proceedings in the prosecutor's jurisdiction.

(c) The prosecutor should not participate in a matter in which the prosecutor previously participated, personally and substantially, as a non-prosecutor, unless the appropriate government office, and when necessary a former client, gives informed consent confirmed in writing.

(d) The prosecutor should not be involved in the prosecution of a former client. A prosecutor who has formerly represented a client should not use information obtained from that representation to the disadvantage of the former client, unless the information has become generally known or the ethical obligations of confidentiality and loyalty otherwise do not apply.

(e) Except as law may otherwise permit, the prosecutor should not negotiate to employ any person who is significantly involved as an attorney for, or employee or agent of, the defense counsel in a matter in which the prosecutor is participating personally and substantially. The prosecutor should not contribute for private employment with an accused or the target of an investigation, in a matter in which the prosecutor is participating personally and substantially, or with an attorney or agent for such accused or target.

(f) The prosecutor should not permit the prosecutor's professional judgment or obligations to be affected by the prosecutor's personal, political, financial, professional, business, property, or other interests or relationships. A prosecutor should not allow interests in personal advancement or aggrandizement to affect judgments regarding what is in the best interests of justice in any case.

(g) The prosecutor should disclose to appropriate supervisory personnel at the earliest feasible opportunity any facts or interests that could reasonably be viewed as raising a potential conflict of interest. If it is determined that the prosecutor should nevertheless continue to act in the matter, the prosecutor and supervisors should consider whether any disclosure to a court or defense counsel should be made, and make such disclosure if appropriate. Close cases should be resolved in favor of disclosure to the court and the defense.
(h) The prosecutor whose current relationship to another lawyer is parent, child, sibling, spouse or sexual partner should not participate in the prosecution of a person who the prosecutor knows is represented by the other lawyer. A prosecutor who has a significant personal, political, financial, professional, business, property, or other relationship with another lawyer should not participate in the prosecution of a person who is represented by the other lawyer, unless the relationship is disclosed to the prosecutor’s supervisor and supervisory approval is given, or unless there is no other prosecutor who can be authorized to act in the prosecutor’s stead. In the latter rare case, full disclosure should be made to the defense and to the court.

(i) The prosecutor should not recommend the services of particular defense counsel to accused persons or witnesses in cases being handled by the prosecutor’s office. If requested to make such a recommendation, the prosecutor should consider instead referring the person to the public defender, or to a panel of available criminal defense attorneys such as a bar association lawyer-referral service, or to the court. In the rare case where a specific recommendation is made by the prosecutor, the recommendation should be to an independent and competent attorney, and the prosecutor should not make a referral that embodies, creates or is likely to create a conflict of interest. A prosecutor should not comment negatively upon the reputation or abilities of a defense counsel to an accused person or witness who is seeking counsel in a case being handled by the prosecutor’s office.

(j) The prosecutor should promptly report to a supervisor all but the most obviously frivolous misconduct allegations made, publicly or privately, against the prosecutor. If a supervisor or judge initially determines that an allegation is serious enough to warrant official investigation, reasonable measures, including possible recusal, should be instituted to ensure that the prosecution function is fairly and effectively carried out. A mere allegation of misconduct is not a sufficient basis for prosecutorial recusal, and should not deter a prosecutor from attending to the prosecutor’s duties.

Remainder of Standards are unchanged.
Standard 4-1.1 The Scope and Function of these Standards

(a) As used in these Standards, “defense counsel” means any attorney—including privately retained, assigned by the court, acting pro bono or serving indigent defendants in a legal aid or public defender’s office—who acts as an attorney on behalf of a client being investigated or prosecuted for alleged criminal conduct, or a client seeking legal advice regarding a potential, ongoing or past criminal matter or subpoena, including as a witness. These Standards are intended to apply in any context in which a lawyer would reasonably understand that a criminal prosecution could result. The Standards are intended to apply in any context in which a lawyer would reasonably understand that a criminal prosecution could result. The Standards are intended to serve the best interests of clients, and should not be relied upon to justify any decision that is counter to the client’s best interests. The burden to justify any exception should rest with the lawyer seeking it.

(b) These Standards are intended to provide guidance for the professional conduct and performance of defense counsel. They are written and intended to be entirely consistent with the ABA’s Model Rules of Professional Conduct, and are not intended to modify a defense attorney’s obligations under applicable rules, statutes or the constitution. They are aspirational or describe “best practices,” and are not intended to serve as the basis for the imposition of professional discipline, to create substantive or procedural rights for clients, or to create a standard of care for civil liability. They may be relevant in judicial evaluation of constitutional claims regarding the right to counsel. For purposes of consistency, these Standards sometimes include language taken from the Model Rules of Professional Conduct; but the Standards often address conduct or provide details beyond that governed by the Model Rules of Professional Conduct. No inconsistency is ever intended; and in any case a lawyer should always read and comply with the rules of professional conduct and other authorities that are binding in the specific jurisdiction or matter, including choice of law principles that may regulate the lawyer’s ethical conduct.

(c) Because the Standards for Criminal Justice are aspirational, the words “should” or “should not” are used in these Standards, rather than mandatory phrases such as “shall” or “shall not,” to describe the conduct of lawyers that is expected or recommended under these Standards. The Standards are not intended to suggest any lesser standard of conduct than may be required by applicable mandatory rules, statutes, or other binding authorities.

(d) These Standards are intended to address the performance of criminal defense counsel in all stages of their professional work. Other ABA Criminal Justice Standards should also be
consulted for more detailed consideration of the performance of criminal defense counsel in specific areas.

**Standard 4-1.2  Functions and Duties of Defense Counsel**

(a) Defense counsel is essential to the administration of criminal justice. A court properly constituted to hear a criminal case should be viewed as an entity consisting of the court (including judge, jury, and other court personnel), counsel for the prosecution, and counsel for the defense.

(b) Defense counsel have the difficult task of serving both as officers of the court and as loyal and zealous advocates for their clients. The primary duties that defense counsel owe to their clients, to the administration of justice, and as officers of the court, are to serve as their clients’ counselor and advocate with courage and devotion; to ensure that constitutional and other legal rights of their clients are protected; and to render effective, high-quality legal representation with integrity.

(c) Defense counsel should know and abide by the standards of professional conduct as expressed in applicable law and ethical codes and opinions in the applicable jurisdiction. Defense counsel should seek out supervisory advice when available, and defense counsel organizations as well as others should provide ethical guidance when the proper course of conduct seems unclear. Defense counsel who disagrees with a governing ethical rule should seek its change if appropriate, and directly challenge it if necessary, but should comply with it unless relieved by court order.

(d) Defense counsel is the client’s professional representative, not the client’s alter-ego. Defense counsel should act zealously within the bounds of the law and standards on behalf of their clients, but have no duty to, and may not, execute any directive of the client which violates the law or such standards. In representing a client, defense counsel may engage in a good faith challenge to the validity of such laws or standards if done openly.

(e) Defense counsel should seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to defense counsel’s attention, counsel should stimulate and support efforts for remedial action. Defense counsel should provide services to the community, including involvement in public service and Bar activities, public education, community service activities, and Bar leadership positions. A public defense organization should support such activities, and the office’s budget should include funding and paid release time for such activities.

(f) Defense counsel should be knowledgeable about, and consider, and where appropriate develop or assist in developing alternatives to prosecution or conviction that may be applicable in individual cases, and communicate them to the client. Defense counsel should be available to assist other groups in the community in addressing problems that lead to, or result from, criminal activity or perceived flaws in the criminal justice system.

(g) Because the death penalty differs from other criminal penalties, defense counsel in a capital case should make extraordinary efforts on behalf of the accused and, more specifically, review and comply with the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.
Standard 4-1.4 Defense Counsel's Tempered Duty of Candor

(a) In light of criminal defense counsel's constitutionally recognized role in the criminal process, defense counsel's duty of candor may be tempered by competing ethical and constitutional obligations. Defense counsel must act zealously within the bounds of the law and applicable rules to protect the client's confidences and the unique liberty interests that are at stake in criminal prosecution.

(b) Defense counsel should not knowingly make a false statement of fact or law or offer false evidence, to a court, lawyer, witnesses, or third party. It is not a false statement for defense counsel to suggest inferences that may reasonably be drawn from the evidence. In addition, while acting seeking to accommodate legitimate confidentiality, privilege, or other defense concerns, defense counsel should correct a defense representation of material fact or law that defense counsel knows is, or later learns was, false.

(c) Defense counsel should disclose to a court legal authority in the controlling jurisdiction known to defense counsel to be directly adverse to the position of the client and not disclosed by others.

Standard 4-1.7 Conflicts of Interest

(a) Defense counsel should know and abide by the ethical rules regarding conflicts of interest that apply in the jurisdiction, and be sensitive to facts that may raise conflict issues. When a conflict requiring withdrawal exists and is non-waivable, or informed consent has not been obtained, defense counsel should decline to proceed further, or take only minimal actions necessary to protect the client's interests, until an adequate waiver or new counsel is in place, or a court orders continued representation.

(b) Defense counsel should not permit their professional judgment or obligations regarding the representation of a client to be adversely affected by loyalties or obligations to other, former, or potential clients; by client obligations of their law partners; or by their personal political, financial, business, property, or other interests or relationships.

(c) Defense counsel should disclose to the client at the earliest feasible opportunity any information, including any interest in or connection to the matter or to other persons involved in the matter, that would reasonably be relevant to the client's selection of unconflicted counsel or decision to continue counsel's representation. The disclosure of conflicts of interest that would otherwise be prohibited by applicable rules or law should be in writing, and should be disclosed on the record to any court that the matter comes before. Disclosures to the client should include communication of information sufficient to permit the client to appreciate the material risks involved and available alternatives. Defense counsel should obtain informed consent from a client before proceeding with any representation where an actual or realistically potential conflict is present.

(d) Except where necessary to secure counsel for preliminary matters such as initial hearings or applications for bail, a defense counsel (or multiple counsel associated in practice) should not undertake to represent more than one client in the same criminal case. When there is not yet a
criminal case, such multiple representation should be engaged in only when, after careful
investigation and consideration, it is clear either that no conflict is likely to develop at any stage
of the matter, or that multiple representation will be advantageous to each of the clients
represented and that foreseeable conflicts can be waived.

(e) In instances of permissible multiple representation:

(i) the clients should be fully advised that the lawyer may be unable to continue if a conflict
develops, and that confidentiality may not exist between the clients;

(ii) informed written consent should be obtained from each of the clients, and

(iii) if the matter is before a tribunal, such consent should be made on the record with
appropriate inquiries by counsel and the court.

(f) Defense counsel who has formerly represented a client should not thereafter use
information related to the obtained from that former representation to the disadvantage of the
former client, unless the information has become generally known or the ethical obligations of
confidentiality and loyalty otherwise do not apply, and should not take legal positions that are
substantially adverse to a former client.

(g) In accepting payment of fees by one person for the representation of another, defense
counsel should explain to the payor that counsel’s loyalty and confidentiality obligations are
owed entirely to the person being represented and not to the payor, and that counsel may not
release client information to the payor unless applicable ethics rules allow. Defense counsel
should not permit a person who recommends, employs, or pays defense counsel to render legal
services for another to direct or regulate counsel’s professional judgment in rendering such legal
services. In addition, defense counsel should not accept such third-party compensation unless:

(i) the client gives informed consent after full disclosure and explanation;

(ii) defense counsel is confident there will be no interference with defense counsel’s
independence or professional judgment or with the client-lawyer relationship; and

(iii) defense counsel is reasonably confident that information relating to the representation
of the client will be protected from disclosure as required by counsel’s ethical duty of
confidentiality.

(h) Defense counsel should not represent a client in a criminal matter in which counsel, or
counsel’s partner or other lawyer in counsel’s law office or firm, is the prosecutor in the same or
a substantially related matter, or is a prosecutor in the same jurisdiction.

(i) If defense counsel’s partner or other lawyer in counsel’s law office was formerly a
prosecutor in the same or substantially related matter or was a prosecutor in the same
jurisdiction, defense counsel should not take on representation in that matter unless appropriate
screening and consent measures under applicable ethics rules are undertaken, and no confidential
information of the client or of the government has actually been exchanged between defense
counsel and the former prosecutor.

(j) If defense counsel is a candidate for a position, or seeking employment, as a prosecutor or
judge, this should be promptly disclosed to the client, and informed consent to continue be
obtained.
Defense counsel who formerly participated personally and substantially in the prosecution or criminal investigation of a defendant should not thereafter represent any person in the same or a substantially related matter, unless waiver is obtained from both the client and the government. Defense counsel who acquired confidential information about a person when counsel was formerly a prosecutor should not use such information in the representation of a client whose interests are adverse to that other person, unless the information has become generally known or the ethical obligations of confidentiality and loyalty otherwise do not apply.

Defense counsel whose current relationship to a prosecutor is parent, child, sibling, spouse, or sexual partner should not represent a client in a criminal matter in which defense counsel knows the government is represented by that prosecutor. Nor should defense counsel who has a significant personal or financial relationship with a prosecutor represent a client in a criminal matter in which defense counsel knows the government is represented in the matter by such prosecutor, except upon informed consent by the client regarding the relationship.

Defense counsel should not act as surety on a bond either for a client whom counsel represents or for any other client in the same or a related case, unless it is required by law or it is clear that there is no risk that counsel’s judgment could be materially limited by counsel’s interest in recovering the amount ensured.

Except as law may otherwise permit, defense counsel should not negotiate to employ any person who is significantly involved as an attorney, employee, or agent of the prosecution in a matter in which defense counsel is participating personally and substantially. Defense counsel should not negotiate for employment with prosecutors involved in a matter in which defense counsel’s client is the defendant or the target of an investigation and in which defense counsel is participating personally and substantially.

Remainder of Standards are unchanged.
REPORT

History of the ABA Standards for Criminal Justice

The idea of developing the *ABA Standards for Criminal Justice* was formulated in 1963. The various chapters in the first edition of the Standards were approved by the ABA House of Delegates between 1968 and 1973. They were described by Chief Justice Warren Burger as the “single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history”.

Beginning in 1978, the ABA House of Delegates approved revisions to the Standards. Publications of its second edition occurred in 1980. Since that time, periodic changes have been made to the Standards and publication of these Prosecution Function and Defense Function Standards would begin the Fourth edition of the Standards.

Overview of the Recommended Changes

It has been over 20 years since the third edition of the Prosecution Function and Defense Function Standards were passed by the ABA House of Delegates. In that time there have been many changes in the way that criminal cases are tried. These updated Standards reflect these changes and create best practices in consideration of those changes. In addition to several new Standards noted in the Table of Contents, every Standard has been revised since the previous edition.


These chapters covers the function of prosecutors and defense counsel. The recommended revisions represent a comprehensive examination of Chapter Three and Four of the *ABA Standards for Criminal Justice*, Third Edition, now more than two decades old.

Background

The proposed black letter standards in these chapters emerge from an effort of more than eight years, begun with the work of an updating task force in March 2006. The Task Force was appointed by the Criminal Justice Standards Committee, a Standing Committee of the Criminal Justice Section. The Task Force, which focused on the standards relating to the prosecution and defense function first met in March 2006 to chart direction. After 11 meetings the Task Force submitted a draft to the Criminal Justice Section Standards Committee in May 2009. After 13 Standards Committee meetings, the draft was submitted to the Criminal Justice Section Council for review at the Spring 2013 Meeting. After four Council meetings the Criminal Justice Section Council approved these revised Standards at its April 2014 meeting.
The final proposed standards are, accordingly, the result of careful drafting and extensive review by representatives of all segments of the criminal justice system – judges, prosecutors, defense counsel, court personnel and academics active in criminal justice teaching and research. Circulation of the standards to a wide range of outside expertise also produced a rich array of comment and criticism which has greatly strengthened the final product.

Proposed Amendments

Since these chapters were last amended, there have been dramatic developments in the area of legal ethics. Thousands of new judicial decisions have been handed down. Hundreds of new books and articles touching upon the ethics of our profession have been published. Indeed, the proper role and function of prosecutors and defense counsel has been a particularly topical focus of discussion, debate and controversy in recent years.


The revision of the Prosecution and Defense Function Standards for a Fourth Edition was a mammoth project. It required the review of two sets of Standards simultaneously, and revising or newly drafting some 122 Standards that span the breadth of criminal litigation, from investigation through post-conviction. Moreover, an effort was made to make the obligations of lawyers in both roles – prosecution or defense – “parallel” or equivalent where appropriate, and to justify differences where differences seemed appropriate. The project spanned about ten years.

In the course of drafting Commentary for all 122 Standards, small word or phrasing differences were discovered, between Standards that were intended to be parallel, and for which no substantive difference was envisioned or intended.

The following pages identify 11 Standards in which such word or phrasing differences appear. For each, the Criminal Justice Section has recommended simple “fixes” or edits, after review of a slightly longer list of changes considered by the Criminal Justice Standards Committee at a meeting in Chicago on December 10, 2016. All the suggested edits on the following pages were approved by the Standards Committee at that meeting, and adopted by the Criminal Justice Section Council on May 6, 2017, and no substantive change in meaning is intended (nor was any substantive difference intended when originally drafted and approved). The affected pairs of Standards were intended to be “parallel” for both prosecutors and defense counsel. The recommended changes will make that clear, and not leave any lingering suggestion in the Standards that some difference was intended where, in fact, it was not (and Commentary will not have to note or attempt to explain the small differences).

It is the judgment of CJS staff that we should seek approval from the House of Delegates regarding these changes to the Fourth Edition of both sets of standards. A redlined version of the proposed changes to the standards is attached as well. The 4th Edition of the Prosecution

Respectfully submitted,

Matthew Redle
Chair, Criminal Justice Section
August, 2017
1. Recommended edits to PF Standard 3-1.1(a) and DF Standard 4-1.1(b).

Purpose: To make parallel as was intended, by adding language from each Standard that was inadvertently omitted from the other.

Prosecution Function Standard 3-1.1(a) and (b) -- The Scope and Function of These Standards

(a) As used in these standards, “prosecutor” means any attorney, regardless of agency, title, or full or part-time assignment, who acts as an attorney to investigate or prosecute criminal cases or who provides legal advice regarding a criminal matter to government lawyers, agents, or offices participating in the investigation or prosecution of criminal cases. These Standards are intended to apply in any context in which a lawyer would reasonably understand that a criminal prosecution could result. The burden to justify any exception should rest with the lawyer seeking it.

(b) These Standards are intended to provide guidance for the professional conduct and performance of prosecutors. They are written and intended to be entirely consistent with the ABA’s Model Rules of Professional Conduct, and are not intended to modify a prosecutor’s obligations under applicable rules, statutes, or the constitution. They are aspirational .... [remainder omitted]

Defense Function Standard 4-1.1 -- The Scope and Function of these Standards

(a) As used in these Standards, “defense counsel” means any attorney – including privately retained, assigned by the court, acting pro bono or serving indigent defendants in a legal aid or public defender’s office – who acts as an attorney on behalf of a client being investigated or prosecuted for alleged criminal conduct, or a client seeking legal advice regarding a potential, ongoing or past criminal matter or subpoena, including as a witness. These Standards are intended to apply in any context in which a lawyer would reasonably understand that a criminal prosecution could result. The Standards are intended to serve the best interests of clients, and should not be relied upon to justify any decision that is counter to the client’s best interests. The burden to justify any exception should rest with the lawyer seeking it.

(b) These Standards are intended to provide guidance for the professional conduct and performance of defense counsel. They are written and intended to be entirely consistent with the ABA’s Model Rules of Professional Conduct, and are not intended to modify a defense attorney’s obligations under applicable rules, statutes or the constitution. They are aspirational .... [remainder omitted]
2. Recommended edits to PF Standard 3-1.2(e) and (f), and DF Standard 4-1.2(d), (e) and (f).

Purpose: To make parallel as was intended, by adding language from each Standard that was inadvertently omitted from the other.

Prosecution Function Standard 3-1.2 -- Functions and Duties of the Prosecutor

..... (e) The prosecutor should be knowledgeable about, consider, and where appropriate develop or assist in developing alternatives to prosecution or conviction that may be applicable in individual cases or classes of cases. The prosecutor’s office should be available to assist other groups in the community in addressing problems that lead to, or result from, criminal activity or perceived flaws in the criminal justice system.

(f) The prosecutor is not merely a case-processor but also a problem-solver responsible for considering broad goals of the criminal justice system. The prosecutor should seek to reform and improve the administration of criminal justice, and when inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, the prosecutor should stimulate and support efforts for remedial action. The prosecutor should provide services to the community, including involvement in public service and Bar activities, public education, community service activities, and Bar leadership positions. A prosecutorial office should support such activities, and the office's budget should include funding and paid release time for such activities.

Defense Function Standard 4-1.2 Functions and Duties of Defense Counsel

..... (d) Defense counsel is the client’s professional representative, not the client’s alter-ego. Defense counsel should act zealously within the bounds of the law and standards on behalf of their clients, but has no duty to, and may not, execute any directive of the client which violates the law or such standards. In representing a client, defense counsel may engage in a good faith challenge to the validity of such laws or standards if done openly.

(e) Defense counsel should seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to defense counsel’s attention, counsel should stimulate and support efforts for remedial action. Defense counsel should provide services to the community, including involvement in public service and Bar activities, public education, community service activities, and Bar leadership positions. A public defense organization should support such activities, and the office’s budget should include funding and paid release time for such activities.

(f) Defense counsel should be knowledgeable about, and consider, and where appropriate develop or assist in developing, alternatives to prosecution or conviction that may be applicable in individual cases, and communicate them to the client. Defense counsel should be available to assist other groups in the community in addressing problems that lead to, or result from, criminal activity or perceived flaws in the criminal justice system.
3. Recommended edits to DF Standard 4-1.2(b).

Purpose: To make parallel as was intended, by using the same word in both parallel Standards.

Prosecution Function Standard 3-1.4 -- The Prosecutor's Heightened Duty of Candor

.... (b) The prosecutor should not make a statement of fact or law, or offer evidence, that the prosecutor does not reasonably believe to be true, to a court, lawyer, witness, or third party, except for lawfully authorized investigative purposes. In addition, while seeking to accommodate legitimate confidentiality, safety or security concerns, a prosecutor should correct a prosecutor's representation of material fact or law that the prosecutor reasonably believes is, or later learns was, false, and should disclose a material fact or facts when necessary to avoid assisting a fraudulent or criminal act or to avoid misleading a judge or factfinder.

Standard 4-1.4 -- Defense Counsel's Tempered Duty of Candor

.... (b) Defense counsel should not knowingly make a false statement of fact or law or offer false evidence, to a court, lawyer, witnesses, or third party. It is not a false statement for defense counsel to suggest inferences that may reasonably be drawn from the evidence. In addition, while seeking to accommodate legitimate confidentiality, privilege, or other defense concerns, defense counsel should correct a defense representation of material fact or law that defense counsel knows is, or later learns was, false.

4. Recommended edits to PF Standard 3-1.7 and DF Standard 4-1.7.

Purpose: To make parallel as was intended, including adding language from one Standard that was inadvertently omitted from the other, and to make small non-substantive phrases the same.

Prosecution Function Standard 3-1.7 -- Conflicts of Interest

(a) The prosecutor should know and abide by the ethical rules regarding conflicts of interest that apply in the jurisdiction, and be sensitive to facts that may raise conflict issues. When a conflict requiring recusal exists and is non-waivable, or informed consent has not been obtained, the prosecutor should recuse from further participation in the matter. The office should not go forward until a non-conflicted prosecutor, or an adequate waiver, is in place, or a court orders continued representation.

.... (d) The prosecutor should not be involved in the prosecution of a former client. A prosecutor who has formerly represented a client should not use information obtained from that representation to the disadvantage of the former client, unless the information has become generally known or the ethical obligations of confidentiality and loyalty otherwise do not apply.

(e) Except as law may otherwise permit, the prosecutor should not negotiate to employ any person who is significantly involved as an attorney for, or employee or agent of, the defense counsel in a matter in which the prosecutor is participating personally and substantially. The prosecutor should not negotiate for private employment with an accused or the target of an investigation, in a matter in which the prosecutor is participating personally and substantially, or with an attorney or agent for such accused or target.
.... (g) The prosecutor should disclose to appropriate supervisory personnel at the earliest feasible opportunity any facts or interests that could reasonably be viewed as raising a potential conflict of interest. If it is determined that the prosecutor should nevertheless continue to act in the matter, the prosecutor and supervisors should consider whether any disclosure to a court or defense counsel should be made, and make such disclosure if appropriate. Close cases should be resolved in favor of disclosure to the court and the defense.

Defense Function Standard 4-1.7 -- Conflicts of Interest

(a) Defense counsel should know and abide by the ethical rules regarding conflicts of interest that apply in the jurisdiction, and be sensitive to facts that may raise conflict issues. When a conflict requiring withdrawal exists and is non-waivable, or informed consent has not been obtained, defense counsel should decline to proceed further, or take only minimal actions necessary to protect the client's interests, until an adequate waiver or new counsel is in place, or a court orders continued representation.

.... (c) Defense counsel should disclose to the client at the earliest feasible opportunity any information, including any interest in or connection to the matter or to other persons involved in the matter, that would reasonably be relevant to the client's selection of unconflicted counsel or decision to continue counsel's representation. The disclosure of conflicts of interest that would otherwise be prohibited by applicable rules or law should be in writing, and should be disclosed on the record to any court that the matter comes before. Disclosures to the client should include communication of information sufficient to permit the client to appreciate the material risks involved and available alternatives. Defense counsel should obtain informed consent from a client before proceeding with any representation where an actual or realistically potential conflict is present.

.... (f) Defense counsel who has formerly represented a client should not use information obtained from that former representation to the disadvantage of the former client, unless the information has become generally known or the ethical obligations of confidentiality and loyalty otherwise do not apply, and should not take legal positions that are substantially adverse to a former client.

(n) Except as law may otherwise permit, defense counsel should not negotiate to employ any person who is significantly involved as an attorney for, or employee or agent of, the prosecution in a matter in which defense counsel is participating personally and substantially. Defense counsel should not negotiate for employment with prosecutors involved in a matter in which defense counsel's client is the defendant or the target of an investigation and in which defense counsel is participating personally and substantially.
112B

GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: Matthew Redle, Chair

1. **Summary of Resolution(s).** This resolution makes harmonizing edits and revisions to the *ABA Standards for Criminal Justice: Prosecution Function, 4th Edition*, and *ABA Standards for Defense Function, 4th Edition* involving small word or phrasing differences between Standards that were intended to be parallel. No substantive differences are envisioned or intended.

2. **Approval by Submitting Entity.** This resolution was passed by the Criminal Justice Council at the spring Council meeting in Jackson Hole, Wyoming in May, 2017.

3. **Has this or a similar resolution been submitted to the House or Board previously?** The *ABA Standards for Criminal Justice: Prosecution Function, 4th Edition*, and *ABA Standards for Defense Function, 4th Edition* were approved by the House of Delegates in February 2015.

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


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

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

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** These standards will be used in training programs and literature to provide guidance to prosecutors, defense attorneys, and judges in the performance of their duties in the criminal justice section. The standards will also continue to be used in lobbying efforts, and in amicus briefs.

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

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

10. **Referrals.**

    Standing Committee on Legal Aid & Indigent Defense
    Commission on Disability Rights
    Special Committee on Hispanic Legal Rights & Responsibilities
    Commission on Homelessness and Poverty
    Center for Human Rights
    Commission on Immigration
Racial & Ethnic Diversity
Racial & Ethnic Justice
Youth at Risk
Young Lawyer’s Division
Civil Rights and Social Justice
Government and Public Sector Lawyers
Health Law
International Law
National Conference of Federal Trial Judges
National Conference of State Trial Judges
Law Practice Division
Litigation
Science & Technology
Commission on Sexual Orientation and Gender Identity
Standing Committee on Professional Ethics
Judicial Division

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

Sara Elizabeth Dill
ABA Criminal Justice Section
1050 Connecticut Avenue NW, Suite 400
Washington, D.C. 20036
T: (202) 662-1511
E: sara.dill@americanbar.org

Rory Little
U.C. Hastings College of the Law
200 McAllister Street
San Francisco, CA 94102
415-225-5190 (cell)

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

Stephen Saltzburg
2000 H Street, NW
Washington, D.C. 20052
T: 202-994-7089
E: ssaltz@law.gwu.edu

Neal Sonnett
2 South Biscayne Blvd., Suite 2600
Miami, Florida 33131-1819
T: 305-358-2000
Cell: 305-333-5444
E: nnrslaw@sonnett.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution makes harmonizing edits and revisions to the ABA Standards for Criminal Justice: Prosecution Function, 4th Edition, and ABA Standards for Defense Function, 4th Edition involving small word or phrasing differences between Standards that were intended to be parallel. No substantive differences are envisioned or intended.

2. Summary of the Issue that the Resolution Addresses

This resolution adopts edits and revisions to places in the ABA Standards for Criminal Justice: Prosecution Function, 4th Edition, and ABA Standards for Defense Function, 4th Edition that, at the drafting stage, were intended to be parallel, but the final version adopted by the House of Delegates still required wordsmithing.

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

By adopting the proposed changes, the standards will reflect the intention of the drafters to have parallel provisions in certain provisions of the standards. These standards will be used in training programs and literature to provide guidance to prosecutors, defense attorneys, and judges in the performance of their duties in the criminal justice section. The standards will also continue to be used in lobbying efforts, and in amicus briefs.

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

None.
RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal governments to adopt policies and procedures that:

1. favor release of defendants upon their own recognizance or unsecured bond;
2. require that a court determine 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 before requiring such bail or bond;
3. 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;
4. permit a court to order a defendant to be held without bail where public safety warrants pretrial detention and no conditions of pretrial release suffice, and require that the court state on the record the reasons for detention; and
5. bar the use of “bail schedules” that consider only the nature of the charged offense, and require instead that courts make bail and release determinations based upon individualized, evidence-based assessments that use objective verifiable release criteria that do not have a discriminatory or disparate impact based on race, ethnicity, religion, socio-economic status, or sexual or gender identification.
REPORT

I. Curtailing Financial Conditions of Pretrial Release

A. The Escalating Use of Financial Release Conditions

Standard 10-5.1(a) of the ABA Standards for Criminal Justice: Pretrial Release (3d ed., 2007) [hereinafter ABA Standards] establishes a presumption that arrested people will be released on their personal recognizance, effectively a promise to appear in court. If release on personal recognizance would pose a “substantial risk” that a person will not show up for a court proceeding, endanger others’ safety, or imperil the judicial system’s “integrity” (through, for example intimidation of a witness), the person must still usually, but as mentioned below not always, be released, though subject to the “least restrictive” condition or conditions that “reasonably ensure” he or she will attend court proceedings and not imperil others or the judicial process’s integrity. ABA Standards 10-5.1(a)-(b), 10-5.2(a).

The American Bar Association’s longstanding call for the limitation of pretrial detention has manifested itself in myriad other ways. For example, upon a finding of probable cause to believe a person committed a charged crime, the ABA allows for pretrial detention only in very narrow circumstances. At a hearing with the procedural safeguards outlined in ABA Standard 10-5.10, the government must prove, by the heavy standard of clear and convincing evidence, that no release condition or conditions would “reasonably ensure” the defendant will appear in court or protect individual or public safety. ABA Standard 10-5.8(a). And when people are detained pretrial, they must be afforded “accelerated trials” to diminish the period of time they are subject to pretrial incarceration. ABA Standard 10-5.11.

Despite the ABA’s insistence that pretrial detention should occur only in exceptional situations, large-scale pretrial confinement has continued unabated in this country since adoption of the ABA Standards in 2002. (The commentary to the Standards was completed in 2007.) In 2015, almost eleven million people were admitted into a jail. Todd D. Minton & Zhen Zeng, U.S. Dep’t of Justice, Jail Inmates in 2015 at 2 (2016). Most of the people incarcerated in jails have not been convicted of the alleged crime that led to their confinement. They are simply awaiting a decision whether they will be charged with a crime or, if charged, their trial. These unconvicted individuals comprised over 62% of the people incarcerated in jails in 2015, up from 40% in 1983. Todd D. Minton & Zhen Zeng, U.S. Dep’t of Justice, Jail Inmates in 2015 at 5, Table 4 (2016); Allen J. Beck, U.S. Dep’t of Justice, Profile of Jail Inmates, 1989, at 2 tbl. 1 (1991).

One of the chief reasons for the extensive incarceration of presumptively innocent people is the conditioning of release from jail (or not being booked into jail) on the meeting of financial requirements, whether in the form of a cash payment, the posting of property as collateral, or a surety bond from a commercial bail bondsman. Even in 2002, before the publication of many new research findings about financial release conditions and alternatives to them, the ABA was largely opposed to financial release conditions. The ABA Standards, for example, bar financial conditions of release imposed to protect the public’s safety. ABA Standard 10-5.3(b). The Standards only allow the imposition of financial conditions of release (other than unsecured bond) when no other release condition would “reasonably ensure” a person’s appearance in
court. *Id.* at 10-5.3(a). The ABA Standards furthermore call on judges to refrain from imposing a financial release condition that "results in the pretrial detention of the defendant solely due to an inability to pay." *Id.*

As the Vera Institute of Justice recently reported, "Money, or the lack thereof, is now the most important factor in determining whether someone is held in jail pretrial." Ram Subramanian et al., Vera Inst. Of Justice, *Incarceration's Front Door: The Misuse of Jails in America* 29 (2015) [hereinafter Vera Report]. And therein lies the problem. Most of the people detained in jails are poor. Some manage to eventually procure the funds needed to post bail or pay a nonrefundable fee to a bail bonding company, though they have to endure days or weeks of incarceration in the meantime. Many others are unable to ever muster the financial resources needed to gain their freedom. In fact, statistics collected since the adoption of the ABA Standards have revealed that 90% of the individuals who never secure their release from jail while their criminal cases are being processed are not confined because they were denied bail due to being a flight risk or danger to the public. They are incarcerated simply because they could not muster the financial resources needed to secure their liberty. Brian A. Reaves, U.S. Dep’t of Justice, *Felony Defendants in Large Urban Counties, 2009*, at 15 (2013).

Recent statistics from New York City highlight how cash bail continues to erect an insurmountable barrier to freedom for so many people. In 2013, more than half (54%) of the people who had to remain in the city’s jails while their cases were being processed did not have enough money to pay bail set at $2500 or less. Vera Report 32. In fact, 31% of the non-felony defendants who were never able to secure their pretrial release were so poor that they could not even pay a bail sum as little as $500 or less. *Id.*

B. New Research Findings on the Harm Caused by Unneeded Pretrial Confinement

An abundance of research conducted and knowledge amassed since the adoption of the ABA Standards in 2002 have now made it clear that financial conditions of release fail to protect individual or public safety. At best, in rare cases, financial conditions may be used in conjunction with an individualized assessment of risk and ability to pay.

1. Financial Release Conditions’ Promotion of Uninformed and Arbitrary Pretrial-Release Decisions and Jeopardizing of Public Safety. The amount of money or property a person has is not an accurate predictor of the risk of danger that person poses to others or of the risk that he or she will not show up for a scheduled court proceeding. The inability to explain or demonstrate why one particular financial sum is a more appropriate release condition than a higher or lower sum is a further indicator of the arbitrary treatment that ensues from financial release conditions. But researchers have now developed, and jurisdictions are increasingly employing, validated risk-assessment instruments to guide pretrial-release and detention decisions. These empirically-tested tools are much more accurate predictors of risk than financial bail, intuition, or professional judgments unguided by such risk-assessment instruments. Conference of State Court Administrators, *2012-2013 Policy Paper: Evidence-Based Pretrial Release* 6-7 (2012).

---

1 About half of felony defendants subject to financial release conditions cannot meet them and remain in custody until the disposition of their cases. *Felony Defendants, 2009*, at 17.
The state of the science of risk assessment has advanced dramatically since the drafting of the ABA Standards. Before 2002, only a couple jurisdictions had conducted empirical studies of their risk-assessment tools, and those studies were limited. In 2003, a comprehensive pretrial risk-assessment validation study was published, the first validating a tool for use throughout an entire state—Virginia. Marie VanNostrand, Virginia Dep't of Criminal Justice Services, *Assessing Risk Among Pretrial Defendants in Virginia: The Virginia Pretrial Risk Assessment Instrument* (2003). Since then, other states have conducted pretrial risk-assessment studies to develop tools that can be used in all communities within those states. See, e.g., Pretrial Justice Inst., *The Colorado Pretrial Assessment Tool (CPAT)* (2012) [hereinafter *Colorado Pretrial Assessment Tool*]. And the Laura and John Arnold Foundation has developed and tested a tool normed for all jurisdictions across the country. Laura and John Arnold Foundation, *Developing a National Model for Pretrial Risk Assessment* (2013). These studies have demonstrated that it is possible to sort defendants into categories showing their probabilities of success on pretrial release.2

When pretrial detention decisions are informed by these risk-assessment instruments, individuals identified as low and moderate risk can remain in the community during the processing of their criminal cases, though moderate-risk individuals may be subject to certain release conditions, such as supervision requirements. Pretrial detention decisions regarding people classified as high risk also change. When a court determines, by clear and convincing evidence, that no conditions could provide a reasonable assurance of safety or court appearance if a high-risk individual were released, he or she will be detained in jail pending trial. The person will not be able, as now happens in jurisdictions with financial release conditions, to evade confinement when able to post cash bail or meet some other financial release condition. See, e.g., Michael E. Miller, *An Ohio man allegedly tried to kill his ex-wife. When he got out on bail, police say he finished his crime.*, THE WASHINGTON POST, Dec. 10, 2015, available at https://www.washingtonpost.com/news/morning-mix/wp/2015/12/10/an-ohio-man-allegedly-tried-to-kill-his-ex-wife-when-he-got-out-on-bail-police-say-he-finished-his-crime.

2. Increased Recidivism Due to Pretrial Jail Confinement. New research has unveiled that when low- and moderate-risk people are detained in jail for more than a day, they are significantly more likely to engage in a future crime. For example, low-risk people detained for just 2-3 days after their arrest were found to have a 39% higher odds of being arrested for a new crime while on pretrial release, while those held 4-7 days were 50% more likely to be arrested during this pretrial period. Christopher T. Lowenkamp et al., *The Hidden Costs of Pretrial Detention* 11, 17-18 (2013). The same patterns held true for moderate-risk defendants. Id. And this linkage between pretrial confinement and increased recidivism persisted even after the disposition of a criminal case. For example, low-risk individuals who were incarcerated pretrial for 2-3 days were 1.17 times more likely to recidivate during a 24-month post-disposition period. Id. at 28.

---

2 Another thing these studies have made clear is that most people confined in jail pretrial fall into low and moderate-risk categories, meaning that they are appropriate candidates for release on recognizance (low risk) or non-financial conditions (moderate risk). For example, the study of the Colorado statewide pretrial risk-assessment tool, which has four risk levels, found that 69% of the detainees were in the two lowest risk categories, with only 8% of them falling in the highest risk category. *Colorado Pretrial Assessment Tool* 19.
3. The Harm Unnecessary Pretrial Incarceration Inflicts on Confined People. The trauma and stigma that people endure from being incarcerated pretrial cannot be overstated, as recently reported data illustrate. The Bureau of Justice Statistics reported in 2015 that suicide has been the leading cause of death in jails since 2000, Margaret Noonan et al., U.S. Dep’t of Justice, Mortality in Local Jails and State Prisons, 2000-2013 – Statistical Tables 1, 3 (2015), with people confined in jail taking their own lives about three times more frequently than the general population. Lindsay M. Hayes, U.S. Dep’t of Justice, National Study of Jail Suicide: 20 Years Later 45 (2010). Pretrial detainees committed four-fifths of these suicides, a tragic indicator of the devastating effects of jail incarceration. Noonan, supra, at 12. The suicide risk is highest during the first seven days of confinement, id. at 3, 10, when people are experiencing what one corrections expert and court-appointed monitor for the Rikers Island Jail in New York City has termed the “shock of confinement.” The “Shock of Confinement”: The Grim Reality of Suicide in Jail (NPR radio broadcast, July 27, 2015).

Recent research has shed light on the numerous other ways in which people incarcerated before trial are gravely harmed due to their confinement. One stark example of this harm is the sexual victimization of people confined in jail. In 2011-12, 3.2% of the people confined in a jail reported having been sexually victimized since their confinement, a figure that translates into thousands of victims. Allen J. Beck et al., U.S. Dep’t of Justice, Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12, at 9 (2013).

4. Financial Bail’s Skewing of Criminal Case Outcomes. New research has revealed that pretrial detention due to an inability to post bond has a pervasive and negative impact on the outcomes of criminal cases. People who are incarcerated pretrial are more likely to be convicted than their unconfined counterparts. Mary T. Phillips, N.Y. City Criminal Justice Agency, A Decade of Bail Research in New York City 115-17 (2012) [hereinafter New York City Bail Research]. They are more likely to receive a jail or prison sentence. Id. at 115, 118-19. And they are more likely to receive longer prison or jail sentences than those who were not incarcerated pretrial. Id. at 115, 120-21.

The multivariate analyses of the effects of pretrial detention on case outcomes controlled for the effect of other variables that impact case outcomes, such as a person’s offense type, criminal history, or risk level. The most recent such study confirmed the particularly stark impact of pretrial detention on the sentences imposed. See Christopher T. Lowenkamp et al., Investigating the Impact of Pretrial Detention on Sentencing Outcomes (2013). The research found that people who were detained throughout the pretrial period were substantially more likely than those who were released to receive a sentence that involved either jail or prison. For example, detained individuals who had been scored by a validated pretrial risk-assessment tool as low risk were approximately five times more likely to receive a jail sentence and four times more likely to receive a prison sentence than people released during the pretrial period. Id. at 13, 17. Likewise, moderate-risk individuals who were detained during the pretrial period were approximately four times more likely to get a jail sentence and three times more likely to get a prison sentence, controlling for other factors, than their counterparts who were released during the pretrial period. Id.
That same study also looked at the length of sentences that were imposed on those who were in custody throughout the pretrial period compared to those who had been released pending trial. Looking at those who had scored as low risk on the pretrial risk assessment, the study found that jail sentences were three and a half times longer for those who had been detained pretrial than for those who had been released. *Id.* at 15. For those who had been scored as moderate risk, jail sentences were twice as long. *Id.* Likewise, controlling for other factors, prison sentences were much longer for those who had been detained pretrial than for those who had been released. *Id.*

These research findings are not a surprise. When people are unable to post bond and return to their families and community, they will likely be more prone, even when innocent, to agree during plea negotiations to enter a guilty plea in return for their earlier release from confinement. When people are confined during plea negotiations, they also have less leverage to induce an agreement from the prosecutor to reduce a charge in return for a guilty plea. The ensuing elevated convictions for people not wealthy enough to post bail yield more severe sentences than those imposed on like individuals who are not incarcerated during the processing of their cases. *Id.* at 115.

Another potential reason why those incarcerated pretrial are both more likely to be sent to jail or prison and to receive longer confinement sentences is that people released pretrial have the chance to show a sentencing judge how they are complying with the law, including court-ordered release requirements, and are working to change for the better – meeting family responsibilities, going to school, getting a job, obtaining treatment, and the like. *Id.* at 118. Those in jail without the financial means to secure their release have no such chance.

II. Key Requirements for Effective Pretrial-Release and Detention Decision Making

To realize the objectives of equal justice and public safety, this report outlines ten particularly key steps that jurisdictions need to take as they curtail or completely jettison the “antiquated and sometimes dangerous pretrial practices” in which pretrial release and detention are linked to a person’s wealth. Assistant Attorney General Laurie Robinson, U.S. Dep’t of Justice, Remarks at the National Symposium on Pretrial Justice (May 31, 2011). These key requirements provide guidance to jurisdictions seeking to implement practices that limit the use of detention, a principle supported by the ABA Criminal Justice Standards on Pretrial Release. Most of these requirements are self-explanatory, but four points bear highlighting.

First, the value of validated risk-assessment instruments, for which Requirements 1 and 3 call, in informing and guiding pretrial release decisions has already been mentioned. An additional benefit of empirically-based risk-assessment instruments is that they are also tailored to guide decisions regarding what conditions, if any, someone released pretrial should be subject to. This guidance can help avert the imposition of unnecessary release conditions on low-risk people. Research has made it clear that the best way to address low-risk people is through the option of personal recognizance. These individuals typically need no supervision or financial incentive to return to court, and researchers have in fact determined that release conditions can actually increase the risk of these individuals’ pretrial failure (a missed court appearance or arrest on another charge). Marie VanNostrand & Gena Keebler, U.S. Dep’t of Justice, *Pretrial Risk Assessment in the Federal Court* 32-33 (2009).
Empirically-grounded risk assessments can also facilitate the identification of the release conditions that will make it more likely that moderate-risk people will complete the pretrial period successfully while remaining in the community. A recent study found, for example, that, after controlling for numerous variables, pretrial monitoring of non-financial conditions significantly reduces the likelihood of failure to appear for both moderate-risk and certain higher-risk individuals. Christopher T. Lowenkamp & Marie VanNostrand, *Exploring the Impact of Supervision on Pretrial Outcomes* 13-14 (2013).

Second, it is vital that jurisdictions undertake and augment efforts to completely avoid unnecessary pretrial incarceration rather than simply take steps to shorten the length of such unneeded confinement. This is true not only because these individuals have not been convicted of a crime but because of the many onerous consequences of even short-term confinement, such as the increased recidivism and what can be suicide-generating despair, humiliation, and fear mentioned earlier.

Researchers have developed streamlined risk-assessment instruments that can accurately identify low-risk arrestees. See Marie VanNostrand & Christopher T. Lowenkamp, *Assessing Pretrial Risk without a Defendant Interview* (2013). Requirement 1 urges jail officials and others to employ such instruments to avoid the booking into jail and unnecessary incarceration of these low-risk people for whom a citation to appear in court will suffice. Judges can then, with the aid of a validated risk-assessment instrument, determine the conditions of release, if any, for other individuals booked into the jail.

Third, one of the primary goals of this resolution is to bring a halt to the prevailing practice in this country of incarcerating presumptively innocent people without the financial resources that would enable them to remain within their communities while decisions are being made regarding the pursuit or disposition of a criminal charge. At the same time, the resolution provides the means to assure that those with unmanageable risks are detained without bond. As Requirement 8 and the ABA Standards provide, after a hearing that comports with due process, judges can order the continued detention of people whom the government has proven, by clear and convincing evidence, pose such a high risk of danger to the public or the judicial system’s integrity or high risk of failure to appear for a court date that they cannot be released pretrial, even with conditions. See ABA Standard 10-5.8 (authorizing pretrial detention when “no condition or combination of conditions of release will reasonably ensure the defendant’s appearance in court or protect the safety of the community or any person”); Standard 10-5.9(a)(ii)(B) (also authorizing pretrial detention when there is a “substantial risk” that a charged defendant will “obstruct or attempt to obstruct justice, or threaten, injure, or intimidate a prospective witness or juror”); and Standard 10-5.10 (outlining the rights that must attend a pretrial detention hearing, including the right to be represented by counsel, to have counsel appointed if unable to pay for one, to be present and testify, to present witnesses, to confront and cross-examine the prosecution’s witnesses, to present other information to the court by proffer, and to have the judge describe on the record or in writing within three days the reasons for ordering a person’s detention pretrial).

Fourth, while the ABA recognizes that pretrial detention is, in very limited instances, necessary, the elimination of financial release conditions as the default mode of release will
eradicate their potential to undermine the procedural and substantive requirements that must be met under Requirement 8 and the ABA Standards in order for a person to be subjected to pretrial detention. No longer will it be possible to skirt the need for a detention hearing by simply setting a financial release condition that, as a practical matter, the person in question has no ability to meet.

III. Elimination of Bail Schedules

In the seminal case of Stack v. Boyle, the United States Supreme Court ultimately held that such blanket bail setting was improper, given the individualized criteria contained in the Federal Rules of Criminal Procedure for setting bail. 342 U.S. 1 (1951) The Court stated, “[b]ail set at a figure higher than an amount reasonably calculated to fulfill [the purpose of assuring the presence of the accused] is ‘excessive’ under the Eighth Amendment.” Id. at 5. The Court further held that to “reasonably calculate” the appropriate bail for individual defendants, courts must conduct bail determinations “based upon standards relevant to the purpose of assuring the presence of that defendant. The traditional standards, as expressed in the Federal Rules of Criminal Procedure, are to be applied in each case to each defendant . . . To infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act.” (Emphasis added.) Id. at 5, 6.

Since Stack, the Supreme Court has recognized an additional legitimate purpose for bail - community safety. See United States v. Salerno, 481 U.S. 739 (1987). Subsequently, nearly every state has incorporated the two valid purposes for bail - court appearance and community safety - into its laws or rules, along with standards relevant to furthering those purposes. These standards typically provide for individualized bail determinations, requiring judicial officials to weigh a variety of factors, including, among other things, the nature and circumstances of the offense charged, the weight of the evidence, family ties, employment, financial resources, and character and mental condition of the defendant. Despite the clear legal emphasis on the importance of individualized bail determinations, many American jurisdictions have nevertheless adopted a particular device that represents the antithesis of bail fixed according to the personal characteristics and circumstances of each defendant: the bail schedule.

The Purpose and Use of Bail Schedules

Broadly speaking, bail schedules are procedural schemes that provide judges with standardized money bail amounts based upon the offense charged, regardless of the characteristics of an individual defendant. These schedules might formally be promulgated through state law, or informally employed by local officials. They may be mandatory or merely advisory, and may provide minimum sums, maximum sums, or a range of sums to be imposed for each crime.

The practical effect of these schedules is to detain large numbers of arrestees on relatively low bonds. Misdemeanor and traffic violation bail schedules impose comparatively low bail, which ostensibly is to afford defendants charged with low-level offenses greater opportunity to

---

3 Adapted from Lindsay Carlson, Pretrial Justice Institute, Bond Schedules: A Violation of Judicial Discretion? (2010). With permission from the Pretrial Justice Institute.
obtain release. And yet, a study recently conducted in New York City reveals that in 2008, among defendants arrested on nonfelony charges (misdemeanors and traffic violations) and given bail of $1,000 or less, only 13% were able to post bail at arraignment. Human Rights Watch, The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City, December 2010 at 21. Even more significantly, nearly half of these defendants never made their bail – judges are reluctant to reduce bail unless circumstances have changed significantly - so they were held until the disposition of their case. Id. at 21. But even where judges may be willing to reduce bail, public defenders with limited resources and staff typically have to seek such a reduction. In the meantime, the arrestees sit in jail because they can’t afford their bail.

Finally, where these types of schedules represent a judicial determination that defendants charged with low-risk offenses ought to be released, the appropriate mechanisms are release on recognizance or unsecured appearance bonds. Otherwise, these low bail amounts simply serve as an arrest fine or tax on those defendants who can make bail, while detaining those who can’t. The reality is that even though most jurisdictions can use release on personal recognizance or unsecured bonds to facilitate swift release on low-level offenses, money bail schedules are so prevalent because most courts have come to embrace money as their primary and singular condition of pretrial release.

KEY REQUIREMENTS FOR EFFECTIVE PRETRIAL RELEASE
AND DETENTION DECISION MAKING

1. Validated risk-assessment instruments are utilized by trained individuals in conformance with best practices to avoid the unnecessary confinement of individuals in jail before their first appearance in court.

2. Individuals charged with a crime and confined in jail are provided prompt, meaningful access to an attorney who works to secure their immediate release and to ensure that any release condition is the least restrictive means of achieving its objective.

3. Validated risk-assessment instruments are utilized by trained individuals in conformance with best practices to assist the court in making appropriate decisions about the pretrial release or detention of those individuals who are booked into the jail.

4. Pretrial risk assessments exclude risk factors that have little predictive value but contribute to the disproportionate confinement of minorities and the poor.

5. The factors considered during pretrial risk assessments and the weight assigned to each factor are disclosed to the public and are readily accessible on the Internet.

6. Effective mechanisms are employed, including the use of technology, to alert and remind individuals of court dates.
7. The jurisdiction has the capacity to provide the appropriate level of supervision to individuals on pretrial release, when supervision is needed, and to implement other conditions of their pretrial release.

8. The court is authorized to enter an order of detention before trial when: (a) it finds by clear and convincing evidence, after a due-process hearing, that the person poses such a high level of risk that no condition or combination of conditions could provide a reasonable assurance that the public’s safety will be protected, that the defendant will appear in court if released pretrial, or that the judicial system’s integrity will not be imperiled; and (b) all other requirements for pretrial detention set forth in the ABA’s Standards for Criminal Justice: Pretrial Release (3d ed., 2007) and the law have been met.

9. Training is provided to judges, prosecutors, defense attorneys, law-enforcement officials, jail officials, and pretrial-services officers about the adverse effects of unnecessary pretrial detention, the performance of their pretrial-release-related functions, and the benefits and proper use of risk-assessment instruments.

10. The jurisdiction ensures that data on pretrial-release decisions in that jurisdiction are collected, evaluated, and publicized, at least annually, to ensure that risk-assessment instruments have been designed and are being implemented in a way that meets their objectives and to ensure that pretrial release and detention decisions comply with legal standards and the ABA Standards for Criminal Justice: Pretrial Release.

IV. Conclusion

Government leaders have begun to publicly decry prevailing pretrial-release practices that, in the face of over a decade of research, one would be hard-pressed to describe as sound policy or “pretrial justice.” For example, Delaware Governor Jack Markell noted in a speech in 2015: “It’s not working when a single mom gets stuck in detention because she can’t come up with a hundred bucks and has little to no family support, but a dangerous drug dealer can get his minions to bail him out. . . . Our bail process needs to change, and it can be done, but only if we’re cognizant of the full extent to which everyone involved in our criminal justice system must adjust their thinking.” Jessica Masulli Reyes, Will Delaware end cash bail? THE NEWS JOURNAL, Nov. 8, 2015, available at http://www.delawareonline.com/story/news/crime/2015/11/07/doing-away-cash-bail/74619298.

In New Jersey, Governor Chris Christie signed in sweeping reforms that took effect on January 1, 2017. These reforms allowed the pretrial release of individuals who could not afford bail and also permitted judges to deny bail to cases deemed to be flight risks or threats to the community. In New Mexico, voters similarly approved a Constitutional amendment which prohibited the detention of defendants based solely on the inability to pay, and allowed the denial of bail to defendants whose cases could not be managed in the community.

The use of financial release conditions is also being called into question on another front, through suits filed in a number of jurisdictions challenging, on constitutional grounds, various aspects of the use of these conditions. In one such case, Walker v. City of Calhoun, Georgia, No.
4:15-cv-0170-HLM (N.D. Ga. Jan. 28, 2016), the United States District Court for the Northern District of Georgia Rome Division entered a declaratory judgment stating that "[a]ttempting to incarcerate or to continue incarceration of an individual because of the individual's inability to pay a fine or fee is impermissible... This is especially true where the individual being detained is a pretrial detainee who has not yet been found guilty of a crime." In another case, Rodriguez v. Providence Community Corrections, Inc., No. 3:15-cv-01048 (M.D. Tenn. Dec. 17, 2015), in which bail schedules were challenged, the court wrote: "The use of secured money bonds has the undeniable effect of imprisoning indigent individuals where those with financial means who have committed the same or worse probation violations can purchase their freedom.... The Fourteenth Amendment precludes imprisoning someone because he or she does not have enough money." 4

As mentioned earlier, the ABA Standards currently permit the imposition of financial conditions of release “only when no other less restrictive condition of release will reasonably ensure the defendant’s appearance in court.” ABA Standard 10-5.3(a). But while there is no research indicating that financial release conditions are effective in promoting court appearances, recent research, as discussed previously, demonstrates that the use of validated risk-assessment instruments and properly calibrated non-financial release conditions are effective in improving appearance rates. In other words, in light of what we now know about release conditions, there will always be a “less restrictive condition of release” that “will reasonably ensure the defendant’s appearance in court.” Research has furthermore brought to light, not only that financial release conditions are rarely needed, but that they have adverse, and sometimes profoundly harmful, effects of which there was no knowledge fourteen years ago.

The American Bar Association reiterates its call to federal, state, local, territorial, and tribal governments to adopt policies and procedures that establish the presumption that arrested people will be released on their personal recognizance. Furthermore, research has given us the tools to make rational, research-informed, and transparent decisions, and the time has now come for all government officials – prosecutors, defense attorneys, judges, jail officials, legislators, and others – to “adjust their thinking” and join in practices that rationally and effectively promote individual liberty, public safety and the efficient administration of justice.

Respectfully submitted,

Matt Redle
Chair, Criminal Justice Section
August 2017

---

4 For a synopsis of other litigation challenging the constitutionality of certain financial pretrial-release conditions, see http://equaljusticeunderlaw.org/wp/current-cases/ending-the-american-money-bail-system/.
GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: Matt Redle, Chair

1. Summary of Resolution(s).

This resolution calls for the adoption of policies and procedures that: favor release on personal recognizance bonds or unsecured bonds; that permit cash bonds or secured bonds only upon a determination by the court that such financial conditions and no other conditions will assure appearance; and that pretrial detention should never occur due solely to an inability to pay. The resolution also calls for detention without bail under certain conditions, requires the use of individualized, evidence-based assessments that have been shown to have no discriminatory impact in detention decisions, and rejects the use of ‘bail schedules’ based on the pending charge.

2. Approval by Submitting Entity. This resolution was passed by the Criminal Justice Council at the Spring meeting in Jackson Hole, Wyoming, in May 2017.

3. Has this or a similar resolution been submitted to the House or Board previously? No.

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

The ABA Criminal Justice Standards address many of these issues and are concordant with the resolution. Standard 10-5.1(a) establishes a presumption for release on personal recognizance, and Standards 10-5.3(d)(1) and Standard 10-1.4(c) establish a preference for unsecured bonds over other financial conditions of release. Standards 10-5.8, 5.9, and 5.10 provide for pretrial detention without bail, although the Standards require courts to follow certain procedural safeguards in order for a defendant to be subject to detention without bail. Standards 10-5.3(a) and 10-1.4(e) prohibit financial conditions that cause pretrial detention due to an inability to pay them. Standard 10-5.3(a) prohibits cash bail and secured bond when a “less restrictive condition of release” would reasonably ensure appearance in court. Standard 10-5.3(e) requires that the imposition of financial release conditions be “individualized” and “never” set based on a “predetermined schedule of amounts.”

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

No.

6. Status of Legislation. (If applicable)

States across the country are re-examining their detention and release policies and practices. This includes SB 10 in California, which would eliminate county bail schedules.
and introduce pretrial risk assessments; a bill in Illinois that would require courts to order arrestees charged with a non-violent offense released on own recognizance; a bill in Nebraska that would require any bailable defendants to be released on his or her own recognizance unless the judge makes a determination that such release would not reasonably assure appearance or jeopardize public safety. Other states such as Florida, North Carolina and Idaho have commissions that are examining bail issues or have recently released reports. Some municipalities are taking the lead by re-examining their court rules or practices.

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

This resolution allows the ABA to speak out and bring attention to one of the most pressing criminal justice issues of the day. The detention of individuals before a determination of guilt or innocence due to an inability to pay has reached crisis proportions, with unconvicted persons making up two-thirds of the current jail population. As states and localities seek to change their detention and release practices, the ABA resolution provides guidance and support in this important matter.

8. Cost to the Association. (Both direct and indirect costs)
No costs known.

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

10. Referrals. Concurrent with the filing of this resolution and Report with the House of Delegates, the Criminal Justice Section is sending the resolution and report to the following entities and/or interested groups:

Commission on Veterans Legal Services
Standing Committee on Legal Aid & Indigent Defendants
Commission on Disability Rights
Commission on Hispanic Legal Rights & Responsibilities
Commission on Homelessness and Poverty
Center for Human Rights
Commission on Immigration
Commission on Racial & Ethnic Diversity in the Profession
Coalition on Racial & Ethnic Justice
Commission on Youth at Risk
Young Lawyer’s Division
Section of Civil Rights and Social Justice
Government and Public Sector Lawyers Division
Section of International Law
National Conference of Federal Trial Judges
National Conference of State Trial Judges
Law Practice Division
Section of Science & Technology Law
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Justin Bingham  
City Prosecutor  
City of Spokane Prosecutor's Office  
909 W. Mallon Ave.  
Spokane, WA 99201  
Phone: (509) 835-5994  
jbingham@spokanecity.org

Cherise Fanno Burdeen  
Chief Executive Officer  
Pretrial Justice Institute  
7361 Calhoun Place  
Suite 215  
Rockville, MD 20855  
Direct/Cell: 240-338-3827  
cherise@pretrial.org

Sara Elizabeth Dill  
Director, Criminal Justice Standards and Policy  
American Bar Association  
1050 Connecticut Ave. NW, Suite 400  
Washington, DC 20036  
Phone: 202-662-1511  
sara.dill@americanbar.org

12. Contact Name and Address Information.

Stephen Saltzburg  
2000 H Street, NW  
Washington, D. C. 20052  
T: 202-994-7089  
E: ssaltz@law.gwu.edu

Neal Sonnett  
2 South Biscayne Blvd., Suite 2600  
Miami, Florida 33131-1819  
T: 305-358-2000  
Cell: 305-333-5444  
E: nrslaw@sonnett.com
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

This resolution calls for the adoption of policies and procedures that: favor release on personal recognizance bonds or unsecured bonds; that permit cash bonds or secured bonds only upon a determination by the court that such financial conditions and no other conditions will assure appearance; and that pretrial detention should never occur due solely to an inability to pay. The resolution also calls for detention without bail under certain conditions, requires the use of individualized, evidence-based assessments that have been shown to have no discriminatory impact in detention decisions, and rejects the use of 'bail schedules' based on the pending charge.

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

The detention of individuals before trial due solely to an inability to pay has reached unmanageable proportions. According to the latest statistics available, approximately two-thirds of people in jail are awaiting trial, and research has shown that many of these people are low-risk individuals who could be returned safely to their jobs, families and communities, either on personal recognizance bond or unsecured bond, with the expectation that they will return to court. Meanwhile, for the individuals whose profiles suggest that they cannot be reasonably managed in the community, money bail still allows the possibility that they can be released.

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

The resolution affirms and highlights the ABA’s position on many critical issues regarding pretrial release and detention. As states and localities seek to revise their bail policies and practices, this resolution will help guide their decisions and provide evidence that these positions are widely accepted and recognized in the legal community.

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

None.
RESOLVED, That the American Bar Association urges federal, state, local, territorial and tribal
governments to adopt laws and policies with respect to pretrial release in juvenile cases that:

1. prohibit the use of financial conditions or collateral for release in any form;

2. use objective verifiable criteria that does not have a discriminatory or disparate
   impact based on race, ethnicity, religion, disability, sexual orientation or gender
   identification; and

3. use the least restrictive conditions of release that protect the public safety and assure
   likelihood of appearance in court.
INTRODUCTION

The IJA-ABA Juvenile Justice Standard 4.7 recommends, "The use of bail bonds in any form as an alternative interim status should be prohibited." The rationale for this position is that the practice of imposing financial conditions of release in juvenile cases is that "It could lead to the same abuses and injustices which have come under attack in the adult criminal system." Standard 10-5.1 of The ABA Standards for Criminal Justice: Pretrial Release (3rd ed., 2007), creates a presumption that arrested people will be released on their personal recognizance. The standard provides that if release on personal recognizance would pose "a substantial risk" that a person will not show up for a court appearance there is still a presumption that least restrictive conditions be imposed as an alternative to detention (ABA Standards 10-5.1 (a)-(b), 10-5.2). Adopting a resolution to end cash bail or bond in juvenile cases would be consistent with the Juvenile Justice Standards. Employing verifiable and race neutral instruments to assess the risk of court appearance would be consistent with ensuring that any conditions of release set in lieu of bail be focused on ensuring court appearance, and also comports with professional standards supporting the presumption of personal recognizance and utilization of the least restrictive alternative in lieu of bail.

THE ESCALATING USE OF CONDITIONS OF RELEASE

The Office of Juvenile Justice Delinquency and Prevention (OJJDP) has emphasized that an effective juvenile justice system does not use detention as a sanction. The juvenile justice system should not be used as a default social services provider. In the last two decades many youth have been referred to juvenile justice from schools, child welfare agencies and the mental health system. In 2000, there were over three million school suspensions and over 97,000 school arrests. Department of Education statistics indicated that in the 2010-2011 school year, African Americans were three to five times more likely to be arrested that white students and Latino students and youth who identify as LGBTQ do not fare much better. The vast majority of youth who are arrested or referred to juvenile courts have not been accused of serious offenses and half of them appear in the system only once. Fifty years after In Re Gault, about 84% of arrests for youth involving children are for non-violent and drug offenses. Francis Gerald Gault, age fifteen, was arrested in 1964 for allegedly making lewd phone calls to a neighbor, without benefit of trial or counsel, after a hearing in the judge's chambers, he was sentenced to the

1 IJA-ABA Juvenile Justice Standard 4.7: Commentary.
3 Donna St. George, Federal Data, WASHINGTON POST (Mar. 6, 2012).
5 387 U.S. 1 (1967).
Arizona Industrial Training School for an indeterminate period of time until age twenty-one. The "school" was "in all but name a penitentiary or jail."\(^7\) Gault emphasized that this deprivation of liberty was not different from the consequences faced by an adult in a felony prosecution. In many instances, youth are still being for conduct that is similar to the allegations made against Gault. About two-thirds of detention holds and subsequent commitment involve youth accused of non-violent offenses and similar percentages involve youth of color.\(^8\) Over 50% are detained for probation violations, including technical violations and holds for violation of pretrial conditions that might not be related to ensuring court appearance or for not paying fines and fees.\(^9\)

In acknowledging that children are not little adults, the United States Supreme Court has provided renewed vitality to JJ Standard 4.7 and its supporting commentary. As noted in *J.D.B. v. North Carolina*\(^10\), a child's age is far more than a chronological fact. It is a fact that generates commonsense conclusions about perception and behavior. In the aftermath of *Roper*\(^11\), *Graham*\(^12\), *J.D.B.*\(^13\), and *Montgomery*\(^14\), practitioners and jurists are considering the implications of the cases message of proportional accountability\(^15\) in a variety of contexts in and out of the courtroom. However, in the midst of this optimism and in spite of dramatic decreases in juvenile arrest rates, referrals to juvenile justice from schools, child welfare and mental health systems have increased as has the process of the recriminalization of status offense conduct that was decriminalized in the aftermath of *In Re Gault*\(^16\) and the enactment of the Juvenile Justice Delinquency Prevention Act (JJDPA) in 1974.

This process has been abetted by the unintended consequences of wide scale deployment of police in schools without first thinking of their relationship with educators and the scope of their authority and expanded use of zero tolerance. The enactment of the Valid Court Order (VCO) in 1980 has enabled over thirty states to bootstrap or convert status offense orders into delinquency probation violations. In 2010, Judge Brian Huff, from Birmingham, Alabama, informed a congressional committee that almost forty thousand status offenders pass through our detention systems annually with a disparate portion of that number being females. Without the VCO, twelve thousand would not be eligible for such treatment.\(^17\) Increased use of conditions of release that are not related to court appearance have accelerated recriminalization. Setting conditions of release, such as orders to attend to school or obey home rules, are the functional

---

\(^7\) Gault, Id. at 61 (Black, J. concurring).

\(^8\) NATIONAL CENTER FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS, 175-176 (2015).

\(^9\) OJJDP STATISTICAL DATA (2011).


\(^16\) 387 U.S. 1 (1967).

\(^17\) Meeting The Challenges Faced By Girls in the Juvenile Justice System: Hearing Before the House Subcommittee on Healthy Families and Communities, 111th Cong. 2 (2010).
equivalent of the VCO.\textsuperscript{18} Research indicates that detaining children, even for minimal periods has an enduring traumatic impact, and also increases recidivism.\textsuperscript{19} Detention disrupts pro-social development by disrupting the connective tissue of access to family, school and community. Recidivism is also increased by increased rates in school dropout and failure, which fuels the school-to-prison pipeline. Children who do not graduate high school are eight times more likely to later be arrested.\textsuperscript{20}

The National Juvenile Defender Center (NJDC) concludes that given the prevalence of youth being brought to court for non-violent property offenses, public order offenses, and drug offenses, that children are often being charged for "adolescent misconduct that is developmentally normative but unequally prosecuted among poor youth and youth of color."\textsuperscript{21} In fact, Black youth are nearly five times more likely to be confined than white youth, and Latino and American Indian and Alaska Native youth are two to three more times likely to be confined.\textsuperscript{22} As noted, "The outlawing of adolescence\textsuperscript{23} causes palpable harm, exacerbates public safety concerns, and threatens to return us to the pre-Gault era when status offense conduct jurisdiction was created.

The policies that have led to an over reliance on collection of bail monies, and fines and fees to fund criminal justice are paralleled in juvenile justice. The consequences of these practices are exacerbated by a child’s dependence on a parent or interested adult regarding indigence determinations as well as ability or willingness to post bond or pay fees and provide transport to court. In March of 2016 the Department of Justice issued recommendations to redress practices that disproportionately affect minority populations and poor communities\textsuperscript{24}. Bail orders and imposition of fees that cannot be paid foster class-driven preventive detention. The D.O.J. letter was directed at court systems to ensure “court systems at every level (emphasis included) of the justice system operate fairly and effectively.”\textsuperscript{25} The D.O.J. letter stresses that all courts must inquire about a defendant’s ability to pay in all contexts. Children, or their families, who are not able to post bond or pay fees penetrate more quickly into the juvenile and criminal justice systems, and the evidence suggests that this leads to increases in recidivism.\textsuperscript{26}

\textsuperscript{18} See e.g., Jake J. v. Commonwealth, 740 N.E. 2d 188 (Mass. 2000) (both conditions of release may be imposed at arraignment with consent of the juvenile; in this instance one of the conditions was attend school without incident. Advocates assert that failure to agree with suggested conditions may result in imposition of bail).
\textsuperscript{19} DEFEND CHILDREN, National Juvenile Defender Center (November 2016); citing e.g. Barry Holman & Jason Zeidenberg, The Dangers of Detention: The Impact of Incarcerating Youth In Detention And Other Secure Facilities, 2006; at 11.
\textsuperscript{20} Robin Dahlberg, Arrested Futures, ACLU (2012).
\textsuperscript{21} DEFENDING CHILDREN, Id. at 10.
\textsuperscript{22} Id., at 10 (citing ANNE E. CASEY FOUNDATION: REDUCING YOUTH INCARCERATION IN THE UNITED STATES 2 (2013).
\textsuperscript{23} DEFENDING CHILDREN, Id., at 10. See also, Blitzman, J. Are We Criminalizing Adolescence? ABA CRIMINAL JUSTICE (May 2015).
\textsuperscript{24} U.S. Department of Justice, Civil Right Division, Office for Access to Justice, Dear Colleague letter, p. 2 (March 14, 2016).
\textsuperscript{25} Id. pg. 2.
Moreover, in spite of Gault's admonition, that "The child requires the guiding hand of counsel at every stage for the proceedings against him." It is an open secret in America's justice system that countless of children accused of crimes are prosecuted and convicted without ever seeing a lawyer. This is in part due to onerous indigence determinations, excessive waiver, and a culture "that frowns upon zealous advocacy." Gault has not turned out to be the juvenile world's equivalent of Gideon. the holding was limited to the scope of due process during the adjudicatory hearing. Four years after Gault, a reconstituted Supreme Court viewing the same history through a different lens, ruled that juveniles are not constitutionally entitled to trial by jury. In the aftermath of this case, McKeiver v. Pennsylvania, each jurisdiction remains free to design the contours of its juvenile system, including the scope of process and access to counsel in all phases of the proceedings, including detention and transfer. Some states apply the criminal rules to juvenile matters, but that is largely by function of rule or statute. The decision not to "constitutionalize" due process at every stage of the proceedings means that juvenile proceedings are deemed quasi-criminal or civil in nature. Ramifications include jeopardizing adequate funding for indigent defense and the juvenile court in times of financial crisis. Access to justice is obviously informed by access to counsel.

The ABA standards have not had their desired effect. The Vera Institute reported recently that "Money, or the lack thereof, is now the most important factor in determining whether someone is held in jail pretrial." Most people who are detained are poor and are unable to post bail. In the criminal context statistics collected since the adoption of the ABA Standards demonstrate that 90% of the individuals who fail to secure their release while being held on bail are not detained because they were a flight risk. They are detained because they could not gather the necessary resources to secure their release. The tragedy of Kalief Browder provides a cautionary tale.

Use of Risk Assessment Tools

In proposing the use of risk assessment tools in juvenile tools it is critically important to emphasize that the resolution is focused on the use of instruments designed to assess the risk of court appearance. There is a danger in employing tools that address treatment protocols as they compromise the presumption of innocence and create the real possibility of greater systemic
involvement, what is euphemistically known as net widening, by the process of pretrial probation violations. Application of instruments that are not race neutral only serve to amplify systemic racial and ethnic disparities. An example of an empirically verifiable, race neutral instrument that assesses the likelihood of Failure to Appear (FTA) is the Massachusetts Juvenile Probation Arraignment Screening Tool (J-PAST). Nationally, most experts and virtually all professional standards indicate that detention should be used to ensure court appearance and in some instances, to minimize the risk of serious offending while current charges are pending. In Massachusetts, which employs a bail statute that applies to juveniles, the focus is on court appearance. The nature of an offense historically has been considered in the context of considering whether the allegation had an increased penalty range that might factor into court appearance. Beginning in 2008, researchers under the supervision of Tom Grisso, Ph.D., and Gina Vincent, Ph.D., directors of the National Youth Screening and Assessment Project at the University of Massachusetts, Department of Psychiatry, began to develop a screening tool as part of the state’s Juvenile Detention Alternative Initiative (JDAI). The process entailed analyzing each of the enumerated factors in the bail statute\(^35\) in an effort to see considerations were race neutral and which could be empirically validated as regards likelihood to appear. The analysis included assessing case data in selected Massachusetts juvenile courts between 2011-2014. The goal of the endeavor was to develop a tool that judges could use in the exercise of their discretion to detain or release an individual. The J-PAST tool is now in the assessment stages, but it is hoped that use of an objective screening tool, if used by judges, can address implicit bias, reduce unnecessary and harmful\(^36\) detention for lower risk youth, and enhance public safety.

Conclusions

The case to implement IJA-ABA Juvenile Justice Standard 4.7 by abolishing case bail is compelling. Detention is often unnecessary, increases recidivism, and is always traumatizing. In addition, the reality is that most youth who enter the juvenile system are accused of low-level offenses. It is axiomatic that in some instances secure detention is appropriate, but only in circumstances where there is a palpable public safety need.\(^37\) In such circumstances, most states provide for dangerousness hearing procedures. The fact is that default rates for youth are low. The Massachusetts J-PAST scores defendants on a three-point scale. A score of three is the highest Failure to Appear (FTA) score. However, even juveniles who receive this score in fact appear in court 75\% of the time.\(^38\) Regardless of their level of risk not appear, juveniles are very likely to appear in court. This conclusion reiterates the need to consider both the need for bail as well as the need for any conditions of release. If conditions are to be imposed, best practice suggests that they be limited to those that specifically address and are related to court appearance.\(^39\)

---

\(^{35}\) G.L. c. 276, sec. 58.

\(^{36}\) Id.

\(^{37}\) REFORMING JUVENILE JUSTICE. Id., Executive Summary.


\(^{39}\) See e.g. Massachusetts Trial Court Committee Conditions of Pretrial Release Report, Massachusetts Trial Court (2016).
Respectfully submitted,

Matt Redle, Chair
Criminal Justice Section
August, 2017
GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section
Submitted By: Matt Redle, Chair

1. Summary of Resolution(s).

This resolution urges all governmental entities to cease the use of bail/bond in the juvenile justice system. The resolution urges governmental entities to utilize objective criteria that do not have a discriminatory or disparate impact based on race, ethnicity, religion, socio-economic status, or sexual or gender identification, and utilizes the least restrictive conditions of release.

2. Approval by Submitting Entity.

This resolution was passed by the Criminal Justice Council at the Spring meeting in Jackson Hole, WY, in May, 2017.

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

No.

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

The old edition of the Juvenile Justice Standards addresses the issue of pretrial release of juveniles, but this resolution brings the policy up to date, and makes it much clearer. Additionally, the standards are currently under revision, and the task force has expressed its support of this resolution, and that it will be included in the new edition of the standards. Given that the Standards process takes years, the Criminal Justice Section felt that it was more important to adopt current policy on this issue.

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

Not applicable

6. Status of Legislation. (If applicable)

Not applicable

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

The proposed policy, if adopted, will be used in lobbying efforts and amicus briefs to encourage all states to eliminate the practice of bail and/or bond in juvenile cases. It may also be used by practitioners in proceedings involving a determination of pretrial release of a juvenile.
8. Cost to the Association. (Both direct and indirect costs)

None

9. Disclosure of Interest. (If applicable)

Not applicable.

10. Referrals.

Concurrent with the filing of this resolution and Report with the House of Delegates, the Criminal Justice Section is sending the resolution and report to the following entities and/or interested groups:

Litigation
Commission on Veteran’s Legal Services
Standing Committee on Legal Aid & Indigent Defense
Commission on Disability Rights
Special Committee on Hispanic Legal Rights & Responsibilities
Commission on Homelessness and Poverty
Center for Human Rights
Commission on Immigration
Racial & Ethnic Diversity
Racial & Ethnic Justice
Commission on Youth at Risk
Young Lawyer’s Division
Civil Rights and Social Justice
Government and Public Sector Lawyers
International Law
National Conference of Federal Trial Judges
National Conference of State Trial Judges
Commission on Sexual Orientation and Gender Identity
Law Practice Division
Science & Technology
Health Law
Children and the Law

11. Contact Name and Address Information.
Sara Elizabeth Dill
Director of Standards and Policy, Criminal Justice Section
American Bar Association
1050 Connecticut Ave NW, 4th Floor
Washington, DC 20036
202-662-1511
Sara.Dill@americanbar.org
12. Contact Name and Address Information.

Stephen Saltzburg  
2000 H Street, NW  
Washington, D. C. 20052  
T: 202-994-7089    E: ssaltz@law.gwu.edu

Neal Sonnett  
2 South Biscayne Blvd., Suite 2600  
Miami, Florida 33131-1819  
T: 305-358-2000  
Cell: 305-333-5444    E: nrslaw@sonnett.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges all governmental entities to cease use of bail/bond in the juvenile justice system. The resolution urges governmental entities to utilize objective criteria that do not have a discriminatory or disparate impact based on race, ethnicity, religion, socio-economic status, or sexual or gender identification, and utilizes the least restrictive conditions of release.

2. Summary of the Issue that the Resolution Addresses

A number of states allow parents to post bail/bond for their children in the juvenile justice system. The result of this practice is that there is enormous inequity between those children and youth who are released from detention facilities and those who are not, based solely on the financial condition of families. The decision between detention and release should instead be based on objective criteria that minimize the danger of discrimination or disparate impact based on race, ethnicity, religion, socio-economic status, or sexual or gender identification, and the decision to release should include the least restrictive conditions of release.

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

The proposed policy will urge states to reconsider the use of cash bail or bond in these cases and pass legislation and policies to stop its use in the juvenile justice system.

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

None are known.
RESOLVED, That the American Bar Association urges federal, state, local, territorial and tribal legislative bodies and governmental agencies to enact laws and adopt policies prohibiting the use of solitary confinement of children and youth under age 18.
REPORT

The principle that children and youth should not be subjected to solitary confinement in any juvenile or adult institution has the nearly unanimous support of individuals, including former President Barack Obama, and a range of organizations. Experts uniformly state that the use of solitary confinement has no place in juvenile confinement or treatment facilities, unless there is a compelling need to separate a child for a limited period of time. Solitary confinement causes the deterioration of the youth’s mental health in a number of ways and increases aggressive behavior by youth, and it does not make a facility safer or more secure. However, the use of solitary confinement remains widespread in state and local juvenile justice facilities. The proposed policy urges all federal facilities who house children and youth under age 18 to maintain the current ban on the use of solitary confinement and urges all state, territorial and local jurisdictions to discontinue its use of this practice.

Reports accompanying ABA policy urging implementation of the US Attorney General’s Report from the National Task Force on Children’s Exposure to Violence, entitled

---


4 DOJ data from 2003 estimates that one-third of youth in custody at that time had been held in isolation with no contact with other residents; more than half were held in solitary confinement for more than 24 hours. Dept’ Justice Office of Juvenile Justice and Delinquency Prevention, Conditions of confinement: Findings From the Survey of Youth in Residential Placement (May 2010). https://www.ncjrs.gov/pdffiles1/ojjdp/227729.pdf; Council of Juvenile Correctional Administrators Toolkit: Reducing the Use of Isolation, March 2015, http://cjca.net/index.php/resources/cjca-publications/107-toolkit-for-reducing-the-use-of-isolation at 2.
Defending Childhood, and ABA policy supporting trauma-informed legal advocacy, each discuss the need to eliminate the use of solitary confinement in juvenile facilities. However, reports to ABA resolutions are not policy, and this proposed resolution is necessary in order to make crystal clear the position of the American Bar Association.

Furthermore, the ABA developed standards governing the use of solitary confinement in juvenile facilities nearly four decades ago, at a time when the use of solitary confinement was considered an acceptable disciplinary measure in juvenile corrections. The IJA/ABA Juvenile Justice Standards relating to Corrections Administration stop short of an absolute prohibition on the practice, permitting the use of room confinement under very restrictive conditions. The commentary to those standards, however, noted that there was a case to be made then for abolition of the practice.

What is meant by solitary confinement?

Solitary confinement is the involuntary placement of a child or youth alone in a cell, room, or other area for any reason other than as a temporary response to behavior that threatens immediate harm to the youth or others and ends when the threat is over and, in no case, more than 4 hours. It's also known as “seclusion”, “isolation”, “segregation” or “room confinement”. One must examine labels that presume to consist of therapeutic practices and instead mean solitary confinement.

According to the American Psychological Association, youth in solitary confinement “may be confined in isolation for days, or even weeks; often have little or no human contact, even with health care providers; are frequently handcuffed or shackled when temporarily released from the cell; are denied the social interaction that plays an integral

---

5 "...many children who have experienced trauma also endure punitive measures, such as solitary confinement, that are still common in our juvenile justice system. The CEV (Children’s Exposure to Violence) report highlights that there is no evidence solitary confinement is rehabilitative; in fact, the suicide rate for youth who have been isolated is disproportionately high." ABA Policy, Children Exposed to Violence (Defending Childhood Task Force Recommendations), HOD 1118 (August 2013), report to the policy emphasizes the need for all juvenile justice facilities to adopt trauma-informed practices and deliver appropriate services for youth's mental health needs, citing Defending Childhood, December 2012, at 178. Report, p. 4. Further, the CEV Report states that use of isolation or solitary confinement for LGBTQ youth to shield them from bullying can serve to exacerbate trauma, and recommends that "consistent therapeutic supervision should be implemented in all juvenile justice facilities, without resorting to isolation, to ensure the safety of LGBT[Q] youth and thus protect them from further violence." Report, p. 7, citing Defending Childhood at p. 183.

6 ABA Policy, Trauma-Informed Legal Advocacy for System-Involved Children and Youth Exposed to Violence, HOD 1098 (February 2014), report p. 3, 9.


role in adolescent psychosocial development; are often denied access to educational materials or opportunities and have little access to recreational activities or recreational spaces. In 2014, Attorney General Eric Holder described the breadth of solitary confinement, as follows:

In a study released last year by the Office of Juvenile Justice and Delinquency Prevention, 47 percent of juvenile detention centers reported locking youth in some type of isolation for more than four hours at a time. We have received reports of young people who have been held in solitary confinement for up to 23 hours a day, often with no human interaction at all. In some cases, children were held in small rooms with windows that were barely the width of their own hands.

This is, to say the least, excessive. And these episodes are all too common.

It is critical to separate solitary confinement from what is best termed temporary confinement, or a time-out. Temporary confinement is sometimes necessary when a youth is out of control and poses an immediate risk of harm to him or herself or others, and de-escalation and other strategies have been ineffective. This can be a reasonable response by facility staff and administrators to a dangerous situation. When the youth regains self-control and is no longer a threat, the staff should return the youth to his or her regular program, but temporary confinement should never last more than 4 hours. A temporary “time out” is not solitary confinement.

---

9 Solitary Confinement of Juvenile Offenders. American Psychological Association https://www.apa.org/about/gr/issues/cyf/solitary.pdf,


11 AACAP statement, supra, 2, “Solitary confinement should be distinguished from brief interventions such as ‘time out’, which may be used as a component of a behavioral treatment program in facilities serving children and/or adolescents, or seclusion, which is a short term emergency procedure...seclusion should only be used for the least amount of time possible for the immediate physical protection of an individual, in situations where less restrictive interventions have proven ineffective.” http://www.aacap.org/aacap/Policy_Statements/2012/Solitary_Confinement_of_Juvenile_Offenders.aspx

12 Id.; see ACLU of Nebraska, Growing Up Locked Down, Jan. 24, 2016, https://www.aclunebraska.org/en/publications/growing-locked-down, for an extended discussion of maximum time periods for a time-out. Four hours is the recommended ceiling by the Juvenile Detention Alternatives Initiative, Annie E. Casey Foundation, but proposed federal legislation limits the time limit to 3 hours under the proposed MERCY Act of 2015, a federal act which was reintroduced in February 2017.
Solitary confinement poses a threat to youth mental health and is ineffective in preserving safety and security in an institution.

Solitary confinement has long-lasting and devastating effects on youth, some of which include trauma, psychosis, depression, anxiety and increased risk of suicide and self-harm. Its use is made worse by the impact of these effects on the developing adolescent brain, and the use of solitary confinement can lead to irreparable harm to youth’s physical, psychological and social growth and well-being. Solitary confinement is even more damaging to youth with mental disorders. Research shows that more than half of all suicides in juvenile facilities occurred while young people were held in isolation.

Research also shows that solitary confinement does not reduce behavioral incidents and may actually increase violent behavior in youth. The Director of the Ohio Department of Youth Services, which dramatically reduced use of solitary confinement in 2015, stated that solitary confinement “does not make facilities safer. It does not prevent violence or reduce assaults on staff and youth; instead, as the department’s data showed, it increases violence.”

Few helpful resources, if any, are available to youth in solitary confinement. There are no education programs, substance abuse treatment sessions or mental health therapies available to youth when held in isolation.

In an ever-decreasing number of states, youth ages 16 to 18 may be prosecuted as adults. And, in a number of states, prosecutors may transfer youth to adult status by

---

13 APA statement, supra, note 3.
15 Id., see also Lindsay M. Hayes, Juvenile Suicide in Confinement: A National Study (2004).
17 “What we saw in Ohio was that seclusion was actually making children worse,” said panelist Linda James, Assistant Director of the Ohio Department of Youth Services. “The more time they spent in seclusion, the more violent they became. Each act became more intensified and violent than the last. We’ve seen fantastic results [using alternatives to solitary confinement] in Ohio. We reduced seclusion by 89 percent and, at the same time, violence decreased by 22 percent.” OJJDP News at a Glance, OJJDP Joins National Campaign To End Solitary Confinement of Youth, May/June 2016, at https://www.ojjdp.gov/newsletter/249928/sf_3.html
18 AACAP statement, supra note 11; ACLU, supra note 14.
"direct file" and others may certify or transfer certain youth to adult criminal court based on a statutory procedure. Regardless of the setting, no one under the age of 18 should be subjected to solitary confinement, in either a juvenile detention or residential facility, or in an adult holding facility or prison.20

One has to ask why solitary confinement is used in youth facilities, and the answer is simple: it is cheap and convenient. Prolonged isolation is often used in facilities where there is insufficient or poorly-trained staff, inadequate resources to respond to disruptive behavior in less restrictive ways, or in situations where staff feel they have no other options.21 When resources are limited by state budgets, facility administrators and staff often use solitary confinement for youth with unaddressed mental health behaviors.22

Because the use of solitary confinement can be harmful and counterproductive, Robert Listenbee, in his role as Administration for the Office of Juvenile Justice and Delinquency Prevention concluded that the "isolation of children is dangerous and inconsistent with best practices and that excessive isolation can constitute cruel and unusual punishment."23 The Department of Justice argued in an amicus brief filed in 2017, that expert and scientific evidence on the damage to youth subjected to solitary confinement, together with the particular vulnerability of youth to suffer psychological damage and the nature of the conditions in that case, that solitary confinement caused youth a "substantial risk of harm" to which the defendants were deliberately indifferent, and thus violated the youth’s constitutional rights under the Eighth and Fourteenth Amendment.24

23 Letter from Robert L. Listenbee, Administrator, US Dep’t of Justice to Jesselyn McCurdy, Senior Legislative Counsel, American Civil Liberties Union (Jul. 5, 2013), as cited in American Civil Liberties Union, Alone and Afraid: Children Held in Solitary Confinement and Isolation in Juvenile Detention and Correctional Facilities (June 2014, revised), at 2, 9-10.
24 Statement of Interest of the United States, U.S. v. Conway, Civil No. 1:16-cv-1150 (DNH) (DEP) (January 3, 2017), citing the U.S. Supreme Court decisions in Miller v. Alabama, 132 S.Ct. 2455, 2467 (2012), Graham v. Florida, 560 U.S. 48, 68 (2010), Roper v. Simmons, 543 U.S. 551, 569 (2005) on the Court’s recognition of adolescent brain science; Former v. Brennan, 511 U.S. 825, 834 (1994) on the standard to be used in determining whether there is a violation of the Eighth Amendment; and H.C. v. Jarrard, 786 F.2d 1080, 1088 (11th Cir. 1986) where the Court considered evidence that isolating juveniles can cause serious harm, and stated that "juveniles are even more susceptible to mental anguish than adult convicts."
There is national consensus that the use of solitary confinement must be eliminated in all youth facilities.

Most prominent is the current ban on solitary confinement in federal facilities that house youth, as ordered by President Obama and the Department of Justice in early 2016.\(^{25}\) The federal Office of Juvenile Justice and Delinquency Prevention strongly supports efforts to end youth solitary confinement.\(^{26}\) Many professional organizations, including the American Academy of Adolescent and Child Psychiatry, the American Psychological Association, the National Partnership for Juvenile Services and the National Council of Juvenile and Family Court Judges, support the end of solitary confinement for youth.\(^{27}\) A bi-partisan group of US Senators introduced legislation, the Sentencing Reform and Corrections Act of 2015, which limits the use of solitary confinement for youth in federal custody to situations in which the youth poses a serious and immediate threat of physical harm, and limits isolation to no more than three hours.\(^{28}\) Senators Rand Paul and Cory Booker also introduced the “Record Expungement Designed to Enhance Employment Act of 2015” or the “REDEEM Act”, which would have prohibited the “use of room confinement at a juvenile detention facility for discipline, punishment, retaliation, staffing shortages, administrative convenience, or any reason other than as a temporary response to the behavior of a juvenile that poses a serious and immediate risk of physical harm to the juvenile, to others, or to the juvenile and others.”\(^{29}\) And, in February, 2017, Senator Cory Booker re-introduced the “Maintaining dignity and Eliminating unnecessary Restrictive Confinement of Youths Act” or the “MERCY Act”, which would prohibit the use of solitary confinement as stated in the REDEEM Act.\(^{30}\)

An increasing number of states have banned solitary confinement and continue to do so. The State of California passed legislation in 2016.\(^{31}\) North Carolina banned the use of solitary confinement for children and youth that year as well, and youth corrections systems in Alaska, Connecticut, Indiana, Massachusetts, Maine, Mississippi, Nebraska, Nevada, New Jersey, New York, Ohio, Oklahoma, Oregon, West Virginia, and Texas have all reduced the use of solitary confinement.\(^{32}\) In Massachusetts, the Department of

\(^{25}\) US Department of Justice, Report and Recommendations Concerning the Use of Restrictive Housing, March 30, 2016.

\(^{26}\) The Council of Juvenile Correctional Administrators Toolkit: Reducing the Use of Isolation (2015) and Reducing Isolation in Youth Facilities Training and Technical Assistance Program (RIYA-TTA) programs were the products of grants from OJJDP. RIYA-TTA Program originally consulted with juvenile justice programs in California, Indiana, Massachusetts, Oregon and West Virginia.

\(^{27}\) See, Resolution to Reduce Use of Solitary Confinement for Youth, Sept 2016 at https://www.ncjfcj.org/Solitary-Confinement-Resolution


\(^{29}\) S.675 - 114th Congress (2015-16), REDEEM Act, Section 5045 (B) (1), at https://www.congress.gov/bill/114th-congress/senate-bill/675 The REDEEM Act also specified strict conditions under which a juvenile could be placed in temporary confinement, similar to those in the Sentencing Reform and Corrections Act of 2015.


\(^{31}\) Senate Bill 1143 was signed by Governor Jerry Brown on Sept. 27, 2016.

Youth Services rarely uses isolation for more than 2 hours and does not use it as punishment. Many other states and local jurisdictions have taken steps to reform the use of juvenile solitary confinement on youth, sometimes in the form of agency policy change or statewide legislation, and other times in response to investigations and litigation.

In a 2016 study by the Lowenstein Center for the Public Interest, best practice is simply stated: “Prohibit punitive solitary confinement.” The Lowenstein study describes the strategies states are using to eliminate the use of solitary confinement. Stop Solitary for Kids and the Juvenile Detention Alternatives Initiative (JDAI) likewise have identified and posted a number of ways to reduce and ultimately eliminate solitary confinement.

Under JDAI Juvenile Facility Standards, non-punitive room confinement:
- Must be governed by policies and procedures;
- Must be fully documented by facility staff;
- Can only be used if the behavior threatens imminent physical harm to youth or others;
- Cannot be used as punishment or discipline, or for administrative convenience or staffing shortages;
- Can only be used after staff has exhausted less restrictive de-escalation techniques;
- Must be used only for the time necessary for youth to regain control and no longer pose a threat;
- Must be approved by a unit supervisor and senior administrators;
- Cannot be used for more than 4 hours.

JDAI standards also require that the room in which a youth is confined must be clean, sanitary, suicide-resistant, and protrusion-free, with adequate ventilation, a comfortable temperature with reasonable access to water, toilet facilities and hygiene supplies. Staff must also develop a plan that allows youth to leave room confinement and return to

---


33 Listenbee, supra note 23.
35 Id., at 9.
36 Annie E. Casey Foundation, Stop Solitary for Kids Position Statement, http://www.aecf.org/blog/casey-supports-national-campaign-to-stop-solitary-for-kids/s; Annie E. Casey Foundation, Juvenile Detention Facility Assessment, 2014 (update) at 177-182, see also, Council of Juvenile Correctional Administrators Toolkit: Reducing the Use of Isolation (March 2015);
37 Id.
programming as soon as possible. Qualified mental and medical health professionals must be involved to treat out-of-control youth and to determine if a youth should be transferred to a mental health facility. Further standards are enumerated to protect and serve youth at risk of self-harm.\textsuperscript{38}

It is most important to recognize that an exception to restrict movement by a youth who threatens the safety of himself or another, under specific circumstances and for only as much time as necessary to regain control, should and must not become the rule, whereby a youth is instead confined for automatic periods of 4 hours, in an effort to re-assert punishment and inflict harm. The goal for all children and youth who must be housed in a juvenile facility is treatment and rehabilitation under safe and humane conditions.

\textbf{Conclusion}

All branches of government – executive, legislative and judicial – express grave concerns about the continued practice of holding youth in solitary confinement for extended periods of time, days on end, for punitive reasons. Medical experts agree there is no medical or scientific justification for continued the use of solitary confinement among youth in juvenile justice facilities. States and counties are gradually altering the practice of solitary confinement in both state post-adjudication residential centers and local detention facilities, but this practice must be eliminated across this country as soon as practicable. Long ago, in its Juvenile Justice Standards, the ABA questioned whether there was any rationale supporting the practice. Based on the overwhelming evidence now available, there is not. The American Bar Association should approve policy to end the use of solitary confinement for children and youth by all branches of government.

Respectfully submitted,

Matt Redle
Chair, Criminal Justice Section

August, 2017

\textsuperscript{38} \textit{Id.}
GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section
Co-Sponsor: Commission on Youth at Risk

Submitted By: Matt Redle, Chair

1. Summary of Resolution(s).
This resolution urges all governmental entities to end the practice of solitary confinement against juveniles in all detention and post-adjudication facilities. Juvenile solitary confinement has many euphemisms, but it is defined as the involuntary placement of a child or youth alone in a cell, room, or other area for any reason other than as a temporary response to behavior that threatens immediate harm to the youth or others and ends when the threat is over and, in no case, more than 4 hours.

2. Approval by Submitting Entity. This resolution was passed by the Criminal Justice Council at the Spring Meeting in May, 2017.

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?
Reports accompanying ABA policy urging implementation of the US Attorney General’s Report from the National Task Force on Children’s Exposure to Violence, entitled Defending Childhood, and ABA policy supporting trauma-informed legal advocacy, each discuss the need to eliminate the use of solitary confinement in juvenile facilities. However, reports to ABA resolutions are not policy, and this proposed resolution is necessary in order to make crystal clear the position of the American Bar Association.

Furthermore, the ABA developed standards governing the use of solitary confinement in juvenile facilities nearly four decades ago, at a time when the use of solitary confinement was considered an acceptable disciplinary measure in juvenile corrections. The IJA/ABA Juvenile Justice Standards relating to Corrections Administration stop short of an absolute prohibition on the practice, permitting the use of room confinement under very restrictive conditions. The commentary to those standards, however, noted that there was a case to be made then for abolition of the practice.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?
Not applicable

6. Status of Legislation. (If applicable)
None.
7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.**
   Adoption of the policy will allow the ABA to support efforts in all branches of government that are working to end the practice of solitary confinement in juvenile facilities.

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

9. **Disclosure of Interest.** (If applicable)
   Not applicable.

10. **Referrals.** Concurrent with the filing of this resolution and Report with the House of Delegates, the Criminal Justice Section is sending the resolution and report to the following entities and/or interested groups:
   - Standing Committee on Legal Aid & Indigent Defense
   - Commission on Disability Rights
   - Commission on Hispanic Legal Rights & Responsibilities
   - Commission on Homelessness and Poverty
   - Center for Human Rights
   - Commission on Immigration
   - Center on Racial & Ethnic Diversity
   - Young Lawyer's Division
   - Section on Civil Rights and Social Justice
   - Government and Public Sector Lawyers Division
   - International Law Section
   - National Conference of Federal Trial Judges
   - National Conference of State Trial Judges
   - Law Practice Division
   - Section on Science & Technology
   - Health Law Section
   - Section of Litigation
   - Solo, Small Firm and General Practice Division
   - Center on Children and the Law

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

    Sara Elizabeth Dill
    American Bar Association
    1050 Connecticut Ave NW, 4th Floor
    Washington, DC 20036
    202-662-1511
    Sara.dill@americanbar.org
Linda Britton  
American Bar Association  
1050 Connecticut Ave NW, 4th Floor  
Washington, DC 20036  
202-662-1730  
Linda.Britton@americanbar.org

12. **Contact Name and Address Information.**  
Stephen Saltzburg  
2000 H Street, NW  
Washington, D. C. 20052  
T: 202-994-7089  
E: ssaltz@law.gwu.edu

Neal Sonnett  
2 South Biscayne Blvd., Suite 2600  
Miami, Florida 33131-1819  
T: 305-358-2000  
Cell: 305-333-5444  
E: mrslaw@sonnett.com
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

This resolution urges all governmental entities to end the practice of solitary confinement against juveniles in all detention and post-adjudication facilities. Juvenile solitary confinement has many euphemisms, but it is defined as the involuntary placement of a child or youth alone in a cell, room, or other area for any reason other than as a temporary response to behavior that threatens immediate harm to the youth or others and ends when the threat is over and, in no case, more than 4 hours.

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

Concern over the circumstances under which children and youth are held in locked facilities has been evident for years to the point where all three branches of government have weighed in on this issue and its deleterious impact on children and youth. Many feel that the use of this practice violates the Eighth Amendment proscription against cruel and unusual punishment.

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

The proposed position will allow lawyers and the ABA to continue to work with other jurisdictional officials to end this practice in all juvenile facilities.

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

None.
RESOLVED, That the American Bar Association urges federal, state, local, territorial and tribal governments to enact laws allowing individuals to petition to expunge all criminal justice records pertaining to charges or arrests that did not result in a conviction.
REPORT

Summary

This resolution calls for jurisdictions to allow individuals to petition courts, law enforcement, and other applicable criminal justice record keeping entities to expunge, or remove from public view, records pertaining to nonconvictions, including arrests, charges, dispositions of *nolle prosequi* and acquittals.

I. Introduction

One in three American adults has a criminal record.¹ Individuals with criminal records face discrimination in hiring, promotion, and professional licensure.² Many jurisdictions allow for the expungement, or clearing, of a person’s criminal record.³ Laws governing the expungement of criminal records vary from state to state.⁴ Generally, the expungement of a criminal record involves a legal process in which the record or existence of an arrest, charge, or in some cases, the conviction, is removed from public view.⁵ “Public view” means only police records and court records, not news or social media, or in some cases private background check software.⁶ There is generally no right to privacy in expunged records in the United States, although the European Union and other nations have adopted laws providing such protections in recent years.⁷

The expungement of criminal records can be very helpful for individuals who are being denie d employment based on their criminal records,⁸ or those facing limited options for housing.⁹ In many cases, expungement does not apply to guilty adjudications,¹⁰ but only to arrests, charges, dispositions of *nolle prosequi*, diversion programs, or acquittals. In the rare instance where a guilty disposition may be expunged, the category of crimes that are allowable to petition for expungement are often “nuisance crimes.”¹¹ Examples of nuisance crimes include: urination in a public place, soliciting or panhandling, consuming alcohol in public, and loitering or vagrancy.¹²

---

² Id.
³ Id.
⁹ http://www.abacollateralconsequences.org/
¹² Id.
Many times, these crimes are related to homelessness or extreme poverty.\textsuperscript{13}

The current ABA policies on expungement pertain only to victims of human trafficking\textsuperscript{14} and juveniles\textsuperscript{15}. In resolution 103A from 2015, the Association adopted the \textit{Model Act Governing the Confidentiality and Expungement of Juvenile Delinquency Records}.\textsuperscript{16} This Model Act calls for, among other things, the expungement, or total destruction of, records of delinquency automatically two years after the disposition was filed.\textsuperscript{17} Resolution 104H, from the 2013 Midyear Meeting, calls for jurisdictions to allow victims of human trafficking to vacate their criminal convictions, for non-violent offenses that are a direct result of their trafficking and victimization.\textsuperscript{18} The currently proposed resolution seeks to broaden ABA policy on expungement law by allowing for the expungement, or complete destruction of, criminal records of events that did not result in a guilty adjudication, including but not limited to records of arrests, citations, charges, dispositions of \textit{nolle prosequi}, acquittals, and pardons.

\section*{II. The Problem}

One third of Americans have a criminal record, mostly for low level misdemeanors.\textsuperscript{19} These marks on their criminal record can lead to negative impacts on their employment prospects, housing, and professional licensure.\textsuperscript{20} Despite the popularity of “ban the box” legislation nationwide, which prohibits employers from asking whether applicants have a criminal record early into the recruitment process, recent research suggests that in the absence of the ability to screen based on criminal record, such policies may actually increase discrimination against minority applicants.\textsuperscript{21}

The definition of “expungement” varies from state to state.\textsuperscript{22} For the purposes of this resolution, “expungement” refers to the complete removal from public view of an individual’s criminal records including arrests, charges, referrals to diversion programs, acquittals, and dispositions of \textit{nolle prosequi}, but not of convictions. Many states have policies that allow for “sealing” of records, but these records are still available to law enforcement and some professional licensure.

\begin{thebibliography}{9}
\bibitem{13}No Safe Place The Criminalization of Homelessness in U.S. Cities, National Law Center on Homelessness & Poverty, https://www.nlchp.org/documents/No_Safe_Place
\bibitem{14}See resolution 104H (February 11, 2013) http://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/Resources/Trafficking\%20Policies/2013\_MY\_104H.authcheckdam.pdf
\bibitem{15}See Resolution 103A (August 2015) http://www.americanbar.org/content/dam/aba/images/abanews/2015annualresolutions/103a.pdf
\bibitem{16}https://www.americanbar.org/content/dam/aba/images/abanews/2015annualresolutions/103a.pdf
\bibitem{17}Id.
\bibitem{18}Id.
\bibitem{19}https://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/Resources/Trafficking\%20Policies/2013\_MY\_104H.authcheckdam.pdf
\bibitem{21}Id.  
\end{thebibliography}
agencies, and may be “unsealed” with a court order. This is an inadequate remedy for individuals facing discrimination merely because they have a criminal justice related mark on their record that never resulted in a conviction. The appropriate legal recourse for these individuals is the complete destruction of these records. An additional benefit of this method of record removal, is it allows individuals to truthfully say “no” if asked whether they have ever been arrested or charged with a crime in jurisdictions that have not embraced “ban the box” style legislation.

III. Positive Outcomes Related to Expungement

More permissive expungement laws allow people to obtain jobs and housing that can lift them out of poverty. Securing meaningful employment has been shown to be one of the most predictive factors of criminal recidivism. Having a criminal record, even if an individual was acquitted or if the charges were dismissed, can have a negative effect on employment prospects. In many states, records of nonconvictions, such as arrests, can remain open to public view indefinitely. NYU Law Professor James Jacobs refers to this indefinite retention as “the eternal criminal record.” This, compounded with already existing racial biases in employment can lead to worse outcomes for individuals of color. In a recent study, 22% of white applicants with a criminal history were given a call back interview for a job versus 10% of black applicants with a criminal history. For individuals with criminal convictions who have previously served time in prison, the employment prospects are grim. It is estimated that the “wage penalty” or the disparity between those who have been imprisoned and those who have not is between 10 to 20 percent. More permissive expungement laws can lead to more success and less interaction with the criminal justice system for people of color, impoverished individuals, and people who have experienced or are currently experiencing homelessness.

---

23 See N.Y. Crim. Proc. sec. 160.59(7)
29 Id
Studies conducted on the topic of record clearing suggest that record clearing both increases employment rates and also increases earnings. In one particular study, participants who had their record cleared experienced a 5 to 10 percent increase in employment rate after having their records cleared. Additionally, these participants also experienced an increase in earnings after having their records cleared. In the three years after record clearing, participant earnings increased by roughly $6,000, which equates to roughly one third of the sample’s average earnings of $18,000 annually. While more data is needed on the topic of record expungement, these results point towards a net positive impact on employment prospects for individuals who have successfully cleared their criminal records, and a net benefit to society as a whole.

Expungement can also play a particularly important role for racial minorities by reducing the effects of racially motivated arrests and convictions. Policies which do not allow for the expungement of nonconvictions have a disparate impact on minorities who are often victims of racial profiling and targeting by police. "Broken windows" style policing has lead to an increase in arrests of minorities for minor crimes, which contributes to longer criminal records. Broken Windows Theory, termed by criminologists George Kelling and James Wilson in a 1982 issue of The Atlantic, suggests that obvious signs of neglect in a neighborhood signal to both residents and outsiders that the neighborhood is uncared for, and if police address small signs of disorder, then the larger crimes are less likely to occur. This approach to crime control was famously embraced by then-New York City mayor Rudy Giuliani after winning election in 1993. New Yorkers saw violent crime plummet, supposedly due to this new approach. However, crime was also dropping in other cities that had not adopted this policing style, which called into question the efficacy of this method. Whether “broken windows” policing was the cause of the drop in crime or not, what began as a crackdown on subway gate jumpers quickly morphed into discriminatory practices such as “stop and frisk.” Policy makers began to realize that cracking down on low level crime often meant racial profiling, and thousands of young black men were being repeatedly stopped on the street without ever having committed a crime. In a 2008 analysis of stops, only one-fifteenth of 1 percent of stops for “furtive movements” turned up a gun. Kelling and Wilson addressed the potential for this type of abuse in 1982, and Kelling has since spoken out against stop and frisk, but regardless of the

36 Id.
37 Id.
38 Id.
39 Id.
40 Id.
41 Id.
42 Id.
43 Id.
44 Id.
45 Id.
46 Id.
47 Id.
48 Id.
intention behind the theory, it led to decades of abusive policing, targeting young black men, and leading to consistent contact with the criminal justice system.49

Overly restrictive laws regarding criminal records do not take into account the impact of poverty on criminal justice outcomes.50 Individuals who are poor are more likely to be arrested and convicted of crimes.51 They also likely will not have access to an attorney who can assist them with expungements at completion of the criminal case, which could lead to different decisions on whether to accept plea deals based on the collateral consequences of conviction.52 Further, in many states, individuals charged with misdemeanors are not entitled to representation, which will clearly lead to less optimal outcomes than if the individual was represented by counsel.53 Laws that restrict an individual’s recourse in removing nonconvictions from their criminal record clearly have a disparate impact on the poor and people of color, which will lead to less meaningful employment and less economic stability in communities of color.

In addition to poor employment prospects, individuals with a criminal record experience discrimination in housing.54 This type of discrimination is not limited to simply denying individuals housing who have a criminal record.55 Poor credit histories and a lack of rental history also contribute negatively to housing prospects.56 Expungement of criminal records can lead to better housing outcomes, and thus, more stability and likelihood for economic success.57 Family unification is also a major concern. In many cases, public housing regulations prohibit those with criminal records to live in public housing.58 This causes the breakup of family units, and unfairly penalizes primary caregivers by removing their partners from the household and prevents them from meaningfully sharing household responsibilities.59

Recidivism is expensive. Some researchers estimate the cost of crime in the United States at approximately 300 billion dollars per year.60 This includes costs of policing, courts, and

51Elizabeth Brown, Ph.D. and Randall G. Shelden, M.A., Ph.D., Does Age or Poverty Level Best Predict Criminal Arrest and Homicide Rates? A Preliminary Investigation, Justice Policy Journal - Volume 8, Number 1, (May 12, 2011), http://www.cjcj.org/news/5579#article-5
56Id.
58Id.
59Id.
corrections. Additionally, the United States employs 2.5 times more correctional officers compared to the rest of the world. Allowing for expungement can increase employment and housing prospects and decrease recidivism, and potentially "increase the economic viability of entire communities." Overall, the public safety risk to allowing individuals to remove charges, arrests, acquittals, and other non-guilty dispospositions from their record is small compared to the safety concerns surrounding recidivism and further incidences of crime. Additionally, allowing individuals to remove nuisance crime convictions from their record can help individuals move on from poor economic conditions and contribute meaningfully to the economy. On an economic level, reducing recidivism decreases spending on corrections, and increases people entering the workforce which stimulates economic growth. The societal and economic benefits to a more permissive expungement law are numerous, and on a human level, securing meaningful employment leads to lower incidences of drug and alcohol abuse, lower levels of depression, and more healthy family relationships. The benefits of permissive expungement laws are numerous, and will lead to better outcomes for individuals, families and communities.

IV. The Need for More Expungement Clinics, Programs, and Pro Bono Counsel

Laws allowing for the expungement of nonconvictions are only as helpful if they are accessible. Law school clinics, nonprofits, and pro bono attorneys are needed to assist individuals in interpreting their rights under their state’s particular expungement statute. In addition to available pro bono attorneys, training is needed to assist attorneys in assisting individuals in expunging their records.

Law firms seeking to increase their firm’s pro bono contributions should consider implementing training and resources on criminal record expungement for their attorneys. Additionally, law student clinics should also consider planning record sealing days each month where clients may come to the clinic for assistance expunging their record. The American Bar Association could play an important role in this arena.

61 Id.
62 Id.
63 Id.
Finally, courts should make information on record sealing clear, concise and accessible for clients filing petitions pro se. Templates and links to step by step instructions for filing are most helpful to individuals seeking to expunge their records.

V. Conclusion

Though the United States enjoys a presumption of innocence in its criminal justice system, that presumption does not always translate to everyday life. Individuals regularly face discrimination based on the mere fact that they were arrested or charged with a crime. Records of criminal justice events that do not result in a conviction have little to no informational value, but can have a damaging impact on an individual’s ability to obtain housing and employment. Providing individuals with legal recourse to remove nonconvictions from their record will reduce recidivism thereby improving public safety, and lead to healthier and more prosperous communities.

Respectfully submitted,

Matt Redle
Chair, Criminal Justice Section
August 2017
112F

GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: Matt Redle, Chair

1. Summary of Resolution(s).

This resolution calls for jurisdictions to allow individuals to petition courts, law enforcement, and other applicable criminal justice record keeping entities to expunge, or remove from public view, records pertaining to nonconvictions, including arrests, charges, dispositions of nolle prosequi and acquittals.

2. Approval by Submitting Entity.

This resolution was passed by the Criminal Justice Council at the Spring meeting in Jackson Hole, WY, in May 2017.

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?

Comports with all relevant ABA policy on expungement and record sealing including:

- Resolution 104H (February 11, 2013)
- Resolution 103A (August 2015)
  http://www.americanbar.org/content/dam/aba/images/abanews/2015annualresolutions/103a.pdf
- Resolution 106 (Midyear 2007)
  http://www.americanbar.org/content/dam/aba/publications/criminaljustice/2017/cj_policies_list.pdf

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

N/A

6. Status of Legislation. (If applicable)

N/A

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

Policy will be used for lobbying efforts in conjunction with Governmental Affairs Office, in the filing of amicus briefs, for CIS’s State Policy Implementation Project and other relevant projects. Policy will also be used for CLE and member event purposes.
8. Cost to the Association. (Both direct and indirect costs)

N/A

9. Disclosure of Interest. (If applicable)

N/A

10. Referrals. Concurrent with the filing of this resolution and Report with the House of Delegates, the Criminal Justice Section is sending the resolution and report to the following entities and/or interested groups:

- Legal Aid & Indigent Defense
- Commission on Disability Rights
- Special Committee on Hispanic Legal Rights & Responsibilities
- Commission on Homelessness and Poverty
- Center for Human Rights
- Commission on Immigration
- Racial & Ethnic Diversity
- Racial & Ethnic Justice
- Youth at Risk
- Young Lawyer’s Division
- Civil Rights and Social Justice
- Government and Public Sector Lawyers
- International Law
- National Conference of Federal Trial Judges
- National Conference of State Trial Judges
- Law Practice Division
- Science & Technology
- Health Law
- Litigation
- GP/Solo
- Children and the Law
- Standing Committee on Professional Ethics

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

   Lauren King
   1050 Connecticut Ave, NW
   Washington, DC 20036
   202-662-1523
   lauren.king@americanbar.org
12. **Contact Name and Address Information.** (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

Stephen Saltzburg  
2000 H Street, NW  
Washington, D. C. 20052  
T: 202-994-7089  
E: ssaltz@law.gwu.edu

Neal Sonnett  
2 South Biscayne Blvd., Suite 2600  
Miami, Florida 33131-1819  
T: 305-358-2000  
Cell: 305-333-5444  
E: nrslaw@sonnett.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution calls for jurisdictions to allow individuals to petition courts, law enforcement, and other applicable criminal justice record keeping entities to expunge, or remove from public view, records pertaining to nonconvictions, including arrests, charges, dispositions of nolle prosequei and acquittals.

2. Summary of the Issue that the Resolution Addresses

Expungement refers to removing criminal records from public view by petitioning the court. Expungement generally only refers to charges, not convictions. This resolution calls for jurisdictions to allow those individuals who do not have a criminal conviction but nevertheless have a public record of criminal justice events to expunge that record, allowing them to obtain housing and employment they may not have previously been able to obtain.

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

This resolution calls for jurisdictions to allow those individuals who have a public record of criminal justice events to expunge that record, allowing them to obtain housing and employment they may not have previously been able to obtain.

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

This resolution is the result of extensive debate and discussion by the ABA Criminal Justice Council (a balanced mix of prosecutors, defense attorneys, judges and others). The primary concern is providing prosecutors and law enforcement access to records that may show a pattern of criminal behavior, even if none of the arrests or charges resulted in convictions. However, the proposed resolution was approved by the council as it appeared to address the concerns raised at the meeting. Additionally, this resolution calls for the availability and accessibility of expungement procedures, with ultimate decision on expungement to be made on a case-by-case basis, which is usually done only with the approval and consent of the prosecutor’s office.
RESOLVED, That the American Bar Association urges federal, state, local, territorial and tribal
governments to enact laws allowing for the expungement of: (a) convictions, or
(b) other statutory ordinances or violations where a court enters a finding of guilt, for actions
performed in public spaces that are associated with homelessness.
**Summary**

This resolution calls for jurisdictions to allow individuals to file expungement petitions to remove from public view records of the violation of nuisance crimes, or life-sustaining crimes associated with homelessness, including convictions for such violations.

**I. Introduction**

Laws governing the expungement of criminal records vary from state to state. Generally, to expunge a criminal record is a legal process in which the record of an arrest, charge, or in some cases conviction is removed from public view. “Public view” means only police records and court records, not news or social media, or in some cases private background check software. The expungement of criminal records can be very helpful for individuals being denied employment based on their criminal records. The expungement of criminal records can be very helpful for individuals being denied employment based on their criminal records. In many cases, expungement of criminal records can also help individuals obtain housing that they did not previously qualify for. It is important to note that in many cases, expungement does not apply to guilty adjudications. Most states allow for at least some form of record clearing for nonconvictions such as arrests, charges, dispositions of *nolle prosequi*, diversion programs, or acquittals. In the states where a guilty disposition may be expunged, the category of crimes that are allowable to petition for expungement are often “nuisance crimes.” Examples of nuisance crimes include: urination in a public place, soliciting or panhandling, consuming alcohol in public, and loitering or vagrancy. Many times, these crimes are related to homelessness or extreme poverty.

When an individual has expunged a record, or removed it from public view, it is as if the arrest (or other criminal justice event) never occurred. This allows the individual to respond in the

---

6 http://www.abacollateralconsequences.org/
9 Id.
11 See Conn. Gen. Stat. §§ 54-142a; 31-51l(d) for an example of a statute allowing individuals to deny arrest under oath if they have had the record expunged.
negative when asked if he or she has ever been arrested, which can have a net positive effect on their ability to obtain housing, employment, and education and professional licensure.\textsuperscript{12}

The ABA policies on expungement thus far pertain only to victims of human trafficking\textsuperscript{13} and juveniles\textsuperscript{14}. This resolution seeks to broaden the ABA’s stance on expungement law, by allowing for the expungement of convictions for life-sustaining activities, or crimes associated with homelessness.

\section*{II. Prior ABA Policy}

This resolution is consistent with prior ABA policy on life-sustaining acts.\textsuperscript{15} Crimes such as panhandling, loitering, or vagrancy are often crimes committed out of necessity. If an individual is experiencing homelessness, they may be forced to sleep on the streets if shelter is not available.\textsuperscript{16} The ABA has previously called for the decriminalization of laws that punish individuals experiencing homelessness for carrying out otherwise non-criminal “life-sustaining” acts in public spaces such as eating, sleeping or camping\textsuperscript{17} and called upon lawmakers to revise laws and policies to “recognize the problems faced by the homeless when the demand for shelter, housing and services exceeds the supply."\textsuperscript{18} The resolution further urges courts, prosecutors, and other legal actors to consider the problems faced by homeless persons who may be forced to engage in life-sustaining practices in public spaces because they have no alternative private space.\textsuperscript{19} This resolution would take this policy one step further, providing actual relief for individuals who have been convicted of these crimes of necessity.

\section*{III. Types of Expungeable Offenses}

In many states, the only types of crimes that are expungeable are nonconvictions.\textsuperscript{20} However, some states do allow for expungement of convictions, particularly for non-violent misdemeanors.\textsuperscript{21} While the public safety concerns surrounding sex offenses and violent felonies may have merit, a blanket rule disallowing expungement of criminal convictions does not take into account the individualized circumstances surrounding certain types of convictions. A permanent public history of crimes associated with homelessness or poverty, including panhandling and public urination do not serve a public safety purpose, and cause more harm to

\begin{footnotes}
\item[\textsuperscript{12}] \textit{Id}. See also Colo. Rev. Stat. § 24-72-703(4)(d)
\item[\textsuperscript{13}] See resolution 104H (February 11, 2013)
\item[\textsuperscript{14}] See Resolution 103A (August 2015)
http://www.americanbar.org/content/dam/aba/images/abanews/2015annualresolutions/103a.pdf
\item[\textsuperscript{15}] See Resolution 106 (Midyear 2007)
http://www.americanbar.org/content/dam/aba/publications/criminaljustice/2017/cj_policies_list.authcheckdam.pdf
\item[\textsuperscript{16}] No Safe Place The Criminalization of Homelessness in U.S. Cities, National Law Center on Homelessness & Poverty, https://www.nlchp.org/documents/No_Safe_Place
\item[\textsuperscript{17}] Resolution 106, Midyear 2007
\item[\textsuperscript{18}] \textit{Id}.
\item[\textsuperscript{19}] \textit{Id}.
\item[\textsuperscript{20}] See Ala.Code 1975 § 15-27-1
\item[\textsuperscript{21}] See https://www.nacdl.org/ResourceCenter.aspx?id=25091#ND for a comprehensive list of state expungement policies.
\end{footnotes}
the affected individual than benefit to society.22 Though these crimes are often considered minor criminal violations, they still require the convicted individual to check the box admitting to being convicted of a crime on job applications.23 Though there is much progress on “ban the box” laws nationwide, many employers still have biases, implicit or otherwise, against those convicted of a crime, no matter how minor.24 Further, many employers will disqualify an applicant solely based on being convicted of a crime, without doing further research into the type of offense.25

Further, under the flawed police practices resulting from “Broken Windows Theory,”26 many jurisdictions adopted policies that increased arrests for nonviolent nuisance crimes as a means of general crime control.27 Broken Windows Theory, termed by criminologists George Kelling and James Wilson in a 1982 issue of The Atlantic, suggests that obvious signs of neglect in a neighborhood signal to both residents and outsiders that the neighborhood is uncared for, and if police address small signs of disorder, then the larger crimes are less likely to occur.28 This approach to crime control was famously embraced by then-New York City mayor Rudy Giuliani after winning election in 1993.29 New Yorkers saw violent crime plummet, supposedly due to this new approach. However, crime was also dropping in other cities that had not adopted this policing style, which called into question the efficacy of this method.30 Whether “broken windows” policing was the cause of the drop in crime or not, what began as a crackdown on subway gate jumpers quickly morphed into discriminatory practices such as “stop and frisk.”31

Policy makers began to realize that cracking down on low level crime often meant racial profiling, and thousands of young black men were being repeatedly stopped on the street without ever having committed a crime.32 In a 2008 analysis of stops, only one-fifteenth of 1 percent of stops for “furtive movements” turned up a gun.33 Kelling and Wilson addressed the potential for this type of abuse in 1982, and Kelling has since spoken out against stop and frisk,34 but regardless of the intention behind the theory, it led to decades of abusive policing, targeting young black men, and leading to consistent contact with the criminal justice system. Thus, many individuals faced police scrutiny for routine activities such as socializing outside of their

---

23 See https://www.eeoc.gov/laws/practices/inquiries_arrest_conviction.cfm
25 Id.
30 Id.
31 Id.
32 Id.
33 Id.
34 Id.
apartment building. Young men of color continue to be the most affected by these flawed policing methods.

In a study conducted by Berkeley Law's Policy Advocacy Clinic, researchers found that in California, enforcement of anti-homelessness laws is likely based more on status rather than specific behavior. The data shows that while enforcement of "vagrancy" crimes is increasing, arrests for similar crimes such as drunkenness and disorderly conduct are decreasing, illustrating that homeless individuals are being punished for being undesirable to the community, rather than for exhibiting bad behavior. Punishing homeless persons for being homeless decreases the affected persons' ability to gain housing and employment, keeping them in a cycle of poverty. Expungement could provide recourse for individuals targeted by these dubiously constitutional anti-homeless statutes.

Allowing the expungement of convictions for nuisance crimes serves both a compassionate and economical purpose. The social stigma surrounding homelessness and criminal convictions can lead to denial of housing, employment, and potentially other collateral consequences. One of the highest predictors of recidivism is lack of employment. Having to carry around convictions for arguably crimes of survival unfairly blocks individuals from meaningful employment opportunities. Expunging nuisance convictions would lift a huge barrier for individuals trying to get back on their feet after experiencing homelessness or extreme poverty.

IV. Positive Outcomes Associated with Record Expungement

More permissive expungement laws allow people to obtain jobs and housing that can lift them out of poverty. Securing meaningful employment has been shown to be one of the most predictive factors of criminal recidivism. Having a criminal record, even if an individual was acquitted or if the charges were dismissed, can have a negative effect on employment
In many states, records of nonconvictions such as arrests can remain open to public view indefinitely. NYU Law Professor James Jacobs refers to this indefinite retention as "the eternal criminal record." This, compounded with already existing racial biases in employment, can lead to worse outcomes for individuals of color. In a recent study, 22% of white applicants with a criminal history were given a callback interview for a job versus 10% of black applicants with a criminal history. For individuals with criminal convictions who have previously served time in prison, the employment prospects are grim. It is estimated that the "wage penalty" or the disparity between those who have been imprisoned and those who have not is between 10 to 20 percent. More permissive expungement laws can lead to more success and less interaction with the criminal justice system for people of color, impoverished individuals, and people who have experienced or are currently experiencing homelessness.

Studies conducted on the topic of record clearing suggest that record clearing both increases employment rates and also increases earnings. In one particular study, participants who had their record cleared experienced a 5 to 10 percent increase in employment rate after having their records cleared. Additionally, these participants also experienced an increase in earnings after having their records cleared. In the three years after record clearing, participant earnings increased by roughly $6,000, which equates to roughly one third of the sample's average earnings of $18,000 annually. While more data is needed on the topic of record expungement, these results point towards a net positive impact on employment prospects for individuals who have successfully cleared their criminal records.

Expungement can also play a particularly important role for racial minorities by reducing the effects of racially motivated arrests and convictions. Expungement laws not allowing for the clearing of convictions for life-sustaining crimes have a disparate impact on minorities who are...
often victims of racial profiling and targeting by police. Additionally, “broken windows” style policing can lead to an increase in arrests for minor crimes, which may lead to longer criminal records. Overly restrictive laws regarding criminal records do not take into account the impact of poverty on criminal justice outcomes. Individuals who are poor are more likely to be arrested and convicted of crimes. They also likely will not have access to an attorney who can assist them with expungements at the time of their case, which could lead to different decisions on whether to accept plea deals based on the collateral consequences of conviction. Further, in many states, individuals charged with misdemeanors are not entitled to representation, which will clearly lead to less optimal outcomes than if the individual was represented by counsel. Laws that restrict an individual’s recourse in removing convictions for life-sustaining crimes from their criminal record clearly have a disparate impact on the poor and people of color, which will lead to less meaningful employment and less economic stability in communities of color.

In addition to poor employment prospects, individuals with a criminal record experience discrimination in housing. This type of discrimination is not limited to simply denying individuals housing who have a criminal record. Poor credit histories and a lack of rental history also contribute negatively to housing prospects. Expungement of criminal records can lead to better housing outcomes, and thus, more stability and likelihood for economic success. Family unification is also a major concern. In many cases, public housing regulations prohibit those with criminal records to live in public housing. This causes the breakup of family units, and unfairly penalizes primary caregivers by removing their partners from the household and prevents them from meaningfully sharing household responsibilities.

Recidivism is expensive. Some researchers estimate the cost of crime in the United States at approximately 300 billion dollars per year. This includes costs of policing, courts, and

---

63 Elizabeth Brown, Ph.D. and Randall G. Shelden, M.A., Ph.D., Does Age or Poverty Level Best Predict Criminal Arrest and Homicide Rates? A Preliminary Investigation, Justice Policy Journal - Volume 8, Number 1, (May 12, 2011), http://www.cjcj.org/news/5579#article-5
68 Id.
70 Id.
71 Id.
corrections. Additionally, the United States employs 2.5 times more correctional officers compared to the rest of the world. Allowing for expungement can increase employment and housing prospects and decrease recidivism, and potentially “increase the economic viability of entire communities.” Overall, any possible public safety risks associated with allowing individuals to remove convictions for life-sustaining acts from their record is small compared to the safety concerns surrounding recidivism and further incidences of crime. Additionally, allowing individuals to remove nuisance crime convictions from their record can help individuals move on from poor economic conditions and contribute meaningfully to the economy. On an economic level, reducing recidivism decreases spending on corrections, and increases people entering the workforce which stimulates economic growth. The societal and economic benefits to a more permissive expungement law are numerous, and on a human level, securing meaningful employment leads to lower incidences of drug and alcohol abuse, lower levels of depression, and more healthy family relationships. The benefits of permissive expungement laws are numerous, and will lead to better outcomes for individuals, families and communities.

V. Conclusion

This resolution calls for jurisdictions to allow individuals to petition for expungement of records of convictions for life-sustaining activities. Allowing individuals to remove convictions for these non-violent crimes of necessity will give them the hand up they need to lift themselves out of poverty. Because recidivism is expensive, both to the individuals paying court costs, and to society as a whole, policies that make it possible for individuals with prior criminal convictions to obtain employment serve both a compassionate and a fiscally responsible purpose.

Respectfully submitted,

Matt Redle
Chair, Criminal Justice Section
August, 2017

73 Id.
74 Id.
75 Id.
GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted by: Matt Redle, Chair

1. Summary of Resolution(s).

This resolution calls on jurisdictions to allow for the expungement of convictions for so-called “nuisance crimes” or life staining crimes including, but not limited to, public urination, loitering, and vagrancy.

2. Approval by Submitting Entity.

This resolution was passed by the Criminal Justice Council at the Spring meeting in Jackson Hole, WY, in May 2017.

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?

Comports with all relevant ABA policy on expungement and record sealing including:
Resolution 104H (February 11, 2013)

Resolution 103A (August 2015)
http://www.americanbar.org/content/dam/aba/images/abanews/2015annualresolutions/103a.pdf

Resolution 106 (Midyear 2007)
http://www.americanbar.org/content/dam/aba/publications/criminaljustice/2017/ej_policies_list.authcheckdam.pdf

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

N/A.

6. Status of Legislation. (If applicable)

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

Policy will be used for lobbying efforts in conjunction with Governmental Affairs Office, filing of amicus briefs, for CJS's State Policy Implementation Project, and other relevant projects. Policy will also be used for CLE and member event purposes.

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

N/A.

9. Disclosure of Interest. (If applicable)

N/A.

10. Referrals. Concurrent with the filing of this resolution and Report with the House of Delegates, the Criminal Justice Section is sending the resolution and report to the following entities and/or interested groups:

- Legal Aid & Indigent Defense
- Commission on Disability Rights
- Special Committee on Hispanic Legal Rights & Responsibilities
- Commission on Homelessness and Poverty
- Center for Human Rights
- Commission on Immigration
- Racial & Ethnic Diversity
- Racial & Ethnic Justice
- Youth at Risk
- Young Lawyer's Division
- Civil Rights and Social Justice
- Government and Public Sector Lawyers
- International Law
- National Conference of Federal Trial Judges
- National Conference of State Trial Judges
- Law Practice Division
- Science & Technology
- Health Law
- Litigation
- GP/Solo
- Children and the Law
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Lauren King
1050 Connecticut Ave, NW
Washington, DC 20036
202-662-1523
lauren.king@americanbar.org

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

Stephen Saltzburg
2000 H Street, NW
Washington, D. C. 20052
T: 202-994-7089
E: ssaltz@law.gwu.edu

Neal Sonnett
2 South Biscayne Blvd., Suite 2600
E: nrslaw@sonnett.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution also calls on jurisdictions to allow for the expungement of convictions for so-called “nuisance crimes” or life staining crimes such as public urination, loitering, and vagrancy.

2. Summary of the Issue that the Resolution Addresses

Expungement generally refers to removing criminal records from public view by petitioning the court. Expungement generally only refers to charges, not convictions. This resolution addresses expungement of convictions only for non-violent life sustaining crimes (sometimes referred to as nuisance crimes) including public urination, loitering and vagrancy.

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

The proposed policy will allow individuals convicted of life sustaining crimes such as public urination, loitering, and vagrancy to expunge convictions or violations for those offenses.

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

None.
RESOLVED, That the American Bar Association urges state, territorial, and tribal legislatures to amend their guardianship statutes to require that supported decision-making be identified and fully considered as a less restrictive alternative before guardianship is imposed; and urges courts to consider supported decision-making as a less restrictive alternative to guardianship; and

FURTHER RESOLVED, That the American Bar Association urges state, territorial, and tribal legislatures to amend their guardianship statutes to require that decision-making supports that would meet the individual’s needs be identified and fully considered in proceedings for termination of guardianship and restoration of rights; and urges all courts to consider available decision-making supports that would meet the individual’s needs as grounds for termination of a guardianship and restoration of rights.
An individual's right to make decisions about his or her life is a fundamental value in American law. Guardianship is a legal means by which a court appoints a third party (guardian) to make some or all decisions on behalf of an adult whom the court finds is not able to make decisions for him or herself. While guardianship can be an important protective device, it results in loss of an individual's right to make life choices. Accordingly, because of the significant liberty and property interests at stake, less restrictive alternatives must be considered before a guardianship is imposed. Most state statutes have recognized this important concept.

This resolution does several things. First, it continues and furthers the American Bar Association’s (ABA) long-standing interest in, and commitment to, ensuring that guardianship is a “last resort” after other, less restrictive options have been considered. Second, the resolution recognizes the newly denominated modality of supported decision-making—in which people make their own decisions with supports, rather than rely on a surrogate—and urges that it be explicitly included in guardianship statutes requiring consideration of less restrictive alternatives. Supported decision-making is a process by which individuals choose a trusted person or persons to support them in making their own decisions and exercising their legal capacity. Supporters can be friends, family, professionals, advocates, peers, community members, or any other trusted person. They may gather and present relevant information; help the person to understand and weigh decisions, including potential risks, options, and likely outcomes and consequences; communicate the decision to third parties such as health care professionals and financial institutions; and/or assist in implementing the decision. Finally, the resolution further urges courts reviewing already existing guardianships to consider decision-making supports as appropriate grounds for terminating guardianship and restoring the rights of the person who was subject to the guardianship.

This report provides background on adult guardianship and the legal principle of the least restrictive alternative; examines the concept of supported decision-making; summarizes relevant ABA involvement and policy; and explains the need for this resolution.

Background

Guardianship has been employed since Roman times to “protect” persons who are unable to manage their personal or financial affairs because of “incapacity” by removing their right to make decisions and giving legal power to another person, the guardian. In the United States,
guardianship is a matter of state law. Before a guardian may be appointed, an individual must be determined to be an “incapacitated person,” generally defined as

an individual who, for reasons other than being a minor, is unable to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance.4

In most jurisdictions, a single guardianship statute covers all incapacitated adults, regardless of the cause of their incapacity, which often is cognitive impairment due to aging. Six states—California, Connecticut, Idaho, Kentucky, Michigan, and New York—have a separate statute or provision that covers guardianship of persons with intellectual or developmental disabilities.5

Guardianships may be plenary (full), removing all decision-making rights from the person subject to guardianship, or limited, taking away decisions in those areas in which the person is found to lack capacity. Although virtually all statutes include a strong preference for limited guardianships, what empirical data exists suggests that the vast majority of guardians appointed are given total, or plenary power, to substitute their decisions for those of the persons under guardianship, often referred to as “wards” or “incapacitated persons.”6

Few states collect information on guardianship in ways that make it possible to make accurate statements about its prevalence. The National Center for State Courts estimated that, based on the average of active pending adult-guardianship cases in four states for 2008, the number of active cases in the United States is 1.5 million, but could range from less than 1 million to more than 3 million due to the variance between the states.7 With the growing number of aging baby boomers,8 that number is expected to increase significantly.

---

5 CAL. PROB. CODE § 1801(d); CONN. GEN. STAT. ANN. § 45a-669 et seq.; IDAHO CODE ANN. § 15-5-301 et seq.; KY. REV. STAT. ANN. § 387.500 et seq.; MICH. COMP. LAWS ANN. ch. 330 (Mental Health Code), §330.1600 et seq.; N.Y. SURR. CT. PROC. ACT art. 17-A.
7 Brenda K. Uekert & Richard Van Duizend, Adult Guardianships: A “Best Guess” National Estimate and the Momentum for Reform, in FUTURE TRENDS IN STATE COURTS 2011 107-08 (National Center for State Courts, 2011). State Court Leaders Strive to Improve Guardianship and Conservatorship Oversight, NCSC Backgrounder, Nov. 30, 2016, http://www.nscs.org/Newsroom/Backgrounders/2016/Guardianship.aspx (the National Center for State Courts stated that, based on data from a handful of state courts in 2015, there were an estimated 1.3 million open guardianship or conservatorship cases).
It is estimated that between seven and eight million Americans of all ages, or three percent of the general population, experience intellectual or developmental disabilities. According to a 2014-15 National Core Indicators (NCI) survey, 42 percent of adults with intellectual disability across 46 states and the District of Columbia have some kind of guardianship arrangement in place.

Because guardianship intrudes substantially on a person’s liberty, self-determination, and autonomy, it has been the subject of successive reform efforts that have significantly increased the statutorily required (though often ignored in practice) due process protections afforded an “alleged incapacitated person.” These reforms have also attempted to ensure that the substituted decision-making regime of guardianship is the “last resort” or, as a constitutional matter, the “least restrictive alternative” available to protect a person who is unable to care for him or herself.

The “least restrictive alternative” principle was first recognized by the U.S. Supreme Court in Shelton v. Tucker, and has been applied in a number of contexts, including institutionalization and guardianship, to limit state deprivation of individual rights and liberties only to the extent necessary to achieve the state’s legitimate purposes. The Uniform Guardianship and Protective Proceedings Act (UGPPA) provides that guardianship should be viewed as a “last resort,” imposed only if there are no less restrictive alternatives that will meet the individual’s needs. Under the Act, a court visitor’s report must specify “whether less restrictive means of intervention are available.”

The National Probate Court Standards require that a guardianship petition include “representations that less intrusive alternatives to guardianship or conservatorship have been examined”; provide that a court “should encourage the appropriate use of less intrusive alternatives to formal guardianship and conservatorship proceedings” and specify that a court visitor report should state “whether less intrusive alternatives are available.” Many state statutes prioritize less restrictive options to guardianship, such as joint accounts, durable and health care powers of attorney, trusts, representative payment for public benefits for financial decisions, and advance directives, living wills, and use of state default consent laws for personal and health decisions.

---

13 Art. 3 Guardianship of an Incapacitated Person, § 305(e)(3).
15 Id. at Standard 3.3.1(C)(9) at p. 44-45 (Petition).
16 Id. at Standard 3.3.2 at 46-47 (Initial Screening).
17 Id. at Standard 3.3.4 at 49-50 (Commentary).
The Emergence and Meaning of Supported Decision-Making

ABA policy, federal\(^{18}\) and state\(^{19}\) constitutions, the UGPPA,\(^{20}\) most state guardianship statutes, and, quite possibly, the Americans with Disabilities Act (ADA)\(^{21}\) embrace the principle of the least restrictive alternative. In the guardianship context, the principle requires all alternatives that might enable older persons, persons with cognitive limitations, and persons with intellectual disability, of whatever origin,\(^{22}\) to make their own decisions about personal and/or financial matters be considered and exhausted prior to the imposition of the “last resort” of guardianship. However, as a keynote speaker at the 2001 Wingspan Conference noted, the problem is “the failure of available alternatives to obviate the need and demand for guardianship and conservatorships.”\(^{23}\) Or, to put it in a more favorable light, “[t]he greater the availability of and access to alternatives, the better the dignity and freedoms of people needing protection will be preserved.”\(^{24}\)

Over the past several years, a recent shift in the decision-making landscape is the advent of “supported decision-making,” which has been gaining recognition internationally,\(^{25}\) as well as academically\(^{26}\) and legislatively in the United States,\(^{27}\) as a less restrictive alternative to the


\(^{19}\) See, e.g., Kesebrenner v. Anonymous, 33 N.Y.2d 161, 165 (N.Y. 1973) (ruling “To subject a person to a greater deprivation of his personal liberty than necessary to achieve the purpose for which he is being confined is, it is clear, violative of due process.”).

\(^{20}\) UGPPA (1997), Art. 1, Definitions § 102, Duties of Guardian, § 314 (Duties of Guardian).


\(^{22}\) AMERICAN ASSOCIATION ON INTELLUCTUAL AND DEVELOPMENTAL DISABILITIES, DEFINITION OF INTELLUCTUAL DISABILITY, http://www.aaidd.org/intellectual-disability/definition#WlojVMrKhS (defining “intellectual disability” as “a disability characterized by significant limitations in both intellectual functioning and adaptive behavior, which covers many everyday social and practical skills. This disability originates before the age of 18.”).


\(^{24}\) Id. at 581.


\(^{27}\) Supported Decision-Making Agreement Act, TEX. ESTATES CODE ANN. § 1357 (West 2015).
surrogate decision-making model embodied in guardianship.\textsuperscript{28} Guardianship practice involves a third party, the guardian, making decisions for the individual subject to guardianship, using a variety of standards.\textsuperscript{29} By contrast, supported decision-making focuses on supporting the individual’s own decisions.

Supported decision-making constitutes an important new resource or tool to promote and ensure the constitutional requirement of the least restrictive alternative. As a practical matter, supported decision-making builds on the understanding that no one, however abled, makes decisions in a vacuum or without the input of other persons. Whether the issue is what kind of car to buy, which medical treatment to select, or who to marry, a person inevitably consults friends, family, coworkers, experts, or others before making a decision. Supported decision-making recognizes that older persons, persons with cognitive limitations, and persons with intellectual disability will also make decisions with the assistance of others, although the kinds of assistance necessary may vary or be greater than those used by persons without disabilities.

Such assistance or “supports” may be formal or informal, and may come from individuals such as family members, friends, professionals, advocates, peers and community members. Supports may also involve accommodations such as communication aids and devices and modification of practices or procedures, as well as an array of community services and supports such as those provided under the Older Americans Act (OAA).\textsuperscript{30} These supports help individuals understand relevant information and available choices so they can make their own decisions. Individuals serving as supporters can assist the decision-maker in other ways; for example, when a person cannot communicate verbally, a family member may interpret and communicate the person’s decisions. An emergent form of support is the “Supported Decision-Making Agreement,”\textsuperscript{31} by which the person with a disability chooses individuals to support him or her in various areas, such as finances, health care, and employment, and the “supporters” agree to support the person in his or her decisions, rather than substituting their own.

\textsuperscript{28}See, e.g., Saltzman, \textit{New Perspectives}, supra note 21, at 306-07; Dinerstein et al., \textit{supra} note 26. For a useful and concise summary of the history of supported decision-making, see Michelle Browning et al., \textit{Supported Decision Making: Understanding How Its Conceptual Link to Legal Capacity Is Influencing the Development of Practice}, 1(ROUTLEDGE RESEARCH AND PRACTICE IN INTELLECTUAL AND DEVELOPMENTAL DISABILITIES 34-35 (2014), http://dx.doi.org/10.1080/23297018.2014.902726. For a discussion of the extension of supported decision-making to older persons with cognitive decline, see Rebekah Diller, \textit{Legal Capacity for All: What the Shift from Adult Guardianship to Supported Decision-Making Has to Offer Older Adults}, 43 FORDHAM URBAN L.J. (forthcoming 2017) (on file with authors).


\textsuperscript{30}42 U.S.C. §§ 3001-3058ee.

Support for, and Legal Recognition of, Supported Decision-making

As a legal, human rights, or theoretical matter, supported decision-making is the means by which a person with a disability exercises his or her right of legal capacity, as guaranteed by the United Nations Convention on the Rights of Persons with Disabilities (CRPD), which was adopted in 2006 and came into force in May 2008. Article 12 embraces supported decision-making, stating that “persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life,” and that “state parties [governments] shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.” Article 12 has been used to ensure self-determination and equality for people with cognitive, intellectual, and psychosocial disabilities. Supported decision-making is receiving increasing legislative and judicial support in a number of countries.

In 2010, the ABA House of Delegates passed a resolution “urging the United States to ratify and implement United Nations Convention on the Rights of Persons with Disabilities.” Although it has not yet been ratified by the Senate, the CRPD has provided inspiration and impetus for supported decision-making both nationally and more locally.

The federal agency responsible for overseeing the services and supports for both persons with intellectual disability and older persons—the Administration for Community Living (ACL) of the US Department of Health and Human Services (DHHS)—has embraced supported decision-making as an important modality in promoting and protecting autonomy and dignity. In 2013, ACL funded a five-year grant to create a National Resource Center for Supported Decision-

---

32 https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/convention-on-the-rights-of-persons-with-disabilities-2.html. In 2009, President Obama signed the treaty. As of January 2017, 172 countries have ratified the treaty. Although the Obama Administration submitted the CRPD to the Senate for ratification in the 112th Congress and again in the 113th, the Senate has yet to ratify the treaty.


34 Id. at 12(3).

35 See SYMPOSIUM, INTERNATIONAL CONVENING TO SHARE EXPERIENCES ON IMPLEMENTATION OF CRPD ARTICLE 12 (Open Society Foundations & American University, Washington College of Law, Apr. 11-14, 2016) (convening representatives from, but not limited to, Argentina, Bulgaria, China, Columbia, India, Ireland, Israel, Lithuania, and Peru, in order to discuss the challenges and successes regarding implementation of supported decision-making throughout the world).


37 The President’s Committee for People with Intellectual Disabilities has recommended the U.S. Departments of Health and Human Services, Justice, Education and Labor encourage the study, integration, and promotion of supported decision-making in their policies and programs. See Report to the President: Strengthening an Inclusive Pathway for People with Intellectual Disabilities and their Families 61-69 (2016), https://acl.gov/Programs/AIDD/Program_Resource_Search/docs/PCPID-Report-2016.pdf.

Making, $2.5 million for research on its practical impact. ACL also funds state Developmental Disabilities Planning Councils (DDPC), which in turn have funded pilot programs on supported decision-making and its use to restore rights to persons subject to guardianship.

The Uniform Law Commissioners is currently completing a revision of the UGPPA, which is expected to include explicit recognition of decision-making supports, including supported decision-making, as a less restrictive alternative to guardianship. The National Guardianship Association has recognized that “[s]upported decision-making should be considered for the person before guardianship.”

Legislation

Texas enacted the country’s first law recognizing supported decision-making agreements. Supported decision-making is defined as

a process of supporting and accommodating an adult with a disability to enable the adult to make life decisions, including decisions related to where the adult wants to live, the services, supports, and medical care the adult wants to receive, whom the adult wants to live with, and where the adult wants to work, without impeding the self-determination of the adult.

The explicit purpose of the law is to serve as a less restrictive alternative for guardianship. Delaware has recently enacted a similar law.

---

39 The National Center, now three years old, has actively advanced supported decision-making through, inter alia, its website, webinars, printed materials, and numerous presentations to stakeholders groups of all kinds, http://www.supporteddecisionmaking.org/.
41 See, e.g., New York State DDPC Funding Announcement, Supported Decision-making (soliciting proposals for two pilot projects utilizing supported decision-making, one to divert persons at risk of guardianship and one to restore rights to persons subject to guardianship), https://ddpc.ny.gov/supported-decision-making-
42 Id.
43 The revised UGPPA is expected to be titled the Uniform Guardianship, Conservatorship and Other Protective Arrangement Act, and is scheduled to be approved by the Uniform Law Commission in July 2017. The proposed revision provides that the guardianship order must clearly state the court’s finding that the respondent’s needs cannot be met by less restrictive means, including use of appropriate supportive services, technological assistance, and decision-making supports.
45 Supported Decision-Making Agreement Act, TEX. ESTATES CODE ANN. § 1357 (West 2015). The instant resolution does not, in any way, either endorse or propose adoption of such statutes before there is more experience with, and evaluation of, the use of supported decision-making agreements, as commentators have suggested. See, e.g., Nina A. Kohn et al., supra note 26 (proposing an empirical research agenda on how supported decision-making works in practice).
46 Id. § 1357.002(3).
47 Id. § 1357.003.
48 DEL. CODE ANN. tit. 16, ch. 94A.
Further, in 2015 the District of Columbia enacted special education legislation providing that students with disabilities turning 18 years old "may receive support from another competent and willing adult to aid them in their decision-making" related to their individualized education program.\(^{49}\) If a disagreement exists between the student and the supporter, the student's decisional choice prevails.\(^{50}\) In addition to the statute, the District of Columbia Public Schools has established policy and created a form that allows the student to designate the individual(s) who will serve as supporters, and to specify to which documents, such as requests for assessments or changes in placement or services, the student will permit supporters to gain access.\(^{51}\)

**Case Law**

Courts, as well, are recognizing that an ongoing support system that enables persons with intellectual disability to make decisions constitutes a less restrictive alternative that eliminates the need for guardianship.\(^ {52}\) In one well-publicized case, a Virginia court appointed temporary guardians with the specific task of creating a supported decision-making system for Jenny Hatch, a 27-year-old woman with Down syndrome. The order indicated that the temporary guardianship would end in one year, which it did.\(^ {53}\) Similarly, courts have granted restoration of rights upon a showing that the person subject to guardianship now had a functioning support system,\(^ {54}\) or on proof of execution of a supported decision-making agreement.\(^ {55}\)

**ABA Involvement and Policy**

The ABA has played a leading role in these guardianship reform efforts, dating back almost four decades. Particularly notable in this almost forty-year history is the ABA's consistent focus on the need and obligation to exhaust other, less restrictive alternatives that would enable an incapacitated person to avoid guardianship. In 1977, the ABA House of Delegates passed a resolution embodying as "an explicit right and underlying premise" the doctrine of least restrictive alternative, namely "[t]he doctrine that mentally disabled persons cannot be deprived of basic rights in order to achieve state objectives that can be accomplished in less intrusive...

---

\(^{49}\) Special Education Procedural Protections Expansion Act of 2014, DC CODE § 38-2571.04(b).

\(^{50}\) Id. § 104(b)(2).


\(^{52}\) See, e.g., *In re D.D.*, 19 N.Y.S.3d 867, 876 (N.Y. Surr. Ct. 2015) (denying appointment of a mother and brother as co-guardians for their 29-year-old son/brother with Down syndrome on the grounds that his network of supported decision-making over the past 11 years "has yielded a safe and productive life where he has thrived and remained free from the need to wholly supplant the legal right to make his own decisions.").


\(^{54}\) *In re Dameris L.*, 956 N.Y.S.2d 848, 856 (N.Y. Surr. Ct. 2012) (ruling that even if the court had jurisdiction over a woman with an intellectual disability, guardianship was no longer warranted because "she is able to exercise her legal capacity, to make and act on her own decisions, with the assistance of a support network."); *In re Ryan Herbert King*, No. 2003 INT 249 (D.C. Super. Ct. Probate Div., Oct. 11, 2016) (granting motion to terminate 15-year guardianship of an individual with intellectual disability based on existence of supported decision-making arrangement).

In 1979, the ABA Commission on the Mentally Disabled (now the Commission on Disability Rights (CDR)) studied limited guardianship, public guardianship, and adult protective services in six states, leading to its proposal of an extensive model guardianship statute, which took as its basic premise the requirement of "least restrictive dispositional alternative," the following year. The Comment to Chapter I, §3926 of the model statute provided:

The principle of the least restrictive alternative was explained in the report of the President's Committee on Mental Retardation [now the President's Committee on People with Intellectual Disabilities] as follows: when the government ... [has] a legitimate communal interest to serve by regulating human conduct it should use methods that curtail human freedom to no greater extent than is essential for securing that interest. In the context of the statute, no restriction should be placed on the legal capacity of an individual to act in his or her own behalf unless no combination of voluntary services or other alternatives to guardianship or conservatorship would be sufficient to permit the partially disabled or disabled person to meet the essential requirements for his or her physical health or safety and/or manage his or her financial resources.


In response to a nationwide Associated Press exposé of guardianship abuse, COLA and CDR convened in 1988 a multidisciplinary conference, the Wingspread National Guardianship Symposium, which reviewed the then-current guardianship system and developed an agenda for reform, generating thirty-one recommendations. In February 1989, the House of Delegates adopted all but two of the recommendations. The symposium's first recommendation was: "To encourage alternatives to and more appropriate uses of guardianship, the costs and benefits of various guardianship alternatives should be explored." The Commentary stated:

56 ABA Commission on the Mentally Disabled and Section Individual Rights and Responsibilities, Recommendation and Report, August 1077.
59 Id. In its use of a functional rather than medical model, the Model Statute was far ahead of its time, rejecting a results-based model of incapacity, noting that "the [incapacity] standard should focus on the ability to engage in the decision-making process rather than on the resulting decision.... Individuals with disabilities should have no less right to be wrong than those without disabilities." Comment to Section 3(1).
"alternatives should be explored first, and guardianship... should be relied on only as a last resort to provide needed services."63

Two recommendations adopted by the House focused on terminating guardianships and restoring one’s rights. One provided that “[c]ourt orders should make it relatively easy for the court to extend, limit or dissolve guardianships.”64 (Emphasis added). The Commentary noted that “[i]n this way courts can monitor changing conditions and make sure the guardianship order still represents the least restrictive alternative possible.” (Emphasis added.) The other recommendation stated that “[u]pon a showing of favorable change in circumstances, the burden of proof should be imposed on those seeking to continue the guardianship.”65

In August 1998, the House of Delegates approved the Uniform Guardianship and Protective Proceedings Act (UGPPA),66 which is premised on the principle of the least restrictive alternative. In 2001, ABA entities with a host of other collaborating groups67 convened Wingspan—The Second National Guardianship Conference, which produced recommendations in six separate areas. In 2002, approving these recommendations, the House explicitly “[s]upport[ed] the concept that guardianship should be a last resort and that less restrictive alternatives should be explored and exhausted prior to judicial intervention....”68

A third invitational national convocation, the Third National Guardianship Summit in 2011, sponsored by the National Guardianship Network—including both the ABA Commission on Law and Aging and the Section of Real Property, Trust and Estate Law—produced recommendations,69 which the House adopted in August 2012.70 The House explicitly endorsed the obligation of a conservator [or guardian] “to assist the person [subject to guardianship] to develop or regain the ability to manage [his or her] affairs.”71 (Emphasis added.) Recommendation 2.2 encourages the court to issue orders that implement the least restrictive alternative and maximize the person’s right to self-determination and autonomy.72 Recommendation 2.3 encourages courts to “monitor the well-being of the person and status of

63 Id. at Agenda Commentary, 3-4.
64 Id. at Recommendation III-D.
65 Id. at Recommendation III-F.
67 The Wingspan Second National Guardianship Conference’s primary sponsors were the National Academy of Elder Law Attorneys, Stetson University College of Law, and the Borchard Foundation Center on Law and Aging, with co-sponsors including the ABA Commission on Legal Problems of the Elderly, the National College of Probate Judges, the Supervisory Council of the ABA Section of Real Property, Probate and Trusts (currently the Section of Real Property, Trust and Estate Law), the National Guardianship Association, the Center for Medicare Advocacy, the Arc of the United States, and The Center for Social Gerontology, Inc.
71 Id.
72 Symposium, supra note 69, 2012 UTAH L. REV. 1200.
the estate on an on-going basis, including, but not limited to: "Determining whether less restrictive alternatives will suffice."

In October 2012, COLA and CDR hosted the first National Roundtable on Supported Decision-Making, with cooperation of the Agency for Community Living of the US Department of Health and Human Services, to explore concrete ways to move from a model of substitute decision-making to one of supported decision-making. As one consequence of that Roundtable, COLA, CDR, the ABA Section on Civil Rights and Social Justice) and the ABA Section of Real Property, Trust and Estate Law received an ABA Enterprise Grant to develop an instrument to help lawyers identify and implement decision-making options for persons with disabilities that are less restrictive than guardianship, including supported decision-making. That instrument, the PRACTICAL tool, offers concrete steps to implement the least restrictive alternative principle as a routine practice of law; it was rolled out in the summer of 2016.

In September 2016, COLA held an invitational Roundtable on Restoration of Rights. It grew out of a cross-state guardianship file review supported by the Greenwall and Borchard Foundations.

**Need for the Resolution**

Although supported decision-making is increasingly understood and practiced, especially in the intellectual disability/developmental disability community, and clearly offers an additional, and potentially more readily available alternative to guardianship, it may not be widely known among persons seeking guardianship. Legislation that requires supported decision-making to be identified and considered before guardianship is imposed promotes self-determination. Such legislation directs petitioners (and their attorneys) to use the principles of supported decision-making before seeking guardianship—actions already proposed by the ABA’s PRACTICAL tool.

In the same way, courts may not be aware of supported decision-making or how it may constitute a statutorily required less restrictive alternative to guardianship. Accordingly, specifically naming supported decision-making as a modality that must be considered ensures that it will be part of the judicial toolbox available to avoid the unnecessary deprivation of liberty and/or property rights for persons with a variety of cognitive disabilities.

---

73 Id.
74 PRACTICAL is an acronym for Presume, Reason, Ask, Community, Team, Identify, Challenges, Ability, Limits. ABA Commission on Law and Aging et al., http://www.americanbar.org/content/dam/aba/administrative/law_aging/PRACTICALGuide.authcheckdam.pdf.
75 The “least restrictive alternatives” most often mentioned in judicial decisions are trusts, advanced directives and/or powers of attorney, which generally require the services of an attorney, and may either be unknown or unavailable to persons of lower socio-economic status, minorities, and immigrants. It is, however, precisely members of these groups who have been recognized in the judicial decisions on supported decision-making to date.
76 Concomitant with a statutory requirement that supported decision-making must be considered, as the Resolution requires, would be a provision requiring that a guardianship petition contain a detailed statement about efforts already undertaken to utilize supported decision-making, and why those efforts were unsuccessful. The proposed revision of the UGPPA currently under consideration would require that the petition include a description of the alternative means of meeting the person’s need that have been considered or implemented.
77 ABA Commission on Law and Aging et al., supra note 74.
Furthermore, restoration of rights/termination of guardianship proceedings for persons currently subject to guardianship present additional, but equally important occasions for ensuring that guardianship is still the least restrictive available alternative. There is very little data on the number or results of restoration proceedings, but what data does exist suggests that these proceedings are few and far between.

Although ABA policy, the UGPPA, and a number of state statutes specifically require the proponent of continuing guardianship to prove that it is still required, there is a general misconception that the person subject to guardianship must prove that he or she has “recovered” capacity. By requiring courts to consider supported decision-making in restoration proceedings, the inquiry is properly returned to whether the existence of supporters who can assist the person in making his or her own decisions obviates the need for the deprivation of rights engendered by guardianship.

Conclusion

The proposed resolution will further existing ABA policy requiring that guardianship must be the least restrictive available alternative, by bringing the 21st century concept and practice of supported decision-making into legislation prescribing requirements for imposing guardianship and into judicial decision-making in proceedings for the restoration of rights of persons currently subject to guardianship.

Respectfully submitted,

Robert T. Gonzales, Chair
Commission on Disability Rights

Kirke Kickingbird, Chair
Section of Civil Rights and Social Justice

David J. Dietrich, Chair
Section of Real Property, Trust and Estate Law

Honorable Judge Patricia Banks, Chair
Commission on Law and Aging
August 2017

78 Id.
GENERAL INFORMATION FORM

Submitting Entity: Commission on Disability Rights

Submitted By: Robert T. Gonzales, Chair, Commission on Disability Rights

1. Summary of Resolution(s).
   This resolution urges state, territorial, and tribal legislatures to amend their guardianship statutes to require that supported decision-making be identified and fully considered as a less restrictive alternative before guardianship is imposed; and urges courts to consider supported decision-making as a less restrictive alternative to guardianship.

   This resolution further urges state, territorial, and tribal legislatures to amend their guardianship statutes to require that decision-making supports that would meet the individual's needs be identified and fully considered in proceedings for termination of guardianship and restoration of rights; and urges all courts to consider available decision-making supports that would meet the individual's needs as grounds for termination of a guardianship and restoration of rights.

   Supported decision-making is a process by which individuals with psychosocial disabilities, intellectual and developmental disabilities, and traumatic brain injury, as well as older individuals with cognitive limitations, choose a trusted person or persons to support them in making their own decisions and exercising their legal capacity. Supporters can be friends, family, professionals, advocates, peers, community members, or any other trusted person. They may gather and present relevant information; help the individual to understand and weigh decisions, including potential risks, options, and likely outcomes and consequences; communicate the decision to third parties such as health care professionals and financial institutions; and/or assist in implementing the decision.

2. Approval by Submitting Entity.
   The Commission on Disability Rights approved the resolution by vote on April 21, 2017.
   The Commission on Law and Aging approved the resolution by vote on January 27, 2017.
   The Section of Civil Rights and Social Justice approved the resolution by vote on April 30, 2017.
   The Section of Real Property, Trust and Estate Law approved the resolution by vote on April 11, 2017.

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

   In February 1989, the House of Delegates adopted all but two of thirty-one of the recommendations from the Wingspread National Guardianship Symposium, which reviewed
the then-current guardianship system and developed an agenda for reform. See ABA Resolution 89M104,
http://www.americanbar.org/content/dam/aba/directories/policy/1989_my_104.authcheckdam.pdf. The symposium’s first recommendation was: “To encourage alternatives to and more appropriate uses of guardianship, the costs and benefits of various guardianship alternatives should be explored. . . .” The Commentary stated “alternatives should be explored first, and guardianship . . . should be relied on only as a last resort to provide needed services.” In addition, two recommendations adopted by the House focused on terminating guardianships and restoring one’s rights. One provided that “[c]ourt orders should make it relatively easy for the court to extend, limit or dissolve guardianships. The Commentary noted that “[i]n this way courts can monitor changing conditions and make sure the guardianship order still represents the least restrictive alternative possible.” (Emphasis added.) The other recommendation stated that “[u]pon a showing of favorable change in circumstances, the burden of proof should be imposed on those seeking to continue the guardianship.”

In August 1998, the House of Delegates approved the Uniform Guardianship and Protective Proceedings Act (UGPPA), which is premised on the principle of the least restrictive alternative. See ABA Resolution 98A116,

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

The above policies cited in #3 are relevant to this Resolution because we are urging (1) legislatures to amend their guardianship statutes to require that supported decision-making be identified and fully considered as a less restrictive alternative before guardianship is imposed, as well as in proceedings for termination of guardianship and (2) courts to consider supported decision-making as a less restrictive alternative to guardianship, as well as grounds for termination of a guardianship.

Accordingly, this resolution builds on existing ABA policy that views guardianship as a “last resort” by recognizing supported decision-making as a less restrictive alternative to consider before guardianship is imposed, and using this principle as grounds for terminating a guardianship.

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

N/A

6. Status of Legislation. (If applicable)

Texas enacted the country’s first law recognizing supported decision-making agreements. See Supported Decision-Making Agreement Act, TEX. ESTATES CODE ANN. § 1357 (West 2015). The explicit purpose of the law is to serve as a less restrictive alternative for guardianship. Delaware has recently enacted a similar law. See DEL. CODE ANN. tit. 16, ch. 94A.
Further, the District of Columbia enacted special education legislation providing that students with disabilities turning 18 years old "may receive support from another competent and willing adult to aid them in their decision-making" related to their individualized education program. See Special Education Procedural Protections Expansion Act of 2014, DC CODE § 38-2571.04(b).

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

Encourage (1) states to pass legislation that amends their guardianship statutes to require that supported decision-making be identified and fully considered as a less restrictive alternative before guardianship is imposed, as well as in in proceedings for termination of guardianship, and (2) courts to consider supported decision-making as a less restrictive alternative to guardianship, as well as grounds for termination of a guardianship. This would be accomplished by educating states and courts about the principle of supported decision-making and its use in ensuring self-determination.

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

None

9. Disclosure of Interest. (If applicable)

N/A

10. Referrals.

Section of Administrative Law and Regulatory Practice
Section of Civil Rights and Social Justice
Section of Family Law
Health Law Section
Section of Real Property, Trust and Estate Law
Section of State and Local Government Law
Judicial Division
Solo, Small Firm and General Practice Division
Senior Lawyers Division
Young Lawyers Division
Standing Committee on Client Protection
Center for Human Rights
Commission on Law and Aging

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

Commission on Disability Rights
Amy L. Allbright
1050 Connecticut Avenue, NW, Suite 400
Washington, DC 20036
(202) 662-1575
amy.allbright@americanbar.org
12. **Contact Name and Address Information.** (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

Robert T. Gonzales  
Law Offices of Hylton & Gonzales  
201 N. Charles Street, Suite 2200  
Baltimore, MD 21201-4126  
(443) 956-1838 (cell)  
r.gonzales@hyltongonzales.com
EXECUTIVE SUMMARY

1. Summary of the Resolution
This resolution urges state, territorial, and tribal legislatures to amend their guardianship statutes to require that supported decision-making be identified and fully considered as a less restrictive alternative before guardianship is imposed; and urges courts to consider supported decision-making as a less restrictive alternative to guardianship.

This resolution further urges state, territorial, and tribal legislatures to amend their guardianship statutes to require that decision-making supports that would meet the individual’s needs be identified and fully considered in proceedings for termination of guardianship and restoration of rights; and urges all courts to consider available decision-making supports that would meet the individual’s needs as grounds for termination of a guardianship and restoration of rights.

Supported decision-making is a process by which individuals with psychosocial disabilities, intellectual and developmental disabilities, and traumatic brain injury, as well as older individuals with cognitive limitations, choose a trusted person or persons to support them in making their own decisions and exercising their legal capacity. Supporters can be friends, family, professionals, advocates, peers, community members, or any other trusted person. They may gather and present relevant information; help the individual to understand and weigh decisions, including potential risks, options, and likely outcomes and consequences; communicate the decision to third parties such as health care professionals and financial institutions; and/or assist in implementing the decision.

2. Summary of the Issue that the Resolution Addresses
The resolution addresses the following issue: Identification and consideration of supported decision-making as a less restrictive alternative to guardianship, as well as ground for termination of a guardianship and restoration of rights.

3. Please Explain How the Proposed Policy Position will address the issue
This resolution will address this issue by urging (1) legislatures to amend their guardianship statutes to require that supported decision-making be identified and fully considered as a less restrictive alternative before guardianship is imposed, as well as in proceedings to terminate a guardianship and (2) courts to consider supported decision-making as a less restrictive alternative to guardianship, as well as grounds for termination of a guardianship.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified:
At this time, we are not aware of any opposition.
RESOLUTION

RESOLVED, That the American Bar Association favors an interpretation of Section 35(a) of the Lanham Act, 15 U.S.C. §1117(a), that proof of willfulness is not required, but may be taken into account as among the equitable considerations, for a prevailing plaintiff to recover a defendant's profits in actions involving trademark infringement, unfair competition, or cyber-piracy under the Lanham Act, 15 U.S.C. §§ 1114, 1125(a), and 1125(d).
REPORT

This Resolution and Report addresses an issue of statutory interpretation and application of federal law and equity about which the federal circuits are split: whether a showing of willfulness is a prerequisite for a prevailing plaintiff to receive an accounting of the defendant’s profits in a trademark infringement, unfair competition, or cyber-piracy action. Some circuits require a showing of willfulness before a plaintiff can obtain such disgorgement. Others consider the defendant’s intent among a variety of factors when ordering such an equitable remedy. Because the standard applied to an accounting of a defendant’s profits has a significant potential impact on the monetary relief potentially available to a trademark plaintiff, this circuit split promotes forum shopping, a circumstance the Supreme Court has repeatedly recognized as incompatible with the fair and efficient administration of justice. The Resolution supports the view that a prevailing plaintiff seeking the disgorgement of the profits of a defendant found liable for infringement, unfair competition or cyber-piracy should not be required to demonstrate that the defendant’s conduct rose to the level of willfulness, but instead any evidence of willfulness should be considered among other evidence supporting this equitable relief.

The Section of Intellectual Property Law requests the House of Delegates to approve this Resolution, which would support either an Association amicus curiae brief addressing a circuit split that attracts forum shopping, which affects clients and their counsel throughout the country, or the Association’s support for legislation that would end the split, and favors the rule in six circuits: to wit, that willfulness is not required, but may be taken into account among other equitable considerations, for a prevailing plaintiff to recover the profits of a defendant found liable for infringement, unfair competition, and cyber-piracy. This position addresses three critical issues, namely:

1. The current split among the circuits is irreconcilable without intervention by the Supreme Court or enactment of legislation by Congress. This has and will continue to result in plaintiffs shopping for the forum providing them with the best chance of recovering defendant’s profits, a practice with broad impact potential plaintiffs and defendants. Indeed, the Supreme Court recently has issued a writ of certiorari on the issue, albeit without reaching its merit;

2. The resolution favors an interpretation based on rules of statutory construction, which dictate that, in the absence of an expression from Congress that willfulness is a prerequisite to an accounting of an infringing defendant’s profits, such a showing is indeed not required and is only a factor to be considered within the court’s discretion, and is not based on the interest of a party in any particular case; and

3. Unless specifically directed by Congressional legislation, statutes should not be interpreted to tie the hands of federal courts by imposing mandatory requirements that undermine a court’s inherent and broad discretion when ordering the equitable remedy of an accounting.

Both Section 35 of the federal Lanham Act, 15 U.S.C. § 1117 (2012), and the common law recognize the possibility of a prevailing plaintiff recovering several different types of monetary relief. The most commonly invoked is the legal remedy of an award of actual damages
based on the plaintiff’s own lost profits. That remedy is generally available, provided the
plaintiff can prove both causation and amount, J. Thomas McCarthy, *McCarthy on Trademarks
and Unfair Competition* § 30:72 (4th Ed. 2017). This resolution does not address a plaintiff’s
ability to recover actual damages in the form of its lost profits.

Instead, this resolution focuses on the second primary type of monetary recovery
recognized by Section 35 and the common law: the remedy of an accounting, or disgorgement,
of a defendant’s profits. Such disgorgement is generally premised on an unjust enrichment or
deterrence of future misconduct theory. Specifically, a defendant that has unlawfully used a
plaintiff’s trademarks to sell the defendant’s goods – thereby allowing the defendant to trade off
the plaintiff’s goodwill and reputation – would be unjustly enriched by retaining the profits it
obtained through its illegal activity. See, e.g., *Burger King Corp. v. Mason*, 855 F.2d 779, 781
(11th Cir. 1988) (identifying unjust enrichment as basis for accounting remedy). In contrast to an
award of actual damages, disgorgement of a defendant’s profits is an equitable remedy. See, e.g.,
*Fifty-Six Hope Rd. Music, Ltd. v. A.V.E.L.A., Inc.*, 778 F.3d 1059, 1075 (9th Cir.) (“A claim for
disgorgement of profits under § 35(a) is equitable, not legal.”), cert. denied, 136 S. Ct. 410
(S.D.N.Y. 1995) (“As to Plaintiffs’ claim for an accounting and disgorgement of profits, the law
in the Second Circuit is clear that this is an equitable remedy.”). For the reasons more fully
articulated below, the Section of Intellectual Property Law recommends that the ABA adopt
policy reinforcing a court’s discretion to impose equitable remedies, and to discourage requiring
plaintiffs seeking this remedy from having to demonstrate willful infringement by defendants.2

A. Circuit Split and Forum Shopping

Currently, the Third, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits hold that a
showing of willfulness is not required before an accounting of profits can be made, but that the
defendant’s intent is a factor to be considered among the other equitable factors available for the
court’s consideration. The Resolution is consistent with this view. In contrast, the Second,
Eighth, Ninth, Tenth, and District of Columbia Circuits require prevailing plaintiffs to
demonstrate defendants’ willful misconduct as a prerequisite to an accounting of defendants’
profits. Finally, in a blend of the two main positions, the First Circuit requires a plaintiff to prove
that the defendant willfully violated the plaintiff’s rights only if the parties are not direct
competitors. Section D includes a circuit-by-circuit breakdown of the issue including a summary
of the key decisions in each circuit.

The recent decision of *Romag Fasteners, Inc. v. Fossil, Inc.*, 817 F.3d 782 (Fed. Cir.
2016), cert. granted and vacated on other grounds, No. 16-202, 2017 WL 1114951 (U.S. Mar.
27, 2017), squarely presents the issue of whether a prevailing plaintiff must demonstrate the
defendant’s willfulness before recovering the defendant’s profits. In this case, the Federal Circuit

---

1 Section 35 codifies the remedy available under the common law prior to the enactment of the Lanham Act, see,
e.g., *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 262 (1916); an accounting also generally is

2 Willfulness is not a prerequisite for liability for trademark infringement or unfair competition under Sections 1114
and 1125(a) of the U.S. Lanham Act, 15 U.S.C. §§ 1051, et seq.
interpreted Second Circuit law to hold the prevailing plaintiff could not recover the defendant's profits because the jury had found the defendant's infringement was not willful. *Id.* at 791. In reaching this decision, the court rejected the plaintiff's argument that Second Circuit precedent and other pre-1999 decisions no longer applied given the 1999 statutory amendment to the U.S. Trademark Act, by which, the plaintiff contended, Congress chose to make willfulness a prerequisite to the recovery of monetary relief for trademark dilution, but not for other types of infringement. *Id.* at 786-88. On March 27, 2017, the U.S. Supreme Court granted the plaintiff's petition for a writ of certiorari, vacated the decision below, and remanded the case to the Federal Circuit for further consideration in light of *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, 137 S. Ct. 954 (2017), on an apparently unrelated ground. The question of whether willfulness is a prerequisite for an accounting of the profits of a defendant found liable for infringement, unfair competition, or cyber-piracy remains an unresolved question subject to a complete circuit split.

This split among the circuits encourages forum shopping; in other words, enterprising plaintiffs seek out those courts most likely to order the disgorgement of a defendant's profits in situations where the facts may not directly support a finding of willfulness. The different rule in different circuits presents clients and their counsel with uncertain and variable assessments of potential risk. Forum shopping based on different treatment of substantive law is generally discouraged. See, e.g., *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1969 (2014) (discussing federal copyright law superseding state statutes of limitation as serving the purpose, among others, of "prevent[ing] the forum shopping invited by disparate state limitations periods"); *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 583 (2013) ("Not only would it be inequitable to allow the plaintiff to fasten its choice of substantive law to the venue transfer, but it would also encourage gamesmanship.").

This circuit split is irreconcilable without the intervention of either the Supreme Court or the passage of legislation clarifying the availability of an accounting. The resolution would provide a basis for the ABA to urge the Court's resolution of the circuit split and interpretation of this statutory provision in any case in which certiorari is granted on the issue. One possible opportunity may be the *Romag Fastener* case, but it appears that such consideration in that case may be delayed due to other procedural issues.

---

3 Section B. (Statutory Construction), below, discusses the statutory history and construction regarding whether willfulness was added to only the dilution action, or to all actions raised the Lanham Act.
B. Statutory Construction

Section 35(a) of the Lanham Act provides:

When a violation of any right of the registrant of a mark registered in the Patent and Trademark Office, a violation under section [43(a)] or (d) . . . , or a willful violation under section [43(c)] of this title, shall have been established in any civil action arising under this chapter, the plaintiff shall be entitled . . . subject to the principles of equity, to recover (1) defendant’s profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action.


As the italicized language suggests, Section 35(a) expressly requires a showing of willfulness for a prevailing plaintiff to recover a defendant’s profits in a case in which the defendant has violated Section 43(c) of the Act. Id. § 1125(c) (recognizing federal cause of action against conduct likely to dilute the distinctiveness of a famous mark). However, Section 35(a) does not expressly refer to “willfulness” with respect to violations under Section 32 (infringement of a registered mark), id. § 1114, Section 43(a) (unfair competition), id. § 1125(a), or Section 43(d) (cyber-piracy), id. § 1125(d). Under the legal principle of statutory construction, expressio unius est exclusio alterius (i.e., expression of one is the exclusion of another), some courts have interpreted this to mean that, by specifying willfulness for violation of the dilution clause, Congress did not intend for willfulness to also be a requirement for the disgorgement of an infringer’s profits for the infringement of a registered trademark or unfair competition in violation of Section 43(a) of the Act, id. § 1125(a). See Banjo Buddies, Inc. v. Renosky, 399 F.3d 168, 174 (3d Cir. 2005) (“By adding this word to the statute in 1999, but limiting it to § 43(c) violations, Congress effectively superseded the willfulness requirement as applied to § 43(a).”); see also Russello v. United States, 464 U.S. 16, 23, (1983) (cited with approval in Banjo Buddies) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion” (internal quotation marks omitted)).

Prior to the amendment of Section 35(a) of the Act in 1999, the majority view required proof of willfulness for an accounting of an infringer’s profits. In 1999, Congress amended

---

4 As discussed below, the “willfulness” requirement language was added as part of the 1999 amendments to the Lanham Act, and the legislative history shows the intent of this amendment to Section 35 was only to clarify the remedies with respect to the law on dilution.

5 Before the statutory amendments, the Second, Third, Eighth, Tenth, and District of Columbia Circuits required proof of willfulness. George Busch Co. v. Blue Coral, Inc., 968 F.2d 1532, 1540 (2d Cir. 1992) (holding “under [15 U.S.C. § 1117(a)] of the U.S. Trademark Act, a plaintiff must prove that an infringer acted with willful deception before the infringer’s profits are recoverable by way of an accounting.”); SecuraComm Consulting Inc. v. Securacom Inc., 166 F.3d 182, 190 (3d Cir. 1999) (“A plaintiff must prove that an infringer acted willfully before the infringer’s profits are recoverable.”), overruled by Banjo Buddies, Inc. v. Renosky, 399 F.3d 168, 175 (3d Cir. 2005); Minn. Pet Breeders, Inc. v. Schell & Kamping, Inc., 41 F.3d 1242, 1247 (8th Cir. 1994) (holding that an accounting of profits is available only “[i]f a registered owner proves willful, deliberate infringement or deception.”); Bishop v. Equinox Int’l Corp., 154 F.3d 1220, 1223 (10th Cir. 1998) (requiring proof that “defendant’s actions were willful or in bad faith” for an award of profits); ALPO Petfoods, Inc. v. Ralston Purina Co., 913 F.2d 958, 968 (D.C. Cir. 1990) (concluding “an award based on a defendant’s profits requires proof that the defendant acted willfully or in bad faith”). However, the
Section 35(a) to add the phrase "or a willful violation under Section 43(c)," which referred to the likelihood-of-dilution cause of action under the latter statute.

The legislative history of the 1999 Trademark Amendments Act discloses no indication that Congress considered overruling the then-existing majority rule requiring willfulness for an accounting of a defendant's profits, except in cases involving violations of Section 43(c); rather, the legislative history shows an intent to clarify the remedies under Section 35 with respect to the Federal Trademark Dilution Act. See, e.g., Trademark Amendments Act of 1999, Rep. No. 106-250, § 3(b) (“Section three seeks to clarify that in passing the Dilution Act, Congress did intend to allow for injunctive relief and/or damages against an infringer found to have willfully intended to engage in commercial activity that would cause dilution of a famous trademark.”).

If Congress had intended to change the language with respect to infringement actions, it could have done so either at the time or at any time in the intervening eighteen years. See, e.g., Fox Television Stations, Inc v. Aereokiller, LLC, 851 F.3d 1002, 1009 (9th Cir. 2017) (“[I]f Congress had intended § 111 to service the entire secondary transmission community, doling out statutory licenses without regard to the technological makeup of its members, it would have been easy enough for Congress to say so . . . .”); Romag Fasteners, Inc. v. Fossil, Inc., 817 F.3d 782, 790 (Fed. Cir. 2016) (“Given the alleged significance of the purported change, one would have expected to see an acknowledgement or discussion from Congress of the courts of appeals cases in the relevant area if Congress had intended to resolve the circuit conflict.”), cert. granted, judgment vacated on other grounds, No. 16-202, 2017 WL 1114951 (U.S. Mar. 21, 2017).

As a result of the amendments, only the Third Circuit changed its position and no longer requires willfulness as a prerequisite to an accounting of a defendant’s profits in a trademark infringement case. Banjo Buddies, Inc. v. Renosky, 399 F.3d 168, 171 (3d Cir. 2005) (“We hold that willfulness is an important equitable factor but not a prerequisite to . . . [an accounting of a trademark infringer’s profits for a violation of section 43(a)], noting that our contrary position in SecuraComm Consulting Inc. v. Securacom Inc., 166 F.3d 182, 190 (3d Cir. 1999), has been superseded by a 1999 amendment to the Lanham Act.”). The remaining circuits that did not require willfulness or a willful violation under Section 43(c) prior to 1999 have maintained their position following the enactment of the amendments.

Some courts have interpreted Congress’s use of “willful” in the new language concerning a violation of Section 43(c), and the lack of a “willful” requirement for other violations of the Lanham Act, to mean that Congress did not intend willfulness to be a prerequisite for an

Fifth, Sixth, Seventh, and Eleventh Circuits did not require a finding of willfulness for an accounting of profits. Pebble Beach Co. v. Tour 18 Ltd., 155 F.3d 526, 554 (5th Cir. 1998) (holding “whether the defendant had the intent to confuse or deceive” is simply a “relevant factor” to the court’s determination of whether an award of profits is appropriate.”); Roulo v. Russ Berrie & Co., 886 F.2d 931, 941 (7th Cir. 1989) (“Other than general equitable considerations, there is no express requirement that ... the infringer willfully infringe the trade dress to justify an award of profits.”); Wynn Oil Co. v. Am. Way Serv. Corp., 943 F.2d 595, 607 (6th Cir. 1991) (holding that the plaintiff is not required to prove actual confusion to recover profits, and quoting the Seventh Circuit rule that “there is no express requirement ... that the infringer willfully infringe ... to justify an award of profits”) (internal quotation marks omitted) (quoting Roulo, 886 F.2d at 941); Burger King Corp. v. Mason, 855 F.2d 779, 781 (11th Cir. 1988) (“Nor is an award of profits based on either unjust enrichment or deterrence dependent upon a higher showing of culpability on the part of the defendant, who is purposely using the trademark.”).
accounting of an infringer's profits. Following the 1999 amendments, a handful of district courts have ordered accountings of the profits of a defendant found liable for violating sections of the Lanham Act other than Section 43(c) in the absence of findings of willfulness. Other courts have continued to maintain that willfulness is required. See, e.g., Romag Fasteners, 817 F.3d at 791. Thus, there is conflict and inconsistency among the circuits as to whether willfulness is required for a disgorgement of such a defendant’s profits—the conflict is the crux of the petition for a writ of certiorari by the plaintiff in Romag Fasteners, Inc. v. Fossil, Inc., 817 F.3d 782 (Fed. Cir. 2016), which was granted on March 27, 2017, by the U.S. Supreme Court, and has resulted in a remand of the case to the Federal Circuit for further consideration in light of SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC, 137 S. Ct. 954 (2017), on an unrelated issue.

C. Judicial Discretion In Courts’ Entry of Equitable Relief

Imposing willfulness as a sin qua non prerequisite to an accounting of an infringer's profits effectively limits such a remedy to cases in which a plaintiff can prove deliberate deception. However, because willfulness can be very difficult to prove, such a requirement could prevent a trademark owner from obtaining any meaningful monetary recovery despite a finding of infringement because it likewise can be very difficult for a plaintiff to prove it has incurred actual damages proximately arising from the infringement. See, e.g., Fishman Transducers, Inc. v. Paul, 684 F.3d 187 (1st Cir. 2012) (“Proving causation and amount are very difficult unless the two products directly compete.”); Harper House, Inc. v. Thomas Nelson, Inc., 889 F. 2d 197, 210 (9th Cir. 1989) (reversing $1.8 million jury award; “[i]n a suit for damages under section 43(a), actual evidence of some injury resulting from the deception is an essential element”). This is especially true if the plaintiff and the defendant are not competitors. See, e.g., McCarthy, supra, § 30:64.

The disgorgement of a defendant’s profits is an equitable remedy which the court has discretion to enter if the facts of a particular case warrant such extraordinary relief. See, e.g., Fifty-Six Hope Rd. Music, Ltd. v. A.V.E.L.A., Inc., 778 F.3d 1059, 1075 (9th Cir.) (“A claim for disgorgement of profits under § 1117(a) is equitable, not legal.”), cert. denied, 136 S. Ct. 410 (2015); see also Klein-Becker USA, LLC v. Engleri, 711 F.3d 1153, 1163 (10th Cir. 2013) (“Courts have wide discretion to fashion appropriate equitable remedies such as disgorgement of profits.”). Historically, courts have been given wide berth to enter such relief and the imposition of rigid rules restraining the exercise of that discretion have been disfavored. See, e.g., Franklin v. Gwinnett Pub. Cnty. Schools, 503 U.S. 60, __, 112 S.Ct. 1028, 1029 (1992) (“The longstanding general rule is that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute.”) (citing Bell v. Hood, 327 U.S. 678, 684 (1946); Davis v. Passman, 442 U.S. 228, 246-47(1979)); see also First Commodity Traders, Inc. v. Heinold Commodities, Inc., 766 F.2d 1007, 1011 (7th Cir. 1985) (“Because an accounting is an equitable remedy, a court has broad discretion to determine whether it is appropriate to order an accounting.”). The willfulness requirement for disgorgement of a defendant’s profits unnecessarily limits the court’s discretion to craft equitable relief if the legal remedy of an award of actual damages is inadequate or non-existent.
D. A Circuit-By-Circuit Breakdown of the Issue

1. Courts Holding that Willfulness is Not Required

**Third Circuit**

In the Third Circuit, willfulness is just one of many factors which should be considered in deciding whether or not a prevailing plaintiff is entitled to recover the defendant’s profits in cases other than those involving findings of likely dilution under Section 43(c). In *Gucci Am. Inc. v. Daffy’s Inc.*, 354 F.3d 228 (3d Cir. 2003), the Third Circuit considered whether a district court erred when it refused to order the disgorgement of a defendant’s profits to a plaintiff. The court adopted the approach of the Fifth Circuit, which applies the six factors outlined in *Pebble Beach Co. v. Tour 18 I Ltd.*, 155 F.3d 526 (5th Cir. 1998): (1) whether the defendant had the intent to confuse or deceive (i.e., willfulness), (2) whether sales have been diverted, (3) the adequacy of other remedies, (4) any reasonable delay by the plaintiff in asserting his rights, (5) the public interest in making the misconduct unprofitable, and (6) whether it is a case of palming off. Based on these factors, the Third Circuit concluded that the district court did not err in denying an accounting of the defendant’s profits. The Third Circuit again considered the issue of whether willfulness is required for an accounting of profits in *Banjo Buddies, Inc. v. Renosky*, 399 F.3d 168 (3d Cir. 2005). In that case, the Third Circuit cited the *Pebble Beach* factors as the proper test for assessing whether the propriety of an accounting in a trademark infringement case, finding that “[t]he 1999 amendment replaced ‘or a violation under section 43(a)’ with ‘a violation under section 43(a), or a willful violation under section 43(c)’ . . . The plain language of the amendment indicates that Congress intended to condition monetary awards for § 43(c) violations, but not § 43(a) violations, on a showing of willfulness.” The Third Circuit in *Banjo Buddies* thus held that willfulness is just one of several factors to be considered in deciding whether or not a plaintiff is entitled to recover the defendant’s profits.

**Fourth Circuit**

The Fourth Circuit has ruled that willfulness is not required for an accounting of profits, and instead, follows the Third and Fifth Circuits in analyzing six factors. See *Synergistic Int’l, LLC v. Korman*, 470 F.3d 162, 175 (4th Cir. 2006) (citing *Banjo Buddies, Inc. v. Renosky*, 399 F.3d 168, 175 (3d Cir. 2005); *Quick Techs., Inc. v. Sage Grp.*, 313 F.3d 338, 349 (5th Cir. 2002)). These factors are: “(1) whether the defendant had the intent to confuse or deceive, (2) whether sales have been diverted, (3) the adequacy of other remedies, (4) any unreasonable delay by the plaintiff in asserting his rights, (5) the public interest in making the misconduct unprofitable, and (6) whether it is a case of palming off.” *Id.* The first factor concerns whether there has been any willful infringement or if the defendant acted in bad faith, and the Fourth Circuit advised that “willfulness is a proper and important factor in an assessment of whether to make a damages award, [but] it is not an essential predicate thereto.” *Id.* Instead, the trial courts should be addressing all the factors and explaining the reasoning and impact of each relevant factor. *Id.* at 176. Therefore, the Fourth Circuit requires a thorough analysis of all six factors listed above in determining whether a plaintiff is entitled to an accounting of a defendant’s profits, and willfulness is merely one of these factors.
Fifth Circuit

The Fifth Circuit does not require willfulness as a prerequisite for an accounting. In *Quick Technologies, Inc. v. Sage Group PLC*, 313 F.3d 338 (5th Cir. 2002), the court established factors to consider when determining whether an accounting of profits is appropriate: “(1) whether the defendant had the intent to confuse or deceive, (2) whether sales have been diverted, (3) the adequacy of other remedies, (4) any unreasonable delay by the plaintiff in asserting his rights, (5) the public interest in making the misconduct unprofitable, and (6) whether it is a case of palming off.” *Id.* at 349 (citing *Pebble Beach Co. v. Tour 18 Ltd.*, 155 F. 3d 526, 554 (5th Cir. 1998)). The Fifth Circuit went on to state that willful infringement is a significant factor when deciding whether an accounting of profits is warranted; however, it would not adopt a bright-line rule requiring willfulness to be a prerequisite. *Id.* In sum, the Fifth Circuit employs a case-by-case analysis using a set of factors, and willfulness is not a prerequisite.

Sixth Circuit

In *La Quinta Corp. v. Heartland Properties LLC*, 603 F.3d 327 (6th Cir. 2010), the Sixth Circuit affirmed that willfulness is not a prerequisite to an accounting of profits, and a case-by-case analysis should be applied when making such determinations. The Sixth Circuit advised that because there is little guidance in the Lanham Act regarding the equitable principles that should be applied when assessing monetary relief, a case-by-case analysis is needed. *Id.* at 343. The court noted there are a variety of factors that should be examined when deducing if an accounting is appropriate, including “the defendant’s intent to deceive, whether sales were diverted, the adequacy of other remedies, any unreasonable delay by the plaintiff in asserting its rights, the public interest in making the misconduct unprofitable, and ‘palming off,’ i.e., whether the defendant used its infringement of the plaintiff’s mark to sell its own products to the public through misrepresentation.” *Id.* (citing *Synergistic Int’l, LLC v. Korman*, 470 F.3d 162, 175-76 (4th Cir. 2006)). In sum, the Sixth Circuit uses a case-by-case approach and considers a range of factors.

Seventh Circuit

Even prior to the 1999 amendment to Section 35(a) of the U.S. Trademark Act, the Seventh Circuit held that willfulness is not a requirement to recover an infringer’s profits: “The U.S. Trademark Act specifically provides for awarding of profits in the discretion of the judge subject only to principles of equity . . . . Other than general equitable considerations, there is no express requirement that the parties be in direct competition or that the infringer willfully infringed the trade dress to justify an award of profits.” *Roulo v. Russ Berrie & Co.*, 886 F.2d 931, 940 (7th Cir. 1989).

Eleventh Circuit

A showing of willfulness is not required for an accounting of profits in the Eleventh Circuit, but it can be a factor in the final decision. In *Optimum Technologies, Inc. v. Home Depot U.S.A., Inc.*, 217 F. App’x 899 (11th Cir. 2007), the Eleventh Circuit held that “an accounting of a defendant’s profits is appropriate where (1) the defendant’s conduct was willful and deliberate, (2) the defendant was unjustly enriched, or (3) it is necessary to deter future conduct.” *Id.* at 902.
2. Courts Holding that Willfulness Is Required

Second Circuit

Under Second Circuit law, a trademark owner can recover the profits of defendant under Sections 32, 43(a), or 43(d) of the Lanham Act only in cases presenting willful misconduct. In George Basch Co. v. Blue Coral, Inc., 968 F.2d 1532 (2d Cir. 1992), the Second Circuit held that under the U.S. Trademark Act, a plaintiff must prove that a trademark infringer acted with "willful deception" to recover profits. Following the 1999 U.S. Trademark Act amendments, in Merck Eprova AG v. Gnosis SpA, 760 F.3d 247 (2d Cir. 2014), the Second Circuit reaffirmed that willfulness is required to recover the profits of an infringer in the context of a false advertising claim under the U.S. Trademark Act. Then, in Romag Fasteners, Inc. v. Fossil, Inc., 817 F.3d 782 (Fed. Cir. 2016), cert. granted and vacated on other grounds, No. 16-202, 2017 WL 1114951 (U.S. Mar. 27, 2017), on appeal from the District of Connecticut, the Federal Circuit specifically held the 1999 amendments to the U.S. Trademark Act did not change the Second Circuit law, which requires willfulness to recover profits of an infringer.

Eighth Circuit

The Eighth Circuit requires willfulness for an accounting of profits. See, e.g., Minn. Pet Breeders, Inc. v. Schell & Kampeter, Inc., 41 F.3d 1242, 1247 (8th Cir. 1994) (holding an accounting of profits is available if "a registered owner proves willful, deliberate infringement or deception"). This willfulness requirement has been reiterated by the Eighth Circuit following the 1999 statutory amendments. See Masters v. UHC of Del., Inc., 631 F.3d 464 (8th Cir. 2011) (recognizing an accounting of profits may be awarded upon proof of willful infringement and holding actual confusion was not required to recover an infringer’s profits).

Ninth Circuit

The Ninth Circuit requires a finding of willfulness for an accounting of profits. In Fifty-Six Hope Road Music, Ltd. v. A.V.E.L.A., Inc., the Ninth Circuit held that "[a]warding profits ‘is proper only where the defendant is attempting to gain the value of an established name of another.’ Willful infringement carries a connotation of deliberate intent to deceive.” 778 F.3d 1059, 1073-74 (9th Cir. 2015) (quoting Lindy Pen Co. v. Bic Pen Corp., 982 F.2d 1400, 1406 (9th Cir. 1993)), cert. denied, 136 S.Ct. 410 (2015).

Tenth Circuit

The Tenth Circuit requires a plaintiff to establish willfulness as a prerequisite for an accounting of profits under Section 35(a). In Western Diversified Services, Inc. v. Hyundai Motor America, Inc., 427 F.3d 1269 (10th Cir. 2005), the Tenth Circuit held that because of the punitive nature of an accounting, along with the potential windfall to the plaintiff in the absence of actual damages, the court "require[s] a showing that [a] defendant’s actions were willful to support an award of profits under [Section 35(a) of the Lanham Act].” Id. at 1272-73.
D.C. Circuit

The District of Columbia Circuit requires a showing of willfulness for an accounting of profits. In ALPO Pet Foods, Inc. v. Ralston Purina Co., 913 F.2d 958, 968 (D.C. Cir. 1990), the court specifically held that “an award based on a defendant’s profits requires proof that the defendant acted willfully or in bad faith.” The District of Columbia Circuit has not addressed accountings of profits since the 1999 amendments.

3. Courts Holding That Willfulness Must be Shown If the Parties Are Not Competitors (Hybrid Approach)

First Circuit

The First Circuit requires willfulness to obtain an accounting of a defendant’s profits only in certain situations. The leading First Circuit case is Tamko Roofing Products, Inc. v. Ideal Roofing Co., Ltd., which emphasized the Circuit’s three justifications for ordering an accounting of a defendant’s profits: “(1) as a rough measure of the harm to plaintiff; (2) to avoid unjust enrichment of the defendant; or (3) if necessary to protect the plaintiff by deterring a willful infringer from further infringement.” 282 F.3d 23, 36 (1st Cir. 2002). Although willfulness is clearly required in the third justification, it is unclear whether it is necessary in the other two justifications. In Tamko, the First Circuit held that if the products directly compete, fraud, bad faith, or palming off is not required to obtain an accounting of an infringing defendant’s profits. Id. at 35-36. This case did not specifically reach the issue of whether “willfulness” is a prerequisite because the jury made a finding of willfulness. The court did note though that “when the rationale for an award of defendant’s profits is to deter some egregious conduct, willfulness is required.” Id. at 36 n.11.

In evaluating the three justifications, the district court in Fishman Transducers, Inc. v. Paul, noted that the first justification for an accounting of a defendant’s profits requires direct competition (which does not require willfulness) and the third justification requires willfulness, but that the First Circuit had not directly ruled on whether the second justification requires willfulness. Fishman, No. 07-10071-GAO, 2011 WL 1157529, at *1 (D. Mass. Mar. 29, 2011). On appeal, the First Circuit wrote that “our cases usually require willfulness (one primary exception involving direct competition . . . ) to allow . . . a recovery of the defendant’s profits,” and that the plaintiff’s “remaining hope was to recover the defendant’s profits, but this required a showing of willfulness.” Fishman, 684 F.3d 187, 191 (1st Cir. 2012). Therefore, the First Circuit requires willfulness for an accounting of profits unless there is direct competition between the parties.

E. Conclusion

A significant split exists among the circuits on whether a prevailing plaintiff must demonstrate a defendant’s willful infringement, unfair competition, or cyber-piracy before recovering the defendant’s profits as a deterrent to potential future infringements or to remedy unjust enrichment.
From a public policy perspective, recognizing willfulness as only one of the factors in the analysis, but not a requirement, enables aggrieved trademark owners to separate a defendant from its ill-gotten gains resulting from its unlawful actions, and also deters additional unlawful behavior. If implemented by the Supreme Court or Congress, the position recommended by this Report would allow a prevailing trademark plaintiff to recover the defendant’s profits following a finding of infringement, unfair competition, or cyber-piracy, even when the defendant’s conduct, while not blameless, does not rise to the level of willfulness or maliciousness, both of which can be difficult to prove. Moreover, since courts may use their equitable power to order the disgorgement of a defendant’s profits (i.e., its ill-gotten gains resulting from its infringing conduct) to a prevailing plaintiff who has demonstrated infringement, unfair competition, or cyber-piracy, such disgorgement should be subject to as few bright-line rules as possible.

Respectfully submitted,

Donna P. Suchy, Chair
Section of Intellectual Property Law
August 2017
1. **Summary of Resolution**

The resolution calls for the Association to adopt policy addressing a split among the circuits and supporting the view that proof of willfulness should not be a requirement for an accounting of a defendant's profits in trademark infringement, unfair competition, or cyber-piracy cases under Sections 32, 43(a), and 43(d) of the federal Lanham Act, 15 U.S.C. §§ 1114, 1125(a) and 1125(d). An important purpose is to discourage forum shopping by plaintiffs seeking to recover a defendant's profits to remedy proven infringement, which has and will continue to result from a three-way split among the circuits. Secondarily, principles of statutory construction require that willfulness be only one of several factors properly considered by courts in the accounting inquiry, instead of a bright-line prerequisite. Finally, courts ordering equitable remedies such as a disgorgement of profits should not be bound by unnecessarily rigid requirements but rather should be given wide berth to exercise discretion in crafting equitable relief.

2. **Approval by Submitting Entity**

The Intellectual Property Law Section Council approved the resolution on April 4, 2017.

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

No.

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

None.

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

N/A

6. **Status of Legislation**

None.
Plans for implementation of the policy if adopted by the House of Delegates

The policy will provide Association support for legislation or an Association amicus brief in any case addressing the issue. One possible opportunity would be Romag Fasteners, Inc. v. Fossil, Inc., 817 F.3d 782 (Fed. Cir. 2016), cert. granted and vacated on other grounds, No. 16-202, 2017 WL 1114951 (U.S. Mar. 27, 2017), if either party petitions the Supreme Court and certiorari is granted for a second time.

Cost to the Association (both direct and indirect costs).

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

Disclosure of Interest

There are no known conflicts of interest regarding this recommendation.

Referrals

This recommendation will be distributed to each of the Sections, Divisions, Forums, and Standing Committees of the Association in the version accepted and numbered for the agenda by the Rules and Calendar Committee. An earlier version was shared with several sections.

Contact Person (prior to meeting)

Donna P. Suchy
Section Chair, Section of Intellectual Property Law
Managing Counsel,
Intellectual Property Office of the General Counsel
Rockwell Collins Inc.
400 Collins Road, NE
Cedar Rapids, IA 52498
Ph: 319-295-1184
donna.suchy@rockwellcollins.com

and

Susan Barbieri Montgomery
Section Delegate to the House of Delegates
Foley Hoag LLP
155 Seaport Blvd., Ste. 1600
Boston, MA 02210-2600
Ph: 617-773-7071
s.montgomery@northeastern.edu
12. **Contact Persons (who will present the report to the House)**

Susan Barbieri Montgomery  
Section Delegate to the House of Delegates  
Foley Hoag LLP  
155 Seaport Blvd., Ste. 1600  
Boston, MA 02210-2600  
Ph: 617-773-7071  
s.montgomery@northeastern.edu
EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution calls for the Association to adopt policy in support of an interpretation of Section 35(a) of the Lanham Act, 15 U.S.C. §1117(a), that proof of willfulness is not required, but may be taken into account as among the equitable considerations, for a prevailing plaintiff to recover a defendant’s profits in actions involving trademark infringement, unfair competition and/or cyber-piracy.

2. Summary of the Issue that the Resolution Addresses

In an action for trademark infringement, unfair competition or cyber-piracy under the Lanham Act, a prevailing plaintiff may be entitled to a disgorgement of defendant’s profits, as an equitable remedy. However, there is a split among the Circuits as to whether the prevailing plaintiff must establish a defendant’s willfulness to be awarded a disgorgement of defendant’s profits or whether a showing of willfulness is simply a factor considered by the court in fashioning such an equitable remedy. This Resolution seeks to resolve the Circuit split and establish a uniform rule that is based on statutory construction and does not undermine a court’s inherent and broad discretion when ordering the equitable remedy of an accounting.

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

The Resolution calls for the adoption of policy which supports an interpretation of the statute that willfulness is not required but may be considered by a court when determining whether a disgorgement of defendant’s profits is an appropriate equitable remedy. This Resolution would support an Association amicus brief with the Supreme Court of the United States in Romag Fasteners, Inc. v. Fossil, Inc., 817 F.3d 782 (Fed. Cir. 2016), cert. granted and vacated on other grounds, No. 16-202, 2017 WL 1114951 (U.S. Mar. 27, 2017) if either party in the case petitions the Supreme Court for additional review, or in a similar case raising this issue in light of the existing circuit split.

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

This Resolution is consistent with the approach adopted by the Third, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits. The Second Circuit has adopted a different view, namely that willfulness is a mandatory prerequisite to obtain the equitable remedy of disgorgement of defendant’s profits. This position has also been adopted by the Eighth, Ninth, Tenth and D.C. Circuits. The First Circuit has adopted a blended approach that requires a plaintiff to prove the defendant willfully violated the plaintiff’s rights only if the parties are not direct competitors.
RESOLVED, That the American Bar Association supports an interpretation of the novelty requirement of Section 102(a)(1) of the Patent Act such that only sales or offers to sell that make the invention accessible to the public prior to the filing of a patent application could prevent an inventor or patent owner from obtaining or maintaining a patent on that invention.
REPORT

This report concerns whether an invention incorporated in a sale or an offer to sell a product or service must be “available to the public” and, thereby, known to the public, in order for that sale or offer to sell to invalidate claims of a patent to that invention under 35 U.S.C. § 102(a)(1). This Resolution asks the ABA House of Delegates to approve policy supporting an interpretation of 35 U.S.C. § 102(a)(1) that construes language added by Congress and limits invalidating sales or offers for sale to those which make the claimed invention available to the public. Uncertainty regarding interpretation of § 102(a)(1) presents a dilemma for lawyers and applicants with disclosure duties to the PTO because they must choose between compliance with differing and inconsistent duties depending on two different interpretations, or attempt to forecast the interpretation of future on sale bar cases.

In 2011, through the enactment of the America Invents Act (“AIA”), the United States took the dramatic step of switching from a system that awarded patents to the “first-to-invent,” subject to certain conditions, to a system that awarded patents to the “first-to-file” a patent application, also subject to conditions. In making the switch, Congress modified certain conditions to patentability to account for the change in how priority is now determined. These conditions were changed in part because of the recognition that the incentives to promptly file patent applications under a first to file system are different than the incentives that existed under a first to invent system, and also because of a desire to make U.S. and foreign law more consistent.

One such modification redefined the nature of the inventor’s own pre-filing activities that would prevent the inventor from being granted a patent. Before the switch, an inventor could be denied a patent based on disclosures or activity both known to the public and those unknown to the public. This included a sale or offer to sell the product or service, public or private, more than a year prior to the date on which the inventor filed a patent application. Invalidating disclosures unknown to the public were referred to as “secret prior art.” Advocates believed that rejecting patents based on secret prior art would encourage inventors to file patent applications quickly, thereby expediting disclosure of the invention and its eventual dedication to the public. The sale created a bar even if it did not publicly disclose the details of the claimed invention.

In switching to a first to file patent system, however, Congress created a new, stronger incentive for inventors to quickly file a patent application—the complete loss of patent rights to another who files a patent application first—and no longer needed to rely on secret prior art to encourage quick filing. As a result, the AIA introduced a new requirement that only disclosures or other activities that were available to the public could invalidate claims. Specifically, Congress added the language “otherwise available to the public” to the novelty requirement found in the statute, 35 U.S.C. § 102(a)(1). In addition to the literal change to the statute by which the language “otherwise available to the public” was inserted, the AIA’s legislative history shows that Congress intended the new language to apply to all forms of invalidating disclosures or activities, including sales and offers to sell. Accordingly, under the new post AIA novelty system, any information relied on to deny an inventor a patent or to invalidate a claim of an issued patent must have publicly disclosed the details of the claimed invention. A sale or offer to sell would only prevent the inventor from obtaining a patent if the sale or offer made the claimed invention known to the public. The change brought the on-sale doctrine into conformity with the
The public nature of the other prior art items listed in the statute, including patents, printed publications, and public uses.

On May 1, 2017, in *Helsinn Healthcare S.A. v. Teva Pharmaceuticals USA, Inc.*, No. 2016-1284, -1787, 2017 WL 1541518, _ F.3d ___ (Fed. Cir. May 1, 2017), a three judge panel of the Federal Circuit held that an invention is made available to the public when there is a publicly disclosed commercial offer or contract to sell a product embodying the invention, regardless of whether members of the public were aware that the product sold actually embodies the claimed invention. *Slip Op.* at *23-*25. Without articulating an application of statutory construction principles to the language Congress added to the statute, the court ruled that pre-AIA law still applied so that a sale occurs under the statute even if members of the public could not ascertain the claimed invention. *Id.*

This Resolution asks the ABA House of Delegates to approve policy supporting an interpretation of 35 U.S.C. § 102(a)(1) to limit invalidating sales or offers for sale to those which make the claimed invention publicly accessible. This interpretation promotes predictability, simplicity and transparency in the application of patent laws, consistency in the application of novelty law, and also serves the public by encouraging collaboration and information sharing between different organizations (e.g., hospitals, research organizations, etc.) to facilitate the research and development necessary to invent so many of our life-saving and life-altering inventions. This added predictability will provide lawyers with clarifications needed to help them comply with their duties of candor and professional responsibility.

The Section of Intellectual Property Law requests the ABA House of Delegates to approve this Resolution, which would provide the basis for either Association support of legislation to clarify 35 U.S.C. § 102(a)(1) or an Association amicus curiae brief in the U.S. Supreme Court should the petition for certiorari be granted in a relevant case. If a petition is granted in *Helsinn Healthcare S.A. v. Teva Pharmaceuticals USA, Inc.*, Fed. Cir. 2016-1284, the deadline for filing an amicus curiae brief on the merits in the Supreme Court will likely be reached before the next meeting of the House of Delegates.

A. The On-Sale Bar Doctrine Sought to Encourage Inventors to File Patent Applications Without Delay

Under the Patent Act, an inventor is entitled to a patent unless, among other things, the invention is not “novel.” For hundreds of years prior to enactment of the AIA, an inventor could be denied a patent based on activity that was both known and unknown to the public. Those included any sale of or offer to sell the product or service, public or private, more than a year prior to the date on which the inventor filed a patent application. This is better known as the “on-sale bar doctrine,” or common law forfeiture doctrine.¹

¹In *Metallizing Engineering Co. v. Kenyon Bearing & Auto Parts, Co.*, 153 F.2d 516, 520 (2d. Cir. 1946), Judge Learned Hand described the doctrine as barring an inventor from patenting an invention if the inventor attempted to profit from commercial use of the invention beyond the grace period, even if wholly in secret and inaccessible by the public. In its brief before the Federal Circuit, the United States notes that the doctrine was recognized by the U.S. Supreme Court even earlier stating, “the Supreme Court in *Pennock v. Dialogue* recognized that an inventor loses his right to a patent ‘if he suffers the thing invented to go into public use, or to be publicly
The doctrine had been incorporated into the Patent Act as early as 1836, and its inclusion continued through the enactment of the 1952 Act, as found in the pre-AIA novelty provision, 35 U.S.C. § 102(b). Section 102(b) prohibited the patenting of any invention "on sale in this country, more than one year prior to the date of application for patent in the United States." Note that in the pre-AIA novelty provision, no language requiring that those sales be "available to the public" or equivalent to that language was included anywhere in the statute.

At the time, it was thought that this development in the law was necessary to encourage early disclosures of inventions by encouraging an applicant to file a patent application without delay. In Woodland Trust v. Flowertree Nursery, Inc., 148 F.3d 1368, 1370, (Fed. Cir. 1998), the Federal Circuit noted that [the novelty requirement found in] Section 102(b)...is primarily concerned with the policy that encourages an inventor to enter the patent system promptly," and the inventor's failure to file promptly forces the court to treat the inventor's own prior commercial use as a bar, even if kept secret. Id. at 1370; see also, 157 Cong. Rec. S1371 (daily ed. Mar. 8, 2011). When Congress enacted the AIA, it made a significant change in the time for filing patent applications by switching the United States from a first to invent system to a first to file system in conformity with the system in place in all major developed countries. This significant change in turn obviated the need for reliance on any secret activities, including secret sales which do not make the claimed invention known to the public, to serve as invalidating prior art. The necessary incentive for inventors to promptly file their patent applications now resides in a new paradigm rather than the historical system that existed for more than one hundred years in the United States.

B. Congressional Enactment of the Section 102(a)(1) Novelty Requirement:
Dispensing with Reliance on Non-Public Sales or Offers to Sell

An inventor will not be granted a patent if, among other things, the invention is not new. In accordance with AIA § 102(a)(1), an invention is not new if "the claimed invention was patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention." In amending the novelty requirement of § 102(a)(1), Congress has shifted the focus of the novelty test to whether the invention had been put into the public domain prior to the inventor filing a patent application.


Two significant differences exist between the pre-AIA § 102(b) novelty requirement, discussed in the previous section, and the new § 102(a)(1) novelty requirement. First, consistent with the new first-to-file system, the AIA dispensed with the one-year grace period by which an inventor could wait to file his or her application before a statutory novelty bar is triggered (in other words, a U.S. patent application was still timely even though a novelty defeating even might have occurred during a one year window). Second, new § 102(a)(1) includes the language "or otherwise available to the public," not found in pre-AIA § 102(b). Until the AIA became law, sales unavailable to the public, “secret sales,” could be used to invalidate a patent claim.

The plain language of AIA Section 102(a)(1) indicates Congress' intent to do away with reliance on sales that fail to describe the invention by requiring sales to make the invention “accessible to the public” to be invalidating. It provides that an applicant is entitled to a patent unless “the claim invention was... in public use, on sale, or otherwise available to the public” before the inventor filed his or her patent application. Use of the phrase “otherwise available to the public” to conclude the series of statutory bars in Section 102(a)(1) limits the on-sale bar to sales and offers for sale that make the invention available to the public. For “[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.” Paroline v. United States, 134 S. Ct. 1710, 1720-21 (2014).

Similarly, the common meaning of the word “otherwise,” also supports a public availability requirement. Otherwise means “in a different way or manner.” Merriam-Webster's Collegiate Dictionary, at 823 (10th Ed. 1998). For the last category to be available to the public “in a different way or manner” [per the definition of “otherwise”] the prior categories, including “on sale,” must also be fully available to the public. See Strom v. Goldman, Sachs & Co., 202 F.3d 138, 146-47 (2nd Cir. 1999) (“The position of the phrase ‘or any other equitable relief; in the sentence in which it appears indicates that it modifies one or both of the two specific remedies referred to just before it in the same sentence.”); see also, Finisar Corp. v. DirecTV Group, Inc., 523 F.3d 1323 (Fed. Cir. 2008), (“when a modifier is set off from a series of antecedents by a comma, the modifier should be read to apply to each of those antecedents.” Id. at 1336-37 (citation omitted)). For these reasons, the term “on sale” must be read in light of the phrase “otherwise available to the public,” which modifies it. On its face, the new language added to Section 102(a)(1) eliminates non-public sales and uses as prior art.

In addition to statutory construction of the “otherwise available to the public” language, the foregoing interpretation of AIA Section 102(a)(1) is consistent with the Act's legislative history. The House Judiciary Committee Report declared that:

[The AIA] modifies the prior-art sections of the patent law. Prior art will be measured from the filing date of the application and will typically include all art that publicly exists prior to the filing date, other than disclosures by the inventor within 1 year of filing .... [A]nd the phrase “available to the public” is added to clarify the broad scope of relevant prior art, as well as to emphasize the fact that it must be publicly accessible.
114B


[T]he 102(a) bar with respect to an invention ... [can only be triggered] by a disclosure that is ... made available to the public .... If a disclosure ... is not made available to the public, then such a disclosure would not constitute patent-defeating prior art under 102(a) in the first place.


[S]ubsection 102(a) was drafted in part to do away with precedent under current law that private offers for sale or private uses or secret processes practiced in the United States that result in a product or service that is then made public may be deemed patent-defeating prior art. That will no longer be the case. In effect, the new paragraph 102(a)(1) imposes an overarching requirement for availability to the public, that is a public disclosure, which will limit paragraph 102(a)(1) prior art to subject matter meeting the public accessibility standard that is well-settled in current law, especially case law of the Federal Circuit.

157 Cong. Rec. at S1496 (statement of Sen. Patrick Leahy). Representative Lamar Smith explained during the House debate that “current precedent,” i.e., pre-AJA precedent on the forfeiture doctrine, was contrary to the new 102(a) provisions:

[C]ontrary to current precedent, in order to trigger the bar in the new 102(a) in our legislation, an action must make the patented subject matter ‘available to the public’ before the effective filing date.


One of the law’s sponsors, Senator Kyl, advised that new Section 102(a)(1) alters “the definition of non-patent prior art” because “it limits all-non-patent prior art to that which is available to the public.” 157 Cong. Rec. S1370 (daily ed. Mar. 8, 2011). Senator Kyle noted that “[t]he word ‘otherwise’ makes clear that the preceding clauses describe things that are of the same quality and nature as the final clause—that is, although different categories of prior art are listed, all of them are limited to that which makes the invention ‘available to the public.’” Id. Senator Kyl further explained that continuing to allow sales which do not make the claimed invention known to the public to establish a bar to patentability would disrupt the newly created PTAB invalidity proceedings. He argued that, “the bill’s new post-grant review, in which any validity challenge can be raised, would be utterly unmanageable if the validity of all patents subject to review under the new system continued to depend on discovery-intensive searches for secret offers for sale and non-disclosing uses by third parties.” 157 Cong. Rec. at S1371 (emphasis added).
C. The Federal Circuit’s Decision in Helsinn Does Not Reflect Congress’s Decision to Revise the Law

For the reasons set forth above, Section 102(a)(1), when properly interpreted, expressly requires public accessibility of the invention in order to invalidate patent claims based a sale. Well established statutory construction principles require such an interpretation even without resort to the legislative history. However, if the legislative history is considered, it is wholly consistent with a construction that requires public accessibility of the invention for the on sale and offer to sell bars to apply. Congress expressed its intent to place the on-sale doctrine on par with the public nature requirements of the other prior art items listed in the statute, including patents, printed publications, and public uses.

The opinion of a three judge panel of the Federal Circuit does not address interpretation of the plain language Congress added to the statute. Instead, with no discussion of statutory construction principles, the panel applied its own pre-AIA case law, which allowed for secret prior art to invalidate patents under the on sale novelty bar. The panel discounted committee reports and floor statements by the bill’s authors.

D. Helsinn Illustrates Why Agreements That Do Not Make the Invention Known to the Public Should Not Act as a Bar

The Federal Circuit’s decision produces a result that is prejudicial to small companies, such as Helsinn that, unlike their much larger counterparts, need to rely on third parties for distribution and manufacturing of products.

The case involved patents to a drug that successfully treats chemotherapy induced nausea and vomiting. Before Helsinn applied for its patents or obtained FDA approval, Helsinn entered into confidential agreements with suppliers to create sufficient quantities of the drug for use in Phase III clinical studies, and to file a New Drug Application specifying how and where the drug products would be manufactured and packaged for commercial distribution. Helsinn Healthcare S.A. v. Dr. Reddy’s Labs. Ltd., No. CV 11-3962 (MLC), 2016 WL 832089, at *1, *14, *24-*26 (D.N.J. Mar. 3, 2016). Helsinn also entered into a confidential licensing and supply agreement with a third company to assist in the later stage development and eventual sale of the drug. Id. at *27-*29.

The district court concluded that the new language found in the AIA requires that the on-sale bar apply only to public sales, and not to secret sales or sales that do not make the public fully aware of the claimed invention. Id. at *45. It found that interpretation consistent with: 1) the plain language of the amended statute; 2) the PTO’s interpretation of that language; 3) the AIA’s legislative history; and 4) a weighing of the relevant public policy considerations. Id. On the issue of public policy, the court concluded that the first-inventor-to-file system adequately incentivizes an inventor to promptly apply for a patent, rendering reliance on secret sales to invalidate a patent on the invention unnecessary. Id.
The district court found that Helsinn’s agreements with its suppliers were not “sales” because they did not contemplate a commercial sale, but were entered into for the purpose of pursuing FDA approval.\(^4\) \textit{Id.} at *48. It also found that those agreements were not “public” because they were entirely subject to and performed under confidentiality restrictions. \textit{Id.} at *49. The court found that even the licensing agreement did not constitute an invalidating sale because the sale did not make the claimed invention available to the public. \textit{Id.} at *51. It noted that it is not sufficient that a sale or offer for sale merely occur, but to act as a bar the sale of the claimed invention itself must be public. \textit{Id.} The court further found that the defendant had failed to show that press releases, announcing that Helsinn and its licensee had reached some agreement, disclosed the claimed invention or otherwise made the claimed formulation available to the public. \textit{Id.} at *52. To rule otherwise would discourage the collaboration and information sharing between organizations that facilitate the research and development necessary to invent this and countless other life-saving inventions.

However, in \textit{Helsinn Healthcare S.A. v. Teva Pharmaceuticals USA, Inc.}, No. 2016-1284, -1787, 2017 WL 1541518, ___ F.3d ___ (Fed. Cir. May 1, 2017), a three judge panel of the Federal Circuit held that an invention is made available to the public when there is a publicly disclosed commercial offer or contract to sell a product embodying the invention, regardless of whether members of the public were aware that the product sold actually embodies the claimed invention. \textit{Slip Op.} at *23-*25.

\textbf{E. Public Policy Favors A Public Availability Requirement}

To further promote predictability, simplicity and transparency, as well as consistency in the application of novelty requirements, Congress revised Section 102(a)(1) to introduce the new statutory requirement of “public availability” for the sale of an invention before the application filing date. The change brought the on-sale doctrine into conformity with the public nature of the other prior art items listed in the statute, including patents, printed publications, and public use.

The United States Constitution gives Congress the power to grant patents “to promote the progress of science and useful arts.” Art. I, Section 8. Many of the world’s most important inventions, including many lifesaving medications, can only be developed through partnerships between scientists employed by different organizations (e.g., hospitals, contract research organizations, etc.). The forfeiture doctrine discouraged inventors and their employers from entering the agreements that allow these partnerships to form, and scientific collaborations to

\(^4\) Addressing the issue of what constitutes a sale, in \textit{The Medicines Co. v. Hospira, Inc.}, 827 F.3d 1363 (Fed. Cir. 2016) (en banc), the Federal Circuit sitting en banc unanimously held that merely hiring a contract supplier to manufacture a patent product for the inventor does not constitute a “commercial sale.” In that case, The Medicines Company lacked in-house manufacturing capacity and had hired Ben Venue to prepare a stockpile of its patented anticoagulant products using the claimed method, while its supplier was not authorized to sell the manufactured product to others. \textit{Id.} at 1373-74. The Federal Circuit held that to be “on sale” the transaction must be one in which the product is “commercially marketed.” \textit{Id.} It explained that this preparation of the patented product was not a sale because: “(1) only manufacturing services were sold to the inventor—the invention was not; (2) the inventor maintained control of the invention, as shown by the retention of title to the embodiments and the absence of any authorization to Ben Venue to sell the product to others; and (3) ‘stockpiling,’ standing alone, does not trigger the on-sale bar.” \textit{Id.}
take place. Revised Section 102(a)(1)'s public accessibility requirement reduces the risk of forfeiture, and would advance the public policy expressly set for in the Constitution.

The AIA provides ample incentive for inventors to enter the patent system promptly that was not present under the Pre-AIA first-to-invent system. Under the AIA’s first-to-file system, an inventor who sells his invention in secret would risk that another inventor could secure patent rights and subsequently remove his product from the market. Finally, one of the AIA’s main purposes was to harmonize the U.S. patent system with international practice. The major foreign jurisdictions do not disqualify inventions from patenting because of prior secret offers of sale or uses, presumably because they present little risk under first-inventor to-file systems. Accordingly, public policy favors affirming the public availability requirement.

F. Clarity Is Needed to Enable Attorneys and Others to Comply with Their Duties of Candor and Professional Responsibility

Patent applicants, their attorneys, and others involved in the preparation and filing of patent applications owe a duty of candor and good faith to the PTO. They are obligated to disclose “all information known to that individual to be material to patentability” of the claims in patent applications filed in the PTO. 37 CFR § 1.56 “Duty to disclose information material to patentability.” This duty includes a requirement that these individuals provide to the PTO any information that would render a patent invalid under the proper statutory interpretation of the on sale bar. 37 CFR § 1.56(b)(1), see also Paragon Podiatry Lab., Inc. v. KLM Labs., Inc., 984 F.2d 1182, 1193 (Fed. Cir. 1993) (attorney’s knowing failure to disclose sales of the patented device to the PTO rendered the patent unenforceable); Brasseler, U.S.A. I. L.P. v. Stryker Sales Corp., 267 F.3d 1370, 1381 (Fed. Cir. 2001) (awarding attorneys fees after the patent was held unenforceable because the patent attorneys and their clients had committed misconduct before the PTO for failing to disclose the existence of a sale of the patented product). Until the proper interpretation of the Helsinn on sale bar is clarified, or finally decided, applicants cannot determine what sales information is within the scope of their duty to disclose. This case presents a dilemma for those with disclosure duties to the PTO because they must choose between compliance with differing and inconsistent duties depending on two different interpretations, or attempt to forecast the interpretation of future on sale bar cases.

Finally, the uncertainty of the proper interpretation of the on sale bar under Helsinn creates ethical and professional responsibility issues for attorneys who assist clients in filing and prosecuting patents before the PTO. Such attorneys are individually under the same duty of disclosure to the PTO as patent applicants and inventors. 37 CFR 1.56(c). The difference is that lawyers advising clients in filing and prosecuting patent applications put themselves at risk to possible ethical or disciplinary repercussions depending on how they advise clients based on their forecast of case law developments regarding the future interpretation of the on sale bar after the recent decision in Helsinn on May 1, 2017.
For these reasons, the Section of Intellectual Property Law believes its recommendation is consistent with the law and represents sound public policy, and therefore, urges its adoption by the ABA House of Delegates.

Respectfully submitted,

Donna P. Suchy, Chair
Section of Intellectual Property Law
August 2017
GENERAL INFORMATION FORM

Submitting Entity: Section of Intellectual Property Law
Submitted by: Donna P. Suchy, Section Chair

1. Summary of Resolution

The Resolution calls for the Association to adopt policy in support of a clarification of the patent laws and to support an interpretation of those laws such that a sale or an offer to sell a product or service embodying an invention must have been “available to the public” and made the invention known to the public to invalidate claims directed to that invention.

2. Approval by Submitting Entity

The Intellectual Property Law Section Council approved the resolution on February 4, 2017.

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

No.

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

None.

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

N/A


Not applicable at present, but a future legislative solution may be necessary.

7. Plans for implementation of the policy, if adopted by the House of Delegates

The policy would support submission of an amicus curiae brief on behalf of the ABA relating to a petition for writ of certiorari or on the merits before the U.S. Supreme Court or in the Court of Appeals for the Federal Circuit. That opportunity may be presented in the case of Helsinn Healthcare S.A. v. Teva Pharmaceuticals USA, Inc., or another case presenting the same or similar issues regarding the scope of “on sale” prior art. This
policy also would support submission of comments to Congress in the event a legislative solution is proposed.

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

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

9. **Disclosure of Interest**

There are no known conflicts of interest with regard to this recommendation.

10. **Referrals**

This recommendation will be distributed to each of the Sections, Divisions, Forums, and Standing Committees of the Association in the version accepted and numbered for the agenda by the Rules and Calendar Committee. An earlier version was shared with several sections.

11. **Contact Person (prior to meeting)**

Susan Barbieri Montgomery
Section Delegate to the House of Delegates
Foley Hoag LLP
155 Seaport Blvd., Ste. 1600
Boston, MA 02210-2600
Ph: 617 373 7071
s.montgomery@northeastern.edu

12. **Contact Persons (who will present the report to the House)**

Susan Barbieri Montgomery
Section Delegate to the House of Delegates
Foley Hoag LLP
155 Seaport Blvd., Ste. 1600
Boston, MA 02210-2600
Ph: 617 373 7071
s.montgomery@northeastern.edu
EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution calls for the Association to adopt policy in support of a clarification of the patent laws and to support an interpretation of those laws such that a sale or an offer to sell a product or service embodying an invention must have made the invention "available to the public" to invalidate claims of a patent directed to that invention.

2. Summary of the Issue that the Resolution Addresses

Prior to the enactment of the America Invents Act (AIA) in 2011, an inventor’s attempts to sell a product or service more than a year before the inventor filed a patent application would prevent the inventor from obtaining a patent, even if the inventor’s efforts to sell the product were made in secret and even if the sale did not make the invention known to others. When Congress enacted the AIA, it changed the U.S. patent system from one that based priority on which inventor was the first to invent, to one that based priority on which inventor filed first. Because the new priority system encouraged inventors to file quickly, Congress appears to have eliminated reliance on disclosures or activities not fully known to the public to invalidate claims of a patent or application—only public sales or offers to sell could be used to invalidate claims directed to an invention. But there is currently litigation over whether, in amending 35 U.S.C. § 102(a)(1) to include the language “otherwise available to the public,” Congress intended to limit reliance on sales and offers to sell to only those that were fully public or whether it intended to maintain the status quo.

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

The policy would provide authority for the ABA to express views to any appropriate and relevant policy-making body (judicial, legislative, or executive) in support of an interpretation of the patent laws that an invention is "on sale" under 35 U.S.C. § 102(a)(1) only when such sale or offer for sale was directed to an invention which was available to the public.

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

There are two views on interpretation of § 102(a)(1) with the “or otherwise available to the public” language added by Congress: the view expressed in the resolution and the approach taken by a three judge panel of the Federal Circuit, which held that an invention is made available to the public when there is a publicly disclosed commercial offer or contract to sell a product embodying the invention, regardless of whether members of the public were aware that the product sold actually embodies the claimed invention.
RESOLUTION

RESOLVED, That the American Bar Association supports, in a post issuance proceeding at the U.S. Patent and Trademark Office in which a previously issued patent is challenged by a petitioner, applying the statutory requirement that the petitioner asserting the unpatentability of a patent “shall have the burden of proving unpatentability by a preponderance of the evidence” on both the challenged claims and any amendment of the claims proposed by the patent owner during the proceeding.
REPORT

This report concerns the allocation of the burden of persuasion between a patent owner and a third party petitioner in proving the unpatentability of patent claims in a post-issuance proceeding pursued by the petitioner before the Patent Trial and Appeal Board (PTAB) of the U.S. Patent Trademark Office (USPTO). In establishing post-issuance proceedings when it adopted the so-called America Invents Act (the "AIA") in 2011, Congress imposed on third party petitioners who challenge patents "the burden of proving a proposition of unpatentability by a preponderance of the evidence." 35 U.S.C. §§ 316(e) and 326(e). The question addressed in this report is whether the statute should be interpreted to impose the same allocation of the burden of persuasion with respect to patent claims found in the original patent and patent claims added by amendment during the course of the post-issuance proceedings. Uncertainty regarding the answer affects both petitioners and owners. This Resolution asks the ABA House of Delegates to approve policy that follows the plain language of the statute (which includes no limitation to original claims and specifies no distinction between original and amended claims) and therefore urges the courts to interpret the statute to apply the same statutory burden of persuasion in post-issuance proceedings to original and amended claims.

The AIA brought about a number of significant changes in U.S. patent law. One of those changes was the creation of post-issuance proceedings in which a third party may challenge the validity of one or more claims of an issued patent in an inter partes trial proceeding before the PTAB. The AIA created three types of post-issuance proceedings: inter partes review (IPR), post-grant review (PGR) and covered business method (CBM) review (collectively referred to as "post-issuance proceedings"). 35 U.S.C. §§ 311(a) and 321(a); AIA § 18(a).

Congress created the post-issuance proceedings as a relatively expedient, cost-effective option for parties seeking to contest the validity of issued patents. In establishing these proceedings, Congress implicitly acknowledged as it must that patents, once issued by the USPTO, confer property rights on a patent owner that should not be negated without applying an appropriate degree of due process. Post-issuance proceedings have limited discovery in comparison to district court litigation, and the PTAB is required to issue a final written decision within one year of institution of trial. 35 U.S.C. §§ 316(a)(11) and 326(a)(11). The PTAB institutes trial if it determines that the petitioner (third party challenger) has met a threshold burden of demonstrating a reasonable likelihood that at least one of the issued claims in a patent is unpatentable. 35 U.S.C. §§ 314(a) and 324(a).

If the PTAB institutes trial, the patent owner has a statutory right to pursue a motion to amend, in which the patent owner can propose substantive amendments to the issued claims of the patent to overcome the grounds of unpatentability asserted by the petitioner. 35 U.S.C. §§ 316(d)(1) and 326(d)(2).

In post-issuance proceedings, petitioners "have the burden of proving a proposition of unpatentability by a preponderance of the evidence." 35 U.S.C. §§ 316(e) and 326(e). However, the PTAB has not applied the above statutory provision to amended or substitute claims even though that statutory provision draws no distinction between original and amended claims. Instead, the PTAB has placed the ultimate burden of persuasion on patent owners to prove that
proposed amended or substitute claims submitted with a motion to amend are not unpatentable in post-issuance proceedings.

This Resolution asks the ABA House of Delegates to approve policy that urges the courts to reject the PTAB’s reading of the statute and instead clarify the statutory burden of persuasion in post-issuance proceedings without drawing a distinction between original and amended claims because the statute itself draws no such distinction. This Resolution supports the allocation of the burden of persuasion on petitioners who challenge patents to prove unpatentability of both the challenged original claims in the issued patent and any proposed amended or substitute claims presented by the patent owner, consistent with the statutory requirements of 35 U.S.C. §§ 316(e) and 326(e).

A. The Federal Circuit Grants En Banc Rehearing to Address Interpretation of the Statute

On August 12, 2016, the Federal Circuit granted Appellant’s petition for en banc rehearing in In re Aqua Products, Inc. 833 F.3d 1335 (2016), of the PTAB’s denial of Appellant’s motion to amend during an IPR proceeding. The Federal Circuit requested briefing on the following questions:

(a) When the patent owner moves to amend its claims under 35 U.S.C. § 316(d), may the PTO require the patent owner to bear the burden of persuasion, or a burden of production, regarding patentability of the amended claims as a condition of allowing them? Which burdens are permitted under 35 U.S.C. § 316(e)?

(b) When the petitioner does not challenge the patentability of a proposed amended claim, or the Board thinks the challenge is inadequate, may the Board sua sponte raise patentability challenges to such a claim? If so, where would the burden of persuasion, or a burden of production, lie?

After briefing by the parties, the USPTO and amici, the Federal Circuit conducted an oral hearing on December 9, 2016. An en banc rehearing decision is expected by the summer of 2017. If a petition for certiorari is filed at the U.S. Supreme Court by either party in Aqua Products or another case, this case would provide an opportunity for ABA to urge the Court to provide certainty and clarify the appropriate burden of persuasion in the case of amended or substitute claims.

B. Statutory Framework for Motions to Amend

During a post-issuance proceeding (IPR, PGR or CBM proceedings), a patent owner may file a motion to amend one or more of the claims challenged in the proceeding. See 35 U.S.C. §§ 316(d)(1) and 326(d)(1). Congress specified only three limitations on motions to amend. First, a patent owner may only file one motion to amend as a matter of right. Id. Second, the patent owner may only propose a reasonable number of substitute claims for each challenged claim. 35 U.S.C. §§ 316(d)(1)(B) and 326(d)(1)(B). Third, the patent owner’s proposed substitute claims
“may not enlarge the scope of the claims of the patent or introduce new matter.” 35 U.S.C. §§ 316(d)(3) and 326(d)(3). Thus, Congress intended patent owners to have a meaningful opportunity to amend their claims during IPR, CBM or PGR proceedings.

Congress also specified that the petitioner in an IPR, CBM or PGR proceeding “shall have the burden of proving a proposition of unpatentability by a preponderance of the evidence.” 35 U.S.C. §§ 316(e) and 326(e). However, contrary to the plain language of 35 U.S.C. §§ 316(e) and 326(e), which on their face do not differentiate or make an exception for amended or substitute claims, the USPTO and the PTAB require patent owners to bear the burden of persuasion to prove patentability of proposed substitute claims presented with a motion to amend in post-issuance proceedings. Rather than accepting the plain language, this alternative interpretation requires an assumption that “§ 316(a)(9)'s requirement that the patent owner has some obligation to provide “information in support of any amendment,” indicates that the patent owner carries an affirmative duty to justify why newly drafted claims—which, unlike the issued claims, had never been evaluated by the PTO—should be entered into the proceeding.” Nike, Inc. v. Adidas AG, 812 F.3d 1326, 1333–34 (Fed. Cir. 2016). So that “[t]he evidentiary standard of § 316(e), when read together with § 316(a)(9), therefore does not necessarily apply to claims that were not in existence at the time a petition is filed, such as newly offered substitute claims proposed by a patent owner in a motion to amend filed as part of an already-instituted IPR proceeding.” Id.

The resolution favors a more straightforward interpretation based on the plain meaning of the express provisions §§ 316(e) and 326(e): “the petitioner shall have the burden of proving a proposition of unpatentability by a preponderance of the evidence.” §§ 316(e) and 326(e) do not draw a distinction between the issued claims of a patent or proposed amended or substitute claims submitted with a patent owner’s motion to amend. If Congress had intended to impose different burdens of persuasion for original claims of a patent and amended or substitute claims presented with a motion to amend, Congress could have specified such a requirement. See Bates v. United States, 522 U.S. 23, 29 (1997) (“[W]e ordinarily resist reading words or elements into a statute that do not appear on its face.”). The fact that §§ 316(e) and 326(e) immediately follow the motion to amend provisions of §§ 316(d) and 326(d) reinforce the interpretation that Congress did not intend to impose separate burdens of persuasion for original claims of a challenged patent and amended or substitute claims presented with a motion to amend.

When Congress intended to draw distinctions between original claims of a challenged patent and amended or substitute claims presented with a motion to amend, Congress made that distinction clear. For example, §§ 316(a)(9) and 326(a)(9) distinctly refer to “a challenged claim” and “substitute claims.” Further, in §§ 316(d)(1)(B) and 326(d)(1)(B), Congress distinctly referred to a “challenged claim” and “substitute claims.” Moreover, in §§ 318(a) and 328(a), Congress distinctly referred to “any patent claim challenged” and “any new claim added under section 316(d) [or 326(d)].” Thus, when Congress intended to draw a distinction between original claims of a challenged patent and amended or substitute claims presented with a motion to amend, Congress made that distinction explicit. See Rusello v. United States, 464 U.S. 16, 23 (1983) (explaining that where Congress included a phrase in one section of a statute that it omitted in another section of the statute, it should be presumed that Congress acted intentionally in the disparate inclusion or exclusion of phrases in the statute). Since Congress did not draw a
distinction between original claims of a challenged patent or amended or substitute claims presented with a motion to amend when allocating the burden of persuasion on petitioners in §§ 316(e) and 326(e), it is clear that Congress intended for petitioners to have the burden of persuasion in proving a proposition of unpatentability for both original patent claims as well as any proposed claims presented in a motion to amend.

C. Initial Burden of Production of Patent Owners

35 U.S.C. §§ 316(a)(9) and 326(a)(9) provide that the Director of the USPTO shall prescribe regulations “setting forth standards and procedures for allowing the patent owner to move to amend the patent” under 35 U.S.C. §§ 316(d)(1) and 326(d)(1).

In accordance with these provisions, the PTAB reasonably imposes an initial burden of production on the patent owner. In particular, the PTAB’s regulations provide that “[a] motion to amend may be denied where: (i) [t]he amendment does not respond to a ground of unpatentability involved in the trial; or [t]he amendment seeks to enlarge the scope of the claims of the patent or introduce new subject matter.” 37 C.F.R. §§ 42.121(a)(2) and 42.221(a)(2). The PTAB’s regulations also require a motion to amend to “set forth (1) [t]he support in the original disclosure of the patent for each claim that is added or amended; and (2) [t]he support in an earlier-filed disclosure for each claim for which benefit of the filing date of the earlier filed disclosure is sought.” 37 C.F.R. §§ 42.121(b) and 42.221(b).

Consistent with the requirements of 35 U.S.C. §§ 316(a)(9) and 326(a)(9), the above-identified regulations of the PTAB set forth a reasonable initial burden of production on the patent owner to demonstrate (i) that the proposed amendments are supported by the original disclosure of the patent as a whole, (ii) that the proposed amendments overcome the ground of unpatentability asserted by the petitioner, and (iii) that the proposed amendment does not enlarge the scope of the claims of the patent or introduce new subject matter.

However, the PTAB has gone much further by requiring patent owners to prove patentability of proposed substitute claims over (1) the prior art of record (i.e., the prior art relied upon by petitioner) and (2) prior art known to the patent owner. Idle Free Systems, Inc. v. Bergstrom, Inc., IPR2012-00027, Paper 26 (PTAB June 11, 2013) (informative). In Master Image 3D, Inc. v. RealD Inc., the PTAB clarified the meaning of (1) “the prior art of record” and (2) “prior art known to the patent owner” as used in Idle Free. The PTAB indicated that (1) “the prior art of record” includes (a) any material art in the prosecution history of the patent, (b) any material art of record in the current proceeding, including art asserted in grounds not instituted by the Board, and (c) any material art of record in any other proceeding before the PTO involving the patent. In addition, the Board indicated that (2) “prior art known to the patent owner” includes “no more than the material prior art that Patent Owner makes of record in the current proceeding pursuant to its duty of candor and good faith to the Office under 37 C.F.R. § 42.11, in light of a Motion to Amend.” Master Image 3D, IPR2015-00040, Paper 42 at 2-3 (PTAB July 15, 2015) (precedential).

The USPTO rules likewise impose the burden of persuasion on patent owners to prove the patentability of proposed substitute claims over “the prior art of record” and “prior art known
to the patent owner" based on its interpretation that the patent owner, as the proponent for a motion to amend, "has the burden of proof to establish that it is entitled to the relief requested." 37 C.F.R. § 42.20(c). As noted above, Congress required the petitioner in a post-issuance proceeding to "have the burden of proving a proposition of unpatentability by a preponderance of the evidence." 35 U.S.C. §§ 319(e) and 326(e). Since the statute draws no distinction between original and amended claims, the petitioner’s burden of persuasion to establish unpatentability by a preponderance of the evidence that applies for the original claims of the patent should also apply to any proposed substitute claim(s) submitted with a motion to amend under 35 U.S.C. § 316(d)(1) or § 326(d)(1).

Accordingly, once a patent owner satisfies its initial burden of production in demonstrating that (1) the proposed substitute claims are patentable over the prior art relied upon by the petitioner in the petition (37 C.F.R. §§ 42.121(a)(2)(i) and 42.221(a)(2)(i)), (2) the proposed substitute claims do not "enlarge the scope of the claims of the patent or introduce new subject matter" (37 C.F.R. §§ 42.121(a)(2)(ii) and 42.221(a)(2)(ii)), and (3) the proposed substitute claims are supported by the original disclosure of the patent (37 C.F.R. §§ 42.121(b) and 42.221(b)), the burden of production should then shift to the petitioner, and then the petitioner should bear the ultimate burden of persuasion.

In summary, it is appropriate for the patent owner to have the initial burden of production limited to (a) presenting argument or evidence of patentability of the proposed substitute claim(s) over the prior art relied upon by the petitioner in the petition, including prior art asserted in non-instituted grounds of challenge, (b) presenting argument or evidence that the proposed amendments are supported by the original disclosure of the patent as a whole, (c) presenting argument or evidence that the proposed amendments overcome the ground(s) of unpatentability instituted in the proceeding, and (d) presenting argument or evidence that the proposed amendment does not enlarge the scope of the claims of the patent. But once the patent owner satisfies its initial burden of production, the burden of production then should shift to the petitioner. While the PTAB has recognized this shift in the burden of production, see, e.g., MasterImage 3D, IPR2015-00040, Paper 42 at 3 ("With respect to a motion to amend, once Patent Owner has set forth a prima facie case of patentability of narrower substitute claims over the prior art of record, the burden of production shifts to Petitioner.")., the petitioner should always bear the ultimate burden of persuasion with respect to both the original patent claims and any amended or substitute patent claims.

For these reasons, the Section of Intellectual Property Law believes this resolution is facially consistent with the law as adopted by Congress and represents sound public policy. Accordingly, the Section urges its adoption by the ABA House of Delegates.

Respectfully submitted,

Donna P. Suchy, Chair
Section of Intellectual Property Law
August 2017
1. **Summary of Resolution**

   The Resolution calls for the Association to adopt policy in support of a clarification of the patent laws and to support an interpretation of those laws such that in a post-issuance proceeding at the U.S. Patent and Trademark Office (PTO) in which a previously issued patent is challenged by a third party, the PTO may not, as a condition of accepting new claims, require the patent owner to first demonstrate the patentability of the new claims over the prior art of record.

2. **Approval by Submitting Entity**

   The Intellectual Property Law Section Council approved the resolution on April 4, 2017.

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

   No.

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

   None.

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

   N/A

6. **Status of Legislation.**

   Not applicable.

7. **Plans for implementation of the policy, if adopted by the House of Delegates**

   The policy would provide the basis for either Association support of legislation to clarify 35 U.S.C. §§ 316(d)(1) and 326(d)(1) or an Association amicus curiae brief relating to a petition for writ of certiorari or on the merits before the U.S. Supreme Court in the case of *In re Aqua Products, Inc.*, 823 F.3d 1369 (Fed. Cir.), reh'g en banc granted, opinion vacated, 833 F.3d 1335 (Fed. Cir. 2016), now pending before the Court of Appeals for
the Federal Circuit which heard the case sitting en banc, or another judicial proceeding presenting the same or similar issues regarding the allocation of the burden of proving the unpatentability of newly proposed patent claims in a proceeding to challenge a patent brought before the PTO.

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

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

9. **Disclosure of Interest**

There are no known conflicts of interest with regard to this recommendation.

10. **Referrals**

This recommendation will be distributed to each of the Sections and Divisions and Standing Committees of the Association in the version accepted and numbered for the agenda by the Rules and Calendar Committee. An earlier version was shared with several sections.

11. **Contact Person (prior to meeting)**

Susan Barbieri Montgomery  
Section Delegate to the House of Delegates  
Foley Hoag LLP  
155 Seaport Blvd., Ste. 1600  
Boston, MA 02210-2600  
Ph: 617-373 7071  
s.montgomery@northeastern.edu

12. **Contact Persons (who will present the report to the House)**

Susan Barbieri Montgomery  
Section Delegate to the House of Delegates  
Foley Hoag LLP  
155 Seaport Blvd., Ste. 1600  
Boston, MA 02210-2600  
Ph: 617-373 7071  
s.montgomery@northeastern.edu
EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution calls for the Association to adopt policy in support of a clarification of the patent laws and to support an interpretation of those laws such that in a post-issuance proceeding at the U.S. Patent and Trademark Office (PTO) in which a previously issued patent is challenged by a third party, the PTO may not, as a condition of accepting new claims, require the patent owner to first demonstrate the patentability of the new claims.

2. Summary of the Issue that the Resolution Addresses

When Congress enacted the America Invents Act (AIA), it unequivocally specified that the petitioner, not the patent owner, “shall have the burden of proving a proposition of unpatentability by a preponderance of the evidence.” 35 U.S.C. §§ 316(e) and 326(e). Congress also chose to allow patent owners one opportunity to replace claims in their patent, as a matter of right, subject to three conditions none of which involved shifting the burden of persuasion on the issue of validity onto the patent owner. 35 U.S.C. §§ 316(d) and 326(d). Contrary to the plain language of §§ 316(e) and 326(e), the PTO established rules that require the patent owner to prove the patentability of proposed substitute claims presented with a motion to amend. The resolution is intended to address uncertainty and urge clarification of the appropriate burden of persuasion in the case of amended claims.

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

The policy would provide authority for the ABA to express views to any appropriate and relevant policy-making body (judicial, legislative, or executive) in support of an interpretation of the provisions of the AIA that authorizes patent owners one opportunity to replace claims in their patent, as a matter of right, subject to conditions that do not involve shifting the burden of persuasion on the issue of validity onto the patent owner.

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

The PTO’s view is that 35 U.S.C. §§ 316(a)(9) and 326(a)(9) Congress vests the PTO with the authority to prescribe regulations “setting forth standards and procedures for allowing the patent owner to move to amend the patent” in a post-issuance proceeding before the PTAB and, thereby, expressly authorized the PTO to require that the patent owner prove patentability of any proposed substitute claims presented.
RESOLUTION

RESOLVED, That the American Bar Association supports the appointment of counsel at federal government expense to represent all indigent persons in removal proceedings before the Executive Office for Immigration Review (in Immigration Courts and before the Board of Immigration Appeals), and if necessary to advise such individuals of their rights to appeal to the federal Circuit Courts of Appeals.

FURTHER RESOLVED, That unless and until the federal government provides counsel for all indigent persons in removal proceedings before the Executive Office for Immigration Review, the American Bar Association encourages state, local, territorial, and tribal governments to provide in removal proceedings legal counsel to all indigent persons in their jurisdictions who lack the financial means to hire private counsel and who lack pro bono counsel.

FURTHER RESOLVED, That the American Bar Association encourages federal, state, local, territorial, and tribal governments to prioritize government-funded counsel for detained individuals in removal proceedings.
REPORT

The American Bar Association ("ABA"), through its Commission on Immigration ("Commission"), and other related entities, is strongly committed to ensuring fair treatment and full due process rights for immigrants and asylum-seekers under the nation's immigration laws and in accordance with the Constitution. ABA policy has consistently recognized the importance of access to counsel in removal proceedings,\(^1\) where a lawyer’s assistance is essential for a noncitizen to fully understand and effectively navigate the complexities of the U.S. immigration system. Immigration law has been recognized as second only to tax law in terms of complexity.\(^2\) Removal proceedings can be especially difficult and intimidating where language and cultural barriers are present or where the individual is detained or is a member of a vulnerable population.\(^3\) Currently, by statute, a respondent in removal proceedings has the right to be represented by counsel of his or her choosing, but not at government expense.\(^4\)

This resolution proposes to expand the ABA’s current policy to include providing government appointed counsel at the federal government’s expense to indigent noncitizens in removal proceedings before the Department of Justice’s Executive Office for Immigration Review ("EOIR"), specifically those proceedings in Immigration Courts and subsequent appeals to the Board of Immigration Appeals. If necessary, the resolution also calls for appointed counsel to advise clients of their further appellate rights before the U.S. Circuit Courts of Appeals. The ABA has taken an incremental approach in supporting an expanded right to appointed counsel at government expense for indigent individuals in civil proceedings, and this resolution is the next logical step.\(^5\)

The ABA already supports the right to appointed counsel at government expense in all immigration processes for unaccompanied children, people with disabilities and people with mental health conditions, as well as for indigent individuals in removal proceedings with potential legal relief who are unable to secure free or pro bono representation.\(^6\) This resolution

---

\(^1\) Removal proceedings are federal administrative proceedings that determine whether an individual will be expelled or admitted to the United States. See Immigration and Nationality Act ("INA") § 240, 8 U.S.C. § 1229a. These proceedings are held under the jurisdiction of the Executive Office for Immigration Review (EOIR), part of the Department of Justice. EOIR is comprised primarily of the Board of Immigration Appeals, the Office of the Chief Immigration Judge, the Office of the Chief Administrative Hearing Officer, and the Office of Legal Access Programs. 8 CFR § 1003.0(a).

\(^2\) Castro-O’Ryan v. INS, 821 F.2d 1415, 1419 (9th Cir. 1987) (quoting E. Hull, Without Justice for All 107 (1985)) (superseded by Castro-O’Ryan v. INS, 847 F.2d 1307 (9th Cir. 1988)).

\(^3\) Vulnerable populations can include unaccompanied minors, adults with children, people with disabilities and people with mental health conditions, crime victims and asylum-seekers, among others.


\(^5\) In practice, this incremental approach means that only a limited number of individuals would be affected, because it is estimated that only around 35% of all removal orders are issued through EOIR. The majority of removal orders today are issued through an administrative, non-judicial process (executed by the Department of Homeland Security). See Marc R. Rosenblum and Kristen McCabe, Deportation and Discretion, Reviewing the Record and Options for Change, THE MIGRATION POLICY INSTITUTE (2014), http://www.migrationpolicy.org/research/deportation-and-discretion-reviewing-record-and-options-change.

expands support for appointed counsel to all indigent individuals in removal proceedings. Expanding the right to counsel to such individuals will not only help ensure due process and fairness, but also has the potential to make the process more efficient. This resolution is especially timely due to an expected increase in detention and removal proceedings due to the current Administration’s expanded enforcement priorities, as well as a growing awareness of the need for publicly funded counsel by various state and local jurisdictions across the nation.

Current ABA Policies

ABA policy has consistently recognized the importance of legal representation in immigration cases where a lawyer can help a noncitizen understand and effectively navigate the complexities of the U.S. immigration system. As President Klein stated at the ABA’s 2017 Midyear Meeting, “we insist on the right to due process and legal representation – including hearings before impartial immigration judges. Under the rule of law, we owe due process to all, including those who face deportation.”

In the civil context generally, consistent with its commitment to legal representation, the ABA has continuously supported “Civil Gideon” since the 2006 Civil Gideon resolution that supported the provision of legal counsel at public expense in adversarial proceedings “where basic human needs are at stake.” The 2006 Civil Gideon resolution specifically lists basic human needs “such as those involving shelter, sustenance, safety, health or child custody” as examples, but it does not mention immigration.

Unaccompanied children:

- In 2001, the ABA supported government-appointed counsel at government expense for unaccompanied minors in all stages of immigration processes and proceedings.
- In 2004, the ABA adopted its own Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States. These standards include the right to an attorney and a call for timely legal rights presentations for all unaccompanied children, including the opportunity to consult with an attorney, the right to have an attorney represent them in all formal proceedings or other matters affecting a child’s immigration status, and (if necessary) the right to government-appointed counsel at the government’s expense.

---

7 Remarks of Linda A. Klein, President of the ABA, Address to the ABA House of Delegates (February 6, 2017), available at http://www.americanbar.org/content/dam/aba/images/abanews/LindaKleinABAHouseOfDelegates2-6-17.pdf.
9 Id.
12 Id.
• In 2015, the ABA adopted a resolution supporting the provision of legal representation at government expense to unaccompanied minors who have come to the U.S. with no resources for counsel, but with claims for immigration relief, at all stages of the immigration process, including during initial asylum interviews.¹³

People with disabilities and people with mental health conditions:
• In 2006, the ABA adopted a policy supporting the establishment of a system to provide legal representation, including appointed counsel and guardians ad litem, to people with disabilities and people with mental health conditions in all immigration processes and procedures, whether or not potential relief may be available to them.¹⁴

Indigent persons with potential relief:
• In 2006, the ABA adopted a policy supporting the due process right to counsel for all persons in removal proceedings, and the availability of legal representation to all non-citizens in immigration-related matters.¹⁵ This policy also supported the establishment of a system to screen and refer indigent persons with potential relief from removal to pro bono attorneys, Legal Services Corporation sub-grantees, charitable legal immigration programs and government-funded counsel.¹⁶
• In 2011, the ABA also adopted a resolution to improve access to counsel for individuals in immigration removal proceedings, focused on pro bono services.¹⁷ That resolution included developing regulations to strengthen eligibility requirements for pro bono providers, encouraging an increase in pro bono efforts, requiring BIA recognized agencies to provide more pro bono services, increasing training and expertise and minimizing the unauthorized practice of law.¹⁸

**Due Process**

The courts have long recognized that people in deportation proceedings are entitled to due process protections.¹⁹ The U.S. Supreme Court has stated that “once an alien enters the country, the legal circumstance changes, for the Fifth Amendment’s Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”²⁰

---

¹⁴ ABA Resolution 107A, supra note 6.
¹⁵ Id.
¹⁶ Id.
¹⁸ Id.
²⁰ Zadvydas v. Davis, 533 U.S. 678, 693 (U.S. 2001). See, e.g., Pangilinan v. Holder, 568 F.3d 708, 709 (9th Cir. 2009) (holding that an alien was deprived of due process by the Immigration Judge’s failure to probe into the facts of his case); Vargas-Hernandez v. Gonzales, 497 F.3d 919, 926-927 (9th Cir. 2007); Salgado-Diaz v. Gonzales, 395
As noted in prior ABA reports, one of the most important elements of due process is the right to be represented by counsel. This right can be based on multiple sources, including the Fifth Amendment to the U.S. Constitution, and has also long been recognized in the field of immigration law. The Immigration and Nationality Act provides that individuals in removal proceedings shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing. This provision does not prohibit programs from providing government-funded counsel; although it purportedly restricts such individuals' ability to claim an entitlement to counsel and affirms that the government is not required to provide counsel. In fact, certain state and local governments have already voluntarily established programs to provide government funded counsel in their jurisdictions for some noncitizens in removal proceedings.

Federal regulations recognize an individual's right to counsel in diverse matters and circumstances. In addition, courts have recognized that due process might necessitate the appointment of counsel in particular cases and have noted the importance of counsel in removal proceedings. As the studies cited below show, representation is one of the single most important factors affecting the outcome of a proceeding.

F.3d 1158, 1162 (9th Cir. 2005) (finding that "[i]mmigration proceedings, although not subject to the full range of constitutional protections, must conform to the Fifth Amendment's requirement of due process").

21 See, e.g., J.E.F.M. v. Lynch, 837 F.3d 1026, 1033 (9th Cir. 2016) ([W]e agree with the court's analysis in Anguilar that, 'by any realistic measure, the alien's right to counsel is part and parcel of the removal proceeding itself . . . [A]n alien's right to counsel possesses a direct link to, and is inextricably intertwined with, the administrative process that Congress so painstakingly fashioned."") (citing Anguilar v. ICE, 510 F.3d 1, 13 (1st Cir. 2007)); Biwot v. Gonzales, 403 F.3d 1094, 1098 (9th Cir. 2005) ("The right to counsel in immigration proceedings is rooted in the Due Process Clause and codified at 8 U.S.C. § 1362 and 8 U.S.C. § 1229a(b)(4)(A)."); Dakane v. U.S. Atty. Gen., 399 F.3d 1269, 1273 (11th Cir. 2005) ("It is well established in this Circuit that an alien in civil deportation proceedings, while not entitled to a Sixth Amendment right to counsel, has the constitutional right under the Fifth Amendment Due Process Clause right to a fundamentally fair hearing to effective assistance of counsel where counsel has been obtained") (quoting Gbaya v. U.S. Atty. Gen., 342 F.3d 1219, 1221 (11th Cir. 2003)); Borges v. Gonzales, 402 F.3d 398, 408 (3rd Cir. 2005) (recognizing that aliens have a statutory and constitutional right to counsel); Ram v. Mukasey, 254 F. App'x 47, 48 (2d Cir. 2007) (recognizing that the Second Circuit has held that claims of ineffective assistance of counsel are "rooted in the Fifth Amendment's Due Process Clause, and in the statutory right to counsel (at the alien's expense) in expulsion proceedings."); Castaneda-Delgado v. INS, 525 F.2d 1295, 1300 (7th Cir. 1975) ("Since Glasser, the courts have repeatedly recognized that denial of the Sixth Amendment right to counsel is so inherently prejudicial that there is no room for the harmless error doctrine.").


24 See id. at 8.

25 See § 1003.15(b)(5); § 1240.10(a)(1); § 1240.48(a); § 1292.5(b).

26 See Franco-Gonzalez v. Holder, 2014 WL 5475097, at *11 (C.D. Cal. Oct. 29, 2014) (holding that mentally incompetent aliens were entitled to appointment of "Qualified Representative"); Rios-Berrios v. INS, 776 F.2d 859, 863 (9th Cir. 1985) (finding that right to counsel was violated where there was "unexplained haste in beginning deportation proceedings" combined with other factors such as the alien's incarceration).

27 "The alien's stake in the proceeding is enormous (sometimes life or death in the asylum context); the legal rules surrounding deportation and asylum proceedings are very complex; specialized counsel are necessary but in short supply; and evidence suggests that some conduct on the part of the Government in deportation and asylum proceedings has been abusive." Ardestani v. INS, 502 U.S. 129, 140 (1991) (Blackmun, J., dissenting).
As noted in prior ABA reports, a hallmark of the U.S. legal system is the right to counsel, particularly in complex proceedings that have significant consequences. In acknowledging the severe consequences of deportation, Justice Brandeis stated almost 100 years ago that removal can result “in loss of both property and life, or of all that makes life worth living.”

Removal proceedings are adversarial and may carry severe consequences. The stakes for many individuals and their families are exceedingly high: the potential loss of homes and livelihoods, permanent separation from U.S. citizen and legal permanent resident (“LPR”) family members, banishment of a family’s sole breadwinner, or even persecution, torture or death. In this context, representation is arguably at least as critical as in the criminal context.

New National Enforcement Priorities

Through two Executive Orders and implementation memos, the current Administration has set out to vastly increase immigration enforcement and has identified several new national enforcement priorities and mechanisms that will affect a substantial number of noncitizens already living in the United States. These changes include:

1. plans to hire (i) 10,000 additional Immigration and Customs Enforcement (“ICE”) officers and agents to focus on internal enforcement and (ii) 5,000 additional U.S. Customs and Border Protection agents for increased border enforcement;
2. plans to compel state and local authorities to perform immigration enforcement functions;
3. expanding detention capacity and mandating the detention of individuals throughout their immigration court proceedings.

---

28 Ng Fung Ho v. White, 259 U.S. 276, 284 (U.S. 1922).
31 Exec. Order No. 13,768, supra note 30 at § 7.
32 Implementing the President's Border Security and Immigration Enforcement Improvement Policies, supra note 30 at 3.
33 See Exec. Order No. 13,768, supra note 30 at § 8.
34 Implementing the President's Border Security and Immigration Enforcement Improvement Policies, supra note 30 at 2.
4. prioritizing for removal all individuals who entered the United States without authorization or who are deportable or inadmissible due to criminal offenses or security grounds; and
5. setting new enforcement priorities that include removing noncitizens (i) convicted of any criminal offense (regardless of how minor), (ii) simply charged with any criminal offense, where such charge has not been resolved; (iii) who have committed acts which constitute a chargeable criminal offense; (iv) who have engaged in fraud or willful misrepresentation before a governmental agency; (v) who have abused the receipt of public benefits; (vi) who are subject to a final order of removal; and (vi) who, in the judgment of an immigration officer, otherwise pose a risk to public safety or national security.

As a result of these priority changes, a drastic increase in apprehension, detention and removal is expected. DHS Secretary Kelly has already referred to the development of additional detention space in his February 20, 2017, implementing memo on border security. Therefore, counsel for this increasingly targeted population is more essential now than ever before.

Access to Representation in Practice

Regardless of the type of study or methodology used, research has consistently shown the multiple benefits of counsel in removal proceedings, especially for detained noncitizens. Researchers have employed a variety of approaches in evaluating the proportion of immigration cases that have benefited from representation. The statistics differ depending on the approach taken and the numbers vary based on geographic location, detention status and nationality of the respondent.

The most comprehensive report to date is a study by Ingrid V. Eagly and Steven Shafer published in 2015. This study drew on over 1.2 million deportation cases decided between 2007 and 2012. According to the study, the national average of immigrants that secured legal representation in all removal cases was 37%. Some national studies have put the overall national average of immigration cases involving representation upwards of 50%. However, EOIR, which has put in place some measures to provide noncitizens with assistance in obtaining representation.
representation, found that in 2015, almost 60% of noncitizens overall (and only about 14% of those who were detained) had representation.\textsuperscript{42}

In contrast, a Transactional Records Access Clearinghouse ("TRAC") report observed the number of "rocket dockets" (cases that are given priority in the system) involving "adults with children" in which the family was represented as of September 2016.\textsuperscript{44} The TRAC report found that only 30% of the cases involved representation.\textsuperscript{45} A number of more local studies have been conducted as well. One study surveying cases in Northern California found that roughly two thirds of detained immigrants in removal proceedings before the San Francisco Immigration Court had no legal representation at any point in their removal proceedings.\textsuperscript{46} A critical New York-based study focused on the impact of detention on representation. It found that 40% of detained persons in New York City were represented.\textsuperscript{47} That number decreased dramatically to 19% when the detainees' proceedings were transferred outside of New York City.\textsuperscript{48}

The principal imbalances that emerge from the aforementioned studies are as follows: (i) imbalances based on whether the person was detained or not; (ii) imbalances based on the location of the proceedings; and (iii) imbalances based on the respondent's nationality.

\textit{Imbalances Based on Detention}

It is hardly surprising that detention negatively impacts a person's access to counsel. Detention necessarily restricts an individual's access to information and resources that are critical to obtaining counsel. The figures that emerge from the abovementioned studies indeed reflect a very slim likelihood of representation for detainees, relative to non-detained persons. For this reason, until the federal government funds counsel for all indigent individuals in removal proceedings, this policy encourages all jurisdictions that provide immigration-related representation to prioritize counsel for detained, indigent respondents in removal proceedings.

The EOIR breaks down the detention status of respondents into three categories: (i) respondents held in detention throughout the pendency of their case, who are referred to as "detained"; (ii) respondents who are detained, but eventually released on bond before a decision is reached on its merits, who are referred to as "released"; and (iii) respondents who are never detained.\textsuperscript{49}

\textsuperscript{42} Eagly and Shafer, \textit{supra} note 38 at 2.
\textsuperscript{44} TRAC Immigration Report, With the Immigration Court’s Rocket Docket Many Unrepresented Families Quickly Ordered Deported (Oct. 18, 2016), available at http://trac.syr.edu/immigration/reports/441/.
\textsuperscript{45} Id.
\textsuperscript{48} Id. at 363
\textsuperscript{49} Eagly and Shafer, \textit{supra} note 38 at 31.
and Shafer found that only 14% of detained respondents received representation.\textsuperscript{50} This astonishingly low figure compares with 66% of released and never detained persons.\textsuperscript{51} Moreover, Eagly and Shafer found that even in cases where detainees were given time to find representation, they were substantially less likely to do so than those who were released or never detained. Only 36% of detainees who were granted continuances to seek counsel successfully obtained representation, as compared to 71% of “never detained” respondents and 65% of released respondents.\textsuperscript{52} The New York Study similarly found a severe disparity between the ability of detained respondents and non-detained respondents to obtain representation.\textsuperscript{53}

**Geographical Location of Court**

Eagly and Shafer observed that the rate of representation for those detained fluctuated by as much as 22 percentage points between the twenty court jurisdictions that decided the highest volume of detainee cases.\textsuperscript{54} In addition, Eagly and Shafer observed that in the twenty jurisdictions with the highest volume of non-detainee cases (both released and never detained), representation rates varied by as much as 40 percentage points.\textsuperscript{55}

But the most striking geographic finding in Eagly and Shafer’s study relates to the availability of attorneys in different locations with high volumes of immigration proceedings. Eagly and Shafer looked at the ratio of immigration attorneys per 1,000 cases in cities with at least 20,000 proceedings during the six-year period of their study.\textsuperscript{56} The study compared the four cities with the highest rate of representation to the four cities with the lowest.\textsuperscript{57} Even amongst the cities with relatively high representation numbers the ratio fluctuated significantly, with 8.8 immigration attorneys per 1,000 cases in Miami to 27.5 attorneys per 1000 cases in New York.\textsuperscript{58} The extent of the disparity with the bottom end of the spectrum is even more jarring – in Tacoma there were only 1.3 attorneys per 1,000 cases, while in Lumpkin, Georgia, the city did not have a single immigration attorney despite the 42,006 cases decided there.\textsuperscript{59}

These geographical results are significant in that they highlight the importance of uniform federal funding throughout the United States. As described more below, several cities and states have begun to implement government funded representation programs. However, as these results show, lack of counsel is particularly dire in some locations which have large detention centers with no government funded programs and limited availability of pro bono counsel. For this reason, until the primary goal of federally appointed counsel is realized, the ABA would encourage additional state, territorial and local jurisdictions to offer government-funded counsel.

\textsuperscript{50} Id. at 32.
\textsuperscript{51} Id.
\textsuperscript{52} Id. at 34.
\textsuperscript{53} New York Study, supra note 47 at 367-369.
\textsuperscript{54} Eagly and Shafer, supra note 38 at 38.
\textsuperscript{55} Id. at 40.
\textsuperscript{56} Id. at 42.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 43.
\textsuperscript{59} Id.
programs, particularly in areas where detention centers and immigration courts operate. In addition, the ABA would encourage those jurisdictions that offer appointed counsel to cover all detained individuals held in their jurisdiction, not only those who can show they are residents of the local jurisdiction.

Nationality

Eagly and Shafer also show a substantial disparity in representation rates between different nationalities. Once again, a variety of factors make this an unsurprising result in and of itself. However, the extent of the disparity is astonishing. The representation rate among Mexican respondents was found to be only 21%, while the rate for Chinese was 92%—a spread of 71% in the likelihood of representation.

Impact of Lack of Representation on Immigration Proceedings on Respondents

The impact of non-representation in immigration proceedings may be considered in two respects. First, statistics show that lack of representation significantly impacts the court's decisions. Respondents are far less likely to succeed on the merits without representation than they are with representation. Second, lack of representation dramatically impacts motions and other documents filed in the proceedings, making it very difficult to determine whether the respondent has a bona fide claim for relief.

If success is measured by a respondent's ability to remain in the United States, the data reflects a staggering disparity in success between represented respondents and those who appear pro se. Eagly and Shafer show how the numbers fluctuate based on custody status. Detained respondents were ten-and-a-half times more likely to succeed when represented, released respondents were five-and-a-half times more likely and never-detained respondents were three and half times more likely. Regardless, the statistics reflect the overwhelming benefits of representation for persons facing removal proceedings. A TRAC study focusing on proceedings involving women and children found that in cases closed without representation, only 2.3% of respondents were allowed to remain in the country, while 97.7% were ordered deported. In contrast 32.9% of represented respondents were allowed to stay in the country, and 67.1% were deported.

The New York Study found that only 3% of detained respondents who were unrepresented received favorable outcomes. The rate of success for unrepresented non-detained persons was

---

60 Id. at 44-46.
61 Id. at 45.
62 Id. at 49.
64 Id.
65 New York Study, supra note 47 at 383.
better -13%. But it is the disparity with cases in which the respondent was represented that is critical for the purposes of this report. In cases involving detained individuals, representation yielded successful results 18% of the time. In other words, detained individuals were six times more likely to succeed when represented than when unrepresented. In cases involving non-detained individuals, represented respondents were successful 74% of the time. In other words, non-detained respondents were 5.6 times more likely to succeed when represented than when acting pro se. In addition, immigration judges surveyed in 2011 indicated that they can adjudicate cases more efficiently when individuals in removal proceedings are represented by competent counsel.

Inefficiencies in the Lack of Representation on Immigration Proceedings

Access to counsel has been shown to have a significant impact on the efficiency of the immigration court system. The following section will highlight the ways in which costs of a public sponsored representation program could be offset by resulting efficiencies.

It is worth noting three major ways in which government sponsored representation could create more efficiency in the U.S. immigration system. First, the duration of immigration proceedings could be reduced if an integrated public defender system or alternative system of legal representation were introduced. Immigration respondents, who have a right to seek counsel, cause substantial delays in the system due to time spent seeking pro bono or legal services representation. Second, the presence of counsel diminishes the number of respondents in immigration detention through successful bond hearings and requests for custody redeterminations. Third, respondents with counsel are much more likely to appear for their scheduled hearing dates in immigration court than those without counsel. Furthermore, individuals who are able to obtain limited pro bono or legal services representation are likely to have stronger claims for relief than those who are unable to obtain counsel. Accordingly, by providing competent counsel to all indigent respondents at the outset of the hearing, individuals with no viable legal defense will be sooner counseled of this reality and likely spend less time in detention.

Government Sponsored Representation as a Solution to Under-Representation

Eagly and Shafer examined the sources of representation that were provided to persons facing removal proceedings. They found that 90% of representation in all removal proceedings nationwide was provided by small firms and solo practitioners. Only 10% of representation was provided by nonprofit organizations, law school clinics and medium to large size firms,

---

66 Id.
67 Id.
68 Id.
69 Eagly and Shafer, supra note 38 at 59.
70 Eagly and Shafer, supra note 38 at 60-61.
71 Id. at 70-71.
72 Id. at 73.
73 Id. at 48.
74 Eagly and Shafer, supra note 38 at 26.
providing predominantly pro bono representation. This data underscores the fact that the nonprofit sector and traditional pro bono efforts alone, cannot meet the need of those currently lacking counsel without a significant infusion of additional resources.

**What Government Sponsored Representation Would Entail**

**Models for Sponsored Representation**

In the criminal context, compensation rates for representation are set “in one of three ways: (i) uniform rates set by statute, regulation or rule, (ii) rates set at the discretion of the presiding judge on a case-by-case basis, or (iii) through a contract between the state or a state agency and private attorney.” However, the public defender model has been subject to its own share of criticism, and in particular its feasibility in the immigration context has been questioned. Recent efforts by state and local governments to tackle the representation problem with respect to removal proceedings present some alternative models for sponsored representation. The New York Immigrant Family Unity Project (“NYIFUP”) is a public defender model funded by the New York City Council that has contracted with three different agencies to “represent all detained immigrants who meet income criteria and request counsel, regardless of eligibility for relief from removal.”

Recently, in April 2017, the success of the NYIFUP model led the State of New York to pass a budget that set aside $4 million to expand NYIFUP statewide, with the aim to provide legal representation to all financially-eligible New Yorkers facing deportation proceedings in the state.

---

75 Id.


77 “Witnesses reported the prevalence of indigent defense systems plagued by a variety of ailments, including a severe lack of funding; excessive and rising public defender caseloads coupled with inadequate support personnel; insufficient attorney compensation, leading to increased pressure to plead cases; arbitrary and capricious payments to assigned counsel; failures to inform of the right to counsel; acceptance of improper waivers of counsel in misdemeanor cases; and the increased use of contracts for defense services based primarily on cost, not quality, considerations. Regrettably, twenty years later, we found that not that much has changed. In some respects, as detailed in this report, the picture has become more bleak.” American Bar Association Standing Committee on Legal Aid and Indigent Defendants, Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice, at ii (Dec. 2004), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/is_sclaid_def_hp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf.

78 “The program should not replicate a public defender model, which repeatedly has been critiqued for overwhelming caseloads, which in turn result in minimal attention per case.” National Immigration Law Center, Blazing a Trail: The Fight for Right to Counsel in Detention and Beyond, at 26-27 (March 2016), available at https://www.nilc.org/wp-content/uploads/2016/04/Right-to-Counsel-Blazing-a-Trail-2016-03.pdf.

79 Id. at 15.
immigration courts.\(^80\) In March 2015, Friends Representation Initiative of New Jersey was launched based on the NYIFUP model in Elizabeth, NJ.\(^81\)

In California, the Alameda County Public Defender’s Office established a full time position in 2014 for an attorney who screens former or current Alameda Public Defender clients for immigration relief.\(^82\) Unlike NYIFUP, the Alameda attorney “prioritizes cases according to how much of a difference it will make if the immigrant has legal representation.”\(^83\) In early 2016, Los Angeles and San Francisco established programs to provide legal representation to immigrants in detention, with each city allocating $5 million to the cause.\(^84\) In addition, in early 2017, the Seattle City Council and the King County Counsel each approved a legal defense fund to provide for government-sponsored representation in immigration courts, with the Seattle City Council pledging $1 million, and the King County Counsel pledging $750,000.\(^85\) In January 2017, the Washington, DC, Mayor’s Office announced the Immigrant Justice Legal Services grant program, earmarking $500,000 for organizations and law firms providing immigration-related representation to DC residents and their families.\(^86\) There are also efforts to establish similar programs in other immigrant-rich cities.

The various approaches taken by local and state governments above to provide appointed counsel to indigent individuals in removal proceedings offer several models for implementing government sponsored representation. Similar to the Alameda and San Francisco County Public Defender Offices, a position may be created under the Public Defender Office, with the budget coming from the total Public Defender Office\(^87\) or from additional funding provided by the county, like in the case of Alameda\(^88\), or the state. Alternatively, under the NYIFUP scheme, the government can contract with different agencies specializing in immigration law.\(^89\)


\(^81\) National Immigration Law Center, supra note 78 at 18.

\(^82\) Id. at 22.

\(^83\) Id.


\(^87\) “No additional city funding is being used to pay for [the San Francisco Public Defender’s Office] program. The public defender’s office created the role from one of its budgeted attorney positions after assessing the need through its intake forms.” Tamara Aparton, Public Defender to Provide Immigration Help, San Francisco Public Defender, http://sfpublicdefender.org/news/2014/08/public-defender-to-provide-immigration-help/ (last visited May 19, 2017).

\(^88\) National Immigration Law Center, supra note 78 at 22.

\(^89\) National Immigration Law Center, supra note 78 at 15.
Whatever approach is taken, the ultimate program would need to have government support, full-time, paid legal staff and support from immigration judges, court staff and ICE trial attorneys for success. Furthermore, while this policy resolution calls for federally appointed counsel, until that primary goal is realized, the ABA supports and encourages additional efforts by state, local and territorial governments to allocate funding for appointed counsel. While this policy does not call for government-appointed counsel at the federal appellate level, it does require government-appointed counsel to appropriately counsel clients of their appellate rights, by providing information on filing deadlines and other relevant procedures.

Cost of Sponsorship

In a 2014 report on estimated costs of a national immigration public defender system, economist John Montgomery estimated the cost of such a program to be around $208 million annually. The report did note, however, that certain required information and data were incomplete. If criminal defense funding is taken as any indication, the costs can vary significantly between states and the federal program. The Federal Criminal Justice Act currently compensates attorneys representing indigent defendants in federal court at a rate of $125 per hour and limits attorney compensation to $9,700 in the case of non-capital felonies and $2,800 in the case of misdemeanors. In contrast, there are 30 states that have an established statewide rate of compensation. The average compensation in those states is below $65 an hour and can be as low as $40 an hour (Wisconsin). At least 20 states utilize flat fee contracts to provide indigent defense services or pay a flat rate to assigned counsel based on the seriousness of the charge. On the other hand, private attorneys compensated by the government often have a higher rate. In a 2009 study, hourly rates paid to private attorneys by public defender programs ranged from $60 to $125. Funding in immigration cases may also entail additional costs. For example, language-related services are often required. Some removal-defense programs report language-related costs of $12,000 to $24,736 in 2008 and $12,000 to $33,830 in 2009.

90 National Immigration Law Center, supra note 78 at 27.
91 Note that only the 9th Circuit Court of Appeals has a program to provide pro bono appellate counsel to represent indigent petitioners before the federal Circuit Courts of Appeals, See http://www.ca9.uscourts.gov/probono/.
93 Id. at 2.
94 National Association of Criminal Defense Lawyers, supra note 78 at 12.
95 Id.
96 Id.
97 Id. at 14.
99 New York Study, supra note 47 at 399.
NYIFUP, which represented 1,554 clients from November 2013 through November 2015, was started with $500,000 in 2013, “with the aim of representing 190 of the 900 indigent detained immigrants whose cases were before the Varick Street court.” In 2014, due to the success of the program, the New York City Council allocated an additional $4.9 million dollars for the 2015 financial year. However, the funding still covered less than half of the New Yorkers that the Bronx Defenders estimates were unable to afford counsel in removal cases at the time. Based on the NYIFUP figures and the Bronx Defenders' estimates of the need, it would take an annual $10 million to represent each indigent defendant in removal proceedings in New York. NYIFUP itself, however, estimates this cost to be less, at “$7.4 million – or 78-cents per personal income taxpayer per year.”

In his report discussed above, John Montgomery posited that any federal government-sponsored representation costs would be offset by at least $173 to $174 million per year in savings to the federal government, not including the additional savings from reductions in the costs of the Legal Orientation Program, transportation and foster care. After such savings, he estimated that a national program would cost no more than $4 million per year. The figures he used are based on the estimated benefits arising from government sponsored representation, including increased efficiency in the courtroom, reduction in continuances, and reduced number of days in detention. Separately, NYIFUP estimated that it would produce $4 million in savings for New York state employers and $1.9 million in annual savings to New York State in public health insurance and foster care services, along with additional tax revenue garnered from those released from detention and able to return to work during the pendency of their removal proceedings and/or upon the successful termination of such proceedings.

In addition, savings in detention costs can be anticipated with the provision of appointed counsel to all individuals in removal proceedings. The Eagly and Shafter study estimated that the cost of a single day of detention is approximately $158. The same study found that detained

---

100 National Association of Criminal Defense Lawyers, supra note 78 at 14.
101 Id. at 14.
104 Since 2003, EOIR has funded the Office of Legal Access Programs (formerly known as the Legal Orientation and Pro Bono Program) to administer the Legal Orientation Program to educate detained immigrants in a limited number of facilities about their rights and responsibilities in immigration court. EOIR’s Office of Legal Access Programs, EOIR, https://www.justice.gov/eoir/pr/eoir-expands-legal-orientation-programs (last visited May 17, 2017).
105 Montgomery, supra note 92 at 18.
106 Id. at 35.
107 Id. at 14.
108 Center for Popular Democracy, supra note 103 at 15.
109 Eagly & Shafer, supra note 38 at 60.
immigrants spent an average of 33 days seeking counsel.\textsuperscript{110} If counsel were provided on day one, detention cost savings would be over $5,200 per person just from eliminating the delays caused by seeking counsel.\textsuperscript{111} Moreover, counsel could further reduce the number of days spent in detention by reducing the number of frivolous actions filed where there is no legal relief possible,\textsuperscript{112} by successfully advocating for release of their clients,\textsuperscript{113} and by reducing the number of court hearings.\textsuperscript{114} In fact, such increases in efficiency would outweigh any increase in adjudication time,\textsuperscript{115} and “overall the average time for represented cases would undoubtedly decrease.”\textsuperscript{116}

**Conclusion**

In recognition of the serious, life-altering impact of deportation and the extraordinary complexities of immigration law, this resolution reaffirms the ABA’s commitment to due process and fundamental fairness by calling for the appointment of counsel at government expense for indigent respondents in removal proceedings, thereby improving efficiency and enhancing justice.

Respectfully submitted,

Mary Meg McCarthy, Chair
Commission on Immigration

August 2017

\textsuperscript{110} Id.

\textsuperscript{111} This figure represents the cost of a single day of detention ($158) multiplied by the average days spent seeking counsel (33 days). See id.

\textsuperscript{112} Eagly & Shafer, supra note 38 at 66.

\textsuperscript{113} Id. at 70.

\textsuperscript{114} Id. at 62.

\textsuperscript{115} See Carroll Seron et al., The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Courts: Results of a Randomized Experiment, 35 Law & Soc’y Rev. 419, 429 (2001).

\textsuperscript{116} Eagly & Shafer, supra note 38 at 64.
GENERAL INFORMATION FORM

Submitting Entity: Commission on Immigration

Submitted By: Mary Meg McCarthy, Chair

1. Summary of Resolution(s).

This Resolution seeks to establish a right to appointed counsel to represent indigent individuals in adversarial removal proceedings before the Executive Office for Immigration Review (“EOIR”), and, if necessary, to advise such individuals of their subsequent appellate rights before the U.S. Circuit Courts of Appeals. EOIR is comprised of the Immigration Courts and the Board of Immigration Appeals, an administrative appeals unit located in Falls Church, Virginia. Through this Resolution, until the primary goal of appointed counsel at federal expense can be accomplished, the ABA also encourages state, local and territorial governments to provide funding for indigent immigrants in removal proceedings in their jurisdictions. Finally, the Commission encourages all jurisdictions that are providing funding for indigent individuals in removal proceedings to prioritize those who are detained in immigration custody.

2. Approval by Submitting Entity.

The Commission on Immigration approved this Resolution at our last business meeting on February 3, 2017, in Miami, Florida. Previous versions had been disseminated and voted upon by e-mail. At the February 3, 2017, meeting, the Resolution was approved unanimously, by all eligible Commission members present in person and by telephone.

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

No. The ABA has established policy recommending appointed counsel at government expense in immigration processes for unaccompanied children, people with disabilities and people with mental health conditions, as well as for indigent individuals in removal proceedings with potential legal relief who are not able to secure free or pro bono representation. There is no prior policy that recommends government funded counsel for all indigent individuals in removal proceedings, regardless of their particular vulnerabilities or eligibility for relief. There is a civil Gideon policy that recommends government-appointed counsel for low-income persons in adversarial proceedings where basic human needs are at state, such as those involving shelter, sustenance, safety, health or child custody. This policy does not specifically include (or exclude) immigration proceedings.

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

In the civil context generally, consistent with its commitment to legal representation, the ABA has continuously supported “Civil Gideon” since the 2006 Civil Gideon resolution (112A) that supported the provision of legal counsel at public expense in adversarial proceedings “where
basic human needs are at stake." The 2006 Civil Gideon resolution specifically lists basic human needs “such as those involving shelter, sustenance, safety, health or child custody” as examples, but it does not mention immigration. In 2010, the resolutions supporting the ABA Basic Principles for a Right to Counsel in Civil Legal Proceedings (105) and the Civil Gideon Model Access Act for States (104) reiterated the 2006 Civil Gideon resolution.

In the immigration context specifically, the ABA has adopted several “right to counsel” policies that recognize the crucial importance of legal representation in immigration proceedings. Populations of specific concern include persons in removal proceedings, political asylum applicants, unaccompanied minors, non-citizens whose removal cannot be effectuated, detainees, and those held in incommunicado detention. The ABA already supports the right to appointed counsel at government expense in all immigration processes for unaccompanied children and people with disabilities and people with mental health conditions, as described below.

Unaccompanied children:
- In 2001, the ABA supported government-appointed counsel at government expense for unaccompanied minors in all stages of immigration processes and proceedings. (2001M106A)
- In 2004, the ABA adopted its own Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States. These standards include the right to an attorney and call for timely legal rights presentations for all unaccompanied children, including the opportunity to consult with an attorney, the right to have an attorney represent them in all formal proceedings or other matters affecting a child’s immigration status, and (if necessary) the right to government-appointed counsel at the government’s expense. (2004A117)
- In 2015, the ABA adopted a resolution supporting the provision of legal representation at government expense to unaccompanied minors who have come to the U.S. with no resources for counsel, but with claims for immigration relief, at all stages of the immigration process, including during initial asylum interviews. (2015M113)

People with disabilities and people with mental health conditions:
- In 2006, the ABA adopted a policy supporting the establishment of a system to provide legal representation, including appointed counsel and guardians ad litem, to people with disabilities and people with mental health conditions in all immigration processes and procedures, whether or not potential relief may be available to them. (2006M107A)

Indigent persons with potential relief:
- In 2006, the ABA adopted a policy supporting the due process right to counsel for all persons in removal proceedings, and the availability of legal representation to all non-citizens in immigration-related matters. This policy also supported the establishment of a system to screen and to refer indigent persons with potential relief from removal (as identified in the expanded “legal orientation program”) to pro bono attorneys, Legal Services Corporation sub-grantees, charitable legal immigration programs and government-funded counsel. (2006M107A)
In 2011, the ABA also adopted a resolution to improve access to counsel for individuals in immigration removal proceedings, focused on pro bono services. That resolution included developing regulations to strengthen eligibility requirements for pro bono providers, encouraging an increase in pro bono efforts, requiring BIA recognized agencies to provide more pro bono services, increasing training and expertise and minimizing the unauthorized practice of law. (2011A118)

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

N/A

6. Status of Legislation. (If applicable)

N/A

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

If and when Congress considers legislation that would affect appointment of counsel for indigent respondents in removal proceedings, the ABA will be able to share its position based on this and other relevant ABA policies. Recognizing that this type of legislation is unlikely to be introduced at the current time, this policy will provide support and encouragement for efforts of state, local and territorial governments to provide funding for their individual programs.

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

Adoption of the resolution will not result in expenditures for the ABA.

9. Disclosure of Interest. (If applicable)

No known conflict of interest exists.

10. Referrals.

Commission on Domestic and Sexual Violence
Commission on Hispanic Legal Rights and Responsibilities
Section of Civil Rights and Social Justice
Massachusetts Bar Association
Criminal Justice Section
New York County Lawyers Association
Section of Litigation
The Standing Committee on Legal Aid and Indigent Defendants
New York City Bar Association
Working Group on Unaccompanied Minor Immigrants
Commission on Racial and Ethnic Diversity in the Profession
Center for Racial and Ethnic Diversity
Coalition on Racial and Ethnic Justice
Council for Racial and Ethnic Diversity in the Educational Pipeline
Commission on Sexual Orientation and Gender Identity
Commission on Disability Rights
Commission on Women in the Profession

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

Meredith A. Linsky, Director, ABA Commission on Immigration, 1050 Connecticut Ave., NW, Suite 400, Washington, DC 20036, tel. (202) 662-1006, Meredith.Linsky@americanbar.org.

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

Mary Meg McCarthy, Chair, ABA Commission on Immigration, 3180 N. Lake Shore Drive, Apt. 9F, Chicago, IL 60657, tel. (312) 660-1351 (office), (312) 287-6400 (cell), MMcCarthy@heartlandalliance.org.
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution proposes a right to government appointed counsel at federal expense to indigent noncitizens in removal proceedings before the Department of Justice’s Executive Office for Immigration Review (EOIR), specifically before the Immigration Courts and the Board of Immigration Appeals (BIA). This resolution also seeks to ensure that noncitizens are aware of their rights to appeal their cases to the U.S. Circuit Courts of Appeal (if relevant). The ABA has taken an incremental approach in supporting an expanded right to appointed counsel at government expense for indigent individuals in civil proceedings, and this resolution is the next logical step.

2. Summary of the Issue that the Resolution Addresses

The right to counsel provided for by the Immigration and Nationality Act (INA) does not currently include a recognized right to appointed counsel at government expense for indigent respondents. The majority of individuals are ordered removed through summary, DHS-only proceedings, only a minority of individuals (approximately 35%), are placed in “regular” removal proceedings in immigration court pursuant to INA § 240. These are adversarial proceedings where the respondent is opposed by an experienced government attorney.

Moreover, the immigration laws are extremely complex and subject to constantly changing agency interpretations and varied case law within the Board of Immigration Appeals and among the U.S. Circuit Courts of Appeals. Meanwhile, the immigration courts are extremely backlogged, demonstrated by the fact that at the end of January 2017, over 540,000 cases were pending. In a recent national study, only 37% of all immigrants in removal proceedings benefitted from legal representation. Many unrepresented individuals request multiple continuances in immigration court to seek counsel, yet ultimately represent themselves and are unable to successfully defend against removal or apply for relief to which they are legally entitled. As a consequence, the immigration system is bogged down and plagued with inefficiencies. Practically speaking, this lack of counsel results in great hardship to individuals with bone fide claims for relief. As a result, families are separated, U.S. citizen children lose loving parents, and in the most egregious situations, asylum seekers face violence and even death when unable to properly present a claim for protection.

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

The adoption of this policy would improve fairness within the immigration system, as well as enhance the efficiency with which the immigration judges and BIA members operate by making it easier to quickly identify respondents who qualify for legal relief and provide advice and counsel to those who do not qualify.

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

There are no minority views of which we are aware.
RESOLUTION

RESOLVED, That the American Bar Association urges courts to implement plans that welcome opportunities for new lawyers to gain meaningful courtroom experience, and urges law firms and clients to take advantage of those plans.
Judges and lawyers around the country have grown cognizant of the diminished role of lawyers new to the practice of law in the courtroom. In light of the diminishing opportunities available for newer lawyers to develop their litigation skills in a courtroom setting, a directive has been passed by the American Bar Association to support the proper development of the future generation of lawyers. This directive is important because, to develop great trial lawyers, newer lawyers must be provided with the foundation and seasoning that only meaningful courtroom roles can provide. The access to such experiences must be welcomed by the courts and advanced by law firms and clients.

This directive focuses members of the bar on the necessary growth and development of lawyers new to the practice of law. It seeks their contributions through training and mentoring of these attorneys in all facets of trial advocacy. The success of the state and federal courts in the United States requires that the quality of litigation remains at the highest levels as the future generations of lawyers embark upon the legal profession. The American Bar Association can work together with the courts to make sure that when newer lawyers have meaningful courtroom opportunities, they rise to the occasion;

With respect to the judiciary, these members of the bar are critically important to this directive as they are able to open the doors for the development of the future generation of courtroom lawyers. In several jurisdictions, members of the judiciary have initiated revisions to their standing orders to promote the active involvement of newer lawyers in litigation. For example, United States District of Massachusetts Judges Denise J. Casper, Dennis Saylor, and Indira Talwani have enacted standing orders to encourage courtroom opportunities for relatively inexperienced attorneys. The judges encourage lawyers new to the practice of law to not only be tasked with handling routine matters, but also more complex matters such as arguing discovery and dispositive motions, and conducting the examination of witnesses.

Similarly, United States Northern District of California Judge Lucy Koh’s standing order encourages newer attorneys to have an important role at trial. In fact, in one of Judge Koh’s cases during this past year, she encouraged that various motions in limine in Apple, Inc. v. Samsung Electronics, Inc. be handled by newer attorneys. Judge William Alsup, of the same court, includes in his standing order a provision promising a hearing when a request for oral argument is made with the commitment that a lawyer of four or fewer years will argue, and relaxing the “one lawyer per witness” rule for younger attorneys during trial examination. Judges James Donato and John Tigar from that court also have standing orders encouraging new lawyers’ participation.

A number of other judges have embraced similar provisions in many other jurisdictions, including the Northern District of Georgia (Judge Leigh Martin May), Eastern District of Texas (Judge K. Nicole Mitchell), Northern District of Texas (Judge Barbara A. Lynn), Southern District of Texas (Judges Gregg J. Costa and Gary H. Miller), Central District of California (Judge Andrew J. Guilford), and Eastern District of California.
(Judge Kimberly J. Mueller). Their rules include various provisions encouraging opportunities for young lawyers to examine witnesses and providing oral argument if counsel commit to newer lawyers arguing, while also providing assurances that the more junior attorneys have both the requisite authority and supervision. See http://nextgenlawyers.com/wp-content/uploads/2013/04/Judicial-Orders-re-Next-Gen-6-13-16.pdf (last visited April 14, 2017) (collecting court orders discussed above).

Additionally, the Arizona Civil Justice Reform Committee has proposed a resolution to give plaintiffs the choice between compulsory arbitration or a short trial in Arizona Superior Court. Plaintiffs who elect the short trial option would receive a two-day-or-less trial before a judge or six-person jury inside a courtroom, thus providing more opportunities for lawyers to gain experience trying civil cases. By encouraging lawyers with limited courtroom experience to actively participate in the litigation process, these members of the judiciary are helping equip these lawyers with the experience and confidence to actively participate in the litigation process, which will serve to benefit and grow the public trust in the legal community.

With respect to experienced lawyers, these members of the bar are essential to the directive as they are able to assist newer attorneys in gaining valuable experience. They must offer the support needed to entrust these lawyers with the opportunities to litigate cases, argue motions, cross-examine witnesses, and generally develop strong trial advocacy skills. As experienced lawyers, they are charged with providing lawyers new to the practice of law with both the opportunities to actively participate in the courtroom and the resources necessary to properly prepare them for a courtroom experience. This preparation may come by way of answering substantive and procedural questions or by offering mock courtroom experiences.

By investing time in the growth of newer lawyers, the experienced members of the bar will enhance the overall legal experience of newer lawyers, recognizing their value to the overall reputation and strength of the legal profession. And by encouraging their clients to allow newer lawyers to have meaningful courtroom roles, these more seasoned lawyers are supporting the future success of the judicial system.

With respect to national, statewide, local, and specialized bar associations, these organizations of the bar have unique and valuable means of offering training programs and tools necessary for lawyers new to the practice of law to develop litigation skills. These programs and tools are particularly important for lawyers who are not employed. By way of offering trial academies, mock trial programs, and appellate advocacy programs, these various bar associations introduce litigation skills to newer lawyers who may not otherwise have training resources available. By providing such offerings, these various bar associations ensure that litigation experience is available to a wide range of lawyers with limited courtroom experience who are eager to enhance their litigation skills. Examples of meaningful programs offering mentoring and training include the Dallas Senior Lawyers Bar Association and the Judicial Clerkship Program sponsored by the ABA’s Council for Racial and Ethnic Diversity in the Educational Pipeline and the Judicial Division.
With respect to newer lawyers, these newly minted members of the bar also have a responsibility to the rest of the legal profession to improve their own skills. Newer attorneys must demonstrate the dedication necessary to learn the craft of the legal profession. As noted in Judges Denise J. Casper’s, Dennis Saylor’s, and Indira Talwani’s standing orders, when participating in the litigation process, newer lawyers must expect to be held to the highest professional standards as it pertains to their knowledge of the case, overall preparedness in advance of argument, and candor in communicating with the court. In satisfying these expectations, newer lawyers accept the ownership and responsibility of serving as officers of the courts and advocates critical to our system of justice.

Conclusion

The members of the ABA, by adopting the principles contained in this Resolution, are enacting a commitment to preserve the quality of litigation skills of future generations of new lawyers as contemplated by the founders of the legal profession. The joint and active participation of the judiciary, experienced lawyers, various bar associations, and newer lawyers will ensure that the best of the legal profession in courtroom advocacy is passed from the present generation of lawyers to future generations. For lawyers new to the practice of law, achieving success in the courtroom will require a concerted effort by judges, more seasoned attorneys, and bar associations.

To that end, the Honorable Barbara Lynn, Chief U.S. District Judge for the Northern District of Texas, another judge who has promoted the active involvement of newer lawyers in litigation, recently spoke with Joseph M. Hanna (Co-Chair of the ABA Section of Litigation’s Young Lawyer Leadership Program and Young Lawyer Litigator Task Force), about the ABA’s proposed Resolution. Judge Lynn lauded the Resolution, and noted how pleased she is to see these opportunities develop, how new lawyers continue to impress her, and how law firms and clients are supporting these efforts. Judge Lynn has implemented specific requirements in her courtroom that encourage litigants to provide speaking opportunities for newer lawyers, especially when they have contributed significantly to the motion or response, and her practices weigh in favor of holding a hearing when the argument will be handled by a newer lawyer. This example from Judge Lynn reminds us that change is occurring, but in order for us to reach the ultimate goal of the Resolution, it is incumbent that members of the bench and bar work together to help newer lawyers achieve such courtroom experience and success.

Laurence F. Pulgram
Chair, Section of Litigation
August 2017
1. **Summary of Resolution(s).**

The Resolution urges judges to encourage and facilitate the participation of young lawyers in courtroom proceedings.

2. **Approval by Submitting Entity.**

The Section of Litigation approved this Resolution at its Council Meeting on May 6, 2017. The Judicial Division Council approved this Resolution on May 2, 2017.

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

No

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

The Resolution will have no adverse bearing on any ABA policy and will facilitate the ABA’s support of young lawyers.

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

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

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

The Section of Litigation’s Young Advocates Committee, and similar Committees in other Sections, and the Young Lawyers Division, can use the Resolution to encourage judges in their jurisdictions to take steps to facilitate young lawyer participation in court proceedings.
8. **Cost to the Association.** (Both direct and indirect costs) None.

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

10. **Referrals.**

   Young Lawyers Division
   Law Student Division
   Section of Legal Education and Admissions to the Bar
   Senior Lawyers Division

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

    Don Bivens
    Snell & Wilmer, LLP
    400 East Van Buren Street, One Arizona Center
    Phoenix, AZ 85004
    (602) 382-6235
    dbivens@swlaw.com

    Barbara J. Dawson
    Snell & Wilmer, LLP
    400 East Van Buren Street, One Arizona Center
    Phoenix, AZ 85004
    (602) 382-6235
    bdawson@swlaw.com

    Joseph M. Hanna
    Goldberg Segalla, LLP
    665 Main Street, Suite 400
    Buffalo, NY 14203
    (716) 566-5447
    jhanna@goldbergsegalla.com

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

    Don Bivens
    Snell & Wilmer, LLP
    400 East Van Buren, One Arizona Center, Suite 1900
    Phoenix, AZ 85004
    (602) 382-6549
    Cell (602) 708-1450
    dbivens@swlaw.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution urges judges to encourage and facilitate the participation of young lawyers in courtroom proceedings.

2. Summary of the Issue that the Resolution Addresses

Young lawyers need courtroom experience to become mature professionals.

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

The Resolution draws attention to the need, and urges judges to facilitate the participation of young lawyers in courtroom proceedings.

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

None known.
RESOLVED, That the American Bar Association urges all federal, state, local, tribal, and territorial governments to adopt and implement laws, policies, and other effective measures to provide every child with equal access to elementary and secondary public schools funded at levels adequate to ensure a high-quality education.
The ABA has consistently adopted policies to promote education of the populace as a keystone to a functioning democratic society. Specifically, in 2004, ABA resolution 113 supported uninterrupted educational access and stability for homeless and foster care youth. In 2007, the ABA passed resolution 114, which urged the amendment of the No Child Left Behind Act or adoption of other legislation to ensure all students receive a high-quality civics education. In 2009, the House of Delegates adopted Resolution 118A, which urged legislatures to pass laws ensuring that all youth have the right to a high-quality education. Resolution 110, passed in 2010, encourages all lawyers to consider it a fundamental responsibility to ensure all students experience high quality civic learning.

Through this resolution, the ABA will recognize that merely supporting a right to high quality education can be an empty promise without also ensuring that all children have access to adequately funded schools and other critical educational resources. The ABA’s existing policy and these measures, taken together, will help to make high-quality education a reality.

The U.S. Supreme Court’s Recognition of the Importance of Education

In its long-standing policies on the issue of education, the ABA is guided by the United States Supreme Court’s recognition of the importance of education to our democratic society:

"It [education] is required in the performance of our most basic public responsibilities ... It is the very foundation of good citizenship. Today, it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. *Brown v. Bd. of Ed. Of Topeka*, 347 U.S. 483, 493 (1954)"

"Illiteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. *Plyler v. Doe*, 457 U.S. 202 (1982)."

"The inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacles it poses to individual achievement, make it most difficult to reconcile the cost and principle of status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause. *Id.* at 222"

"The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. *Id.* at 223."
The ABA recognizes that delivery of a high-quality education is a core imperative of government. Equal access is perhaps the easiest issue to measure because it turns on actual availability of opportunity at the student level to the same high quality education across relevant jurisdictions.

The balance of this report suggests means to explore key issues surrounding educational delivery and funding.

Assessing the Adequacy of a Public Education System

Educational achievement in general, and particularly literacy, are strongly correlated with a number of positive outcomes. From higher earnings to better health to decreased crime rates, literacy comes with numerous significant benefits. See World Literacy Foundation, The Economic & Social Cost of Illiteracy: A Snapshot of Illiteracy in a Global Context (2015), available at https://worldliteracyfoundation.org/wp-content/uploads/2015/02/WLF-FINAL-ECONOMIC-REPORT.pdf. In pure economic terms, the estimated cost of illiteracy in the United States is $362 billion annually. Id. at 4.

Literacy is not merely a public good; it is a prerequisite to the meaningful exercise of other constitutionally protected rights. The United States Supreme Court has recognized that there may be “some identifiable quantum of education [that] is a constitutionally protected prerequisite to the meaningful exercise of [other rights].” San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 36 (1973). As set forth herein, a basic level of access to literacy is one such prerequisite to the meaningful exercise of constitutional rights, including but not limited to voting, freedom of the press, interstate travel, and notice of criminal conduct.

The necessary level of literacy required as a prerequisite to exercise such rights is not an amorphous or unattainable concept. Over the past 40 years, academic research has developed effective, widely accepted literacy assessments, as well as measures of the literacy levels required to engage in certain activities.


When Rodriguez was decided in 1973, educational assessment was in its infancy. The federal government had only just begun focusing on standardized testing, and it would be decades before school testing was widespread or regular (it is now both). See National Commission on Excellence in Education, A Nation at Risk: The Imperative for Educational Reform, at 24-25 (April 1983), available at http://202.120.223.158/download/b42c4210-e82c-4244-aa-4f-89d2b31344a.doc (1983 National Commission on Excellence study advocating for the expansion of standardized testing at the primary and secondary school levels); No Child Left Behind Act of 2001, Pub. L. 107-110 (requiring state-mandated expansion of standardized testing for primary school students); National Education Association, History of Standardized Testing in the United States, http://www.nea.org/home/66139.htm (describing standardized testing’s now-widespread...
Moreover, in 1973 there were few reliable methods for discerning how much education was required for students to understand a given piece of writing. As a consequence, the plaintiffs (and the Court) in Rodriguez could not identify what specific amount of education was necessary for students to meaningfully exercise their First Amendment rights or to effectively participate in the political process. Nor could the Rodriguez plaintiffs (or the Court) assess whether certain schools or districts were failing to meet that minimum bar. This is no longer the case.

In the mid-1970s, J. Peter Kincaid calibrated the “Flesch-Kincaid” reading grade level assessment to measure the grade-level of technical materials for the U.S. Navy. See William DuBay, The Principles of Readability, at 21 (August 2004). Since then, the Flesch-Kincaid method has been widely employed by legislative and regulatory bodies to ensure that important social documents are sufficiently readable. See, e.g., South Carolina Department of Insurance, Departmental Interpretation of Act No. 66 of 1999, https://online.doi.sc.gov/Eng/Public/Bulletins/Bulletin996.aspx (requiring that life insurance forms “clearly and conspicuously state in a manner that achieves a grade level score of no higher than seventh grade on the Flesch-Kincaid readability test); Fla. Stat. 627.4145 (prohibiting insurance policies from being written higher than a 12th grade Flesch-Kincaid reading level).

In the decades following the introduction of Flesch-Kincaid, numerous other metrics have arisen for assessing the difficulty of text. Probably the most widely used measure today is the Lexile Framework, which, similar to Flesch-Kincaid, is a linguistic-based algorithm that can be applied to any text. Notably, the Common Core Standards rely heavily on the Lexile Framework and, as a consequence, Lexile measures are used today at the school level in all 50 states. Lexile, Common Core Standards, https://www.lexile.com/using-lexile/lexile-measures-and-the-ccssi/. Moreover, 20 states report Lexile measures statewide on their year-end assessments. Id. Over half of all U.S. students participate in reading assessments and programs that make use of Lexile measures. Id.

Accordingly, widely accepted measures of educational achievement can be used to identify the adequacy of elementary and secondary educational programs for preparation of students for the meaningful opportunities to participate in society through employment and through exercise of rights guaranteed by the U.S. Constitution.

Funding Formulae Must Focus on Educational Value to Students

No one reading the various challenges to and defenses of public education funding can reasonably conclude that there is but one lawful system of funding public education systems (e.g., income-based taxes; real property taxes; state or local government funding); rather the various jurisdictions have funded and will continue to fund public education systems by different means of taxation. The merits and lawfulness of taxation and distribution methods are beyond the scope of this resolution. The adequacy of the selected funding method to achieve equal access high quality education with the jurisdiction is at the core of this resolution.
Adequacy is not a matter of simple math, such as dollars per student. Costs to deliver the same quality of education can differ widely across the country and even within a jurisdiction; rural and urban costs may differ greatly; a school district with older but satisfactory facilities may spend less than a school district that has had to build new facilities. While there are admitted complexities at the cost calculation level, the ABA believes the real question is whether an equally high quality education is in fact being delivered for each student, even if per student costs differ across a district, county or state. Simply, a school district spending $5,000 per student per year is not necessarily delivering a 25% better educational product than a neighboring district spending $4,000 per student. In fact, theoretically the lower cost district could be better. The issue is student proficiency, and whether state and local systems meet the applicable definition of high quality education. There is ample information to compare student achievement in state and local systems. If, regardless of cost per student, a system does not meet reasonable levels of student proficiency it fails, and it either needs to be redesigned, its management needs to be changed or its funding needs to be increased or reallocated so that it does meet requirements reliably.

As a practical matter for lawyers seeking to assess their local schools systems, the degree to which a system provides quality education can be determined in significant part by securing complete answers to certain key questions, including:

- Is there a stable, supported and appropriately trained staff of administrators and educators?
- Is instruction offered at both elementary and secondary school levels through curricula and teaching methods reasonably designed to achieve grade-level capability and knowledge goals for all children in the public education system?
- Are there active compulsory processes in place and followed to evaluate attainment and need for intervention for each student having difficulty achieving or failing to achieve applicable grade-level goals?
- Are there basic instructional materials provided to each pupil that are needed to achieve applicable standards?
- Are there clean, healthy and safe physical conditions at all educational facilities?
- Is there a teacher-student, student-student, administrator-teacher, parent-teacher-administrator and school-community environment within the public education system that is conducive to learning?
- Does every child have equal access to developmentally appropriate opportunities?
- Is there an effective process to evaluate the performance of the system in achieving capability and knowledge for every child and the above elements, as well as adequate resources for the design and implementation of corrective actions?

Conclusion

The ABA has repeatedly enacted policies underscoring lawyers’ indispensable role in assuring every child’s right to a high-quality education. Through personal involvement and engagement in their local public schools, whether as interested members of the community
or members of school boards, lawyers can use readily available data to determine whether their state and local school districts are delivering quality education. Lawyers can identify, measure, and evaluate gaps, help experts develop plans to close them, and advocate privately and publicly for the needed reforms and funding, and, where necessary, seek the assistance of the judiciary.

Respectfully submitted,

Reginald M. Turner
Chair of the ABA Commission on the Lawyers' Role in Assuring Every Child's Right to a High-Quality Education

August 2017
1. **Summary of Resolution(s).** The recommendation urges all federal, state, local, tribal, and territorial governments to adopt and implement laws, policies, and other effective measures to assure every child equal access to high-quality, adequately funded elementary and secondary public education.

2. **Approval by Submitting Entity.** The ABA Commission on the Lawyers’ Role in Assuring Every Child’s Right to a High-Quality Education approved the Resolution on April 20, 2017.

   The Council of the Section of Civil Rights and Social Justice approved co-sponsorship of the Resolution during its Spring Meeting on Saturday, April 29, 2017.

   The Commission on Youth at Risk approved co-sponsorship of the Resolution on April 24, 2017.

   The Council of the Section of State and Local Government Law approved co-sponsorship of the Resolution during its Spring Meeting on Sunday, April 30, 2017.

   On May 4, 2017, the Center on Children and the Law approved this Resolution.

3. Has this or a similar resolution been submitted to the House or Board previously? No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? The ABA has consistently adopted policies to promote education of the populace as a keystone to a functioning democratic society. Specifically, in 2004, ABA Resolution 113 supported uninterrupted educational access and stability for homeless and foster care youth. In 2007, the ABA passed resolution 114, which urged the amendment of the No Child Left Behind Act or adoption of other legislation to ensure all students receive a high-quality civics education. In 2009, the House of Delegates adopted Resolution 118A, which urged legislatures to pass laws ensuring that all youth have the right to a high-quality education. Resolution 110, passed in 2010, encourages all lawyers to consider it a fundamental responsibility to ensure all students experience high quality civic learning.
5. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A


7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. We will work with relevant stakeholders within and outside of the American Bar Association and the Governmental Affairs Office to implement the policy.

8. Cost to the Association. (Both direct and indirect costs) Adoption of this proposed resolution would result in only minor indirect costs associated with Section staff time devoted to the policy subject matter as part of the staff members’ overall substantive responsibilities.

9. Disclosure of Interest. (If applicable) There are no known conflicts of interest.

10. Referrals. By copy of this form, the Resolution will be referred to the following entities:

   - Section of Administrative Law and Regulatory Practice
   - Section of Litigation
   - Law Student Division
   - Young Lawyers Division
   - Center for Racial and Ethnic Diversity
   - Commission on Mental and Physical Disability Law
   - Commission on Racial and Ethnic Diversity in the Profession
   - Council on Racial and Ethnic Justice
   - Commission on Women in the Profession
   - Standing Committee on Public Education
   - National Conference of Bar Presidents

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

   Reginald M. Turner, Member
   Clark Hill
   500 Woodward Avenue
   Suite 3500
   Detroit, MI 48226
   Tel: 313-965-8318
   Email: rturner@clarkhill.com
12. **Contact Name and Address Information.** (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

Estelle H. Rogers, CRSJ Section Delegate  
111 Marigold Ln  
Forestville, CA 95436-9321  
Tel.: (202) 337-3332 (Work)  
E-mail: restellerogers@gmail.com

Walter H. White, Jr., CRSJ Section Delegate  
McGuire Woods LLP  
11 Pilgrim Street  
London EC4V 6RN, United Kingdom  
Tel.: +44 (0)20 7632 1630  
Fax: +44 (0)20 7632 1638  
E-mail: wwhite@mcguirewoods.com

2001 K Street N.W.  
Suite 400  
Washington, D.C. 20006-1040  
Tel.: 202/857.1707  
Fax: 202/828.2969  
(alternate address)
EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution urges all federal, state, local, tribal, and territorial governments to adopt and implement laws, policies, and other effective measures to assure every child equal access to high-quality, adequately funded elementary and secondary public education.

2. Summary of the Issue that the Resolution Addresses

The ABA recognizes that delivery of a high-quality education is a core imperative of government. Equal access is perhaps the easiest issue to measure because it turns on actual availability of opportunity at the student level to the same high quality education across relevant jurisdictions.

Moreover, the ABA has repeatedly enacted policies underscoring lawyers' indispensable role in assuring every child's right to a high-quality education. Through personal involvement and engagement in their local public schools, whether as interested members of the community or members of school boards, lawyers can use readily available data to determine whether their state and local school districts are delivering quality education. Lawyers can identify, measure, and evaluate gaps, help experts develop plans to close them, and advocate privately and publicly for the needed reforms and funding, and, where necessary, seek the assistance of the judiciary.

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

Through this resolution, the ABA will recognize that merely supporting a right to high quality education can be an empty promise without also ensuring that all children have access to adequately funded schools and other critical educational resources. The ABA's existing policy and the resolution, taken together, will help to make high-quality education a reality.

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

No minority views or opposition have been identified.
RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal
governments to develop and implement age-appropriate curricula designed to instill in all students
a sense of personal responsibility to cast informed votes and to teach them how to educate
themselves regarding candidates and issues in elections.
The American Bar Association (ABA) has long encouraged measures to instill or enhance civics education in our schools, including public education about the justice system and rule of law in our society. This resolution builds upon the ABA’s 1990 policy, which supported efforts to increase voter registration through state and local agencies that have direct contact with the public; to encourage efforts to make the opportunity to vote easier; and to support educational programs to teach all citizens that voting is a responsibility as well as a privilege of citizenship. It also is consistent with the ABA’s 1995 Resolution 114 in which the ABA committed its support to public education to foster understanding of the Constitution and the rights and responsibilities of citizenship as fundamental to the continued functioning of our democracy, and urged the legal profession to engage the support of policy makers to further this goal through implementation and support of civics education in elementary and secondary schools.

Our citizens become eligible to vote as they leave the secondary school system. Consequently, schools generally have not focused on preparing students for something they cannot do until they graduate. However, the primary and secondary levels of education should be where our students learn about democratic processes fundamental to their continued wellbeing. Although engaged Parent, Teacher Student Associations (PTAs) often stage mock elections for students or take a few, privileged students on state legislative lobbying trips, no uniform effort is made to teach our students the importance of voting and how to educate themselves as to candidates’ backgrounds, positions, and qualifications as well as the facts underlying ballot propositions and other issues.

The goal of this resolution is consistent with Justice David Souter’s keynote speech during the 2009 Opening Assembly of the ABA Annual Meeting in Chicago, in which he said, “I believe civic educational reform is, literally, essential to the continued vitality of American Constitutional government as we know it.” In response to Justice Souter’s call to action, then ABA President-elect, Stephen Zack, wrote: “We must rededicate ourselves to learning about our constitutional system. . . . We must begin where the need is most urgent and the impact can be the greatest—in our nation’s schools.”

Under the “Goals 2000: EDUCATE AMERICA ACT (P.L. 103-227)” enacted in 1994, Goal 3, which was to be achieved by the year 2000, was: “3. Student Achievement and Citizenship: By the year 2000, all students will leave grades 4, 8 and 12 having demonstrated competency over challenging subject matter including, English, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography, and every school in America will ensure that all students learn to use their minds well, so they may be prepared for responsible citizenship, . . .” (emphasis added). It would seem hard to contemplate a student prepared for responsible citizenship who doesn’t understand the need to vote and who does not know how to find the facts relevant to key issues in any given election. Yet, the proliferation of “fake news” and personal viewpoints vented through social media makes training on how to filter out all but genuine

facts relating to key issues especially critical.\textsuperscript{2} The U.S. has one of the lowest voting participation rates among western democracies.\textsuperscript{3} This fact further supports the need for passage of this resolution.

The American Bar Association has long supported efforts to increase voter participation, in fact the predecessor entity to the Standing Committee on Election Law was a Special Committee on Election Law and Voter Participation. The proposed resolution fits squarely with long standing Association efforts and policies to encourage voter participation by lawyers (Standing Committee on Election Law, August 1989) and college students (Special Committee on election law and Voter Participation and the Young Lawyers Division, August 1972). Most recently, the Standing Committee on Election Law has partnered with the Division for Public Education to create resources for the purpose of educating secondary school students about the process and importance of voting (http://www.americanbar.org/groups/public_services/election_law/voting_election_law_resources.html). The Standing Committee and the Division developed a video encouraging students to vote (http://youtu.be/NLHnzi31WUM) and the Standing Committee also created a website www.voteyourvoicenow.org which includes information about voter registration and voting for each state and territory.

In the words of the Standing Committee on Public Education in its 1995 Recommendation and Report to the House of Delegates (#114), "The timeliness of such support is critical to a renewed commitment and understanding of the fundamental relationship between rights, responsibilities, and the rule of law in preparing young people for effective citizenship." Twenty-two years later, we must take stronger, more targeted steps to ensuring our citizens receive the tools they need to actively and effectively fulfill their civic duty to vote in all elections.

Respectfully submitted,

Reginald M. Turner
Chair, ABA Commission on the Lawyer’s Role in Assuring Every Child’s Right to a High-Quality Education

August 2017

\textsuperscript{2} Media education is critically important, as well, to the teaching of civics and social studies. The US is considered far behind its English-speaking counterparts in the world with respect to media education. Robert Cubey, “Media Literacy and the Teaching of Civics and Social Studies at the Dawn of the 21st Century”, Sept. 1, 2004, at http://journals.sagepub.com/doi/abs/10.1177/0002764204267252

\textsuperscript{3} http://www.pewresearch.org/fact-tank/2016/08/02/u-s-voter-turnout-trails-most-developed-countries/ (last visited April 18, 2017)
GENERAL INFORMATION FORM

Submitting Entity: ABA Commission on the Lawyer’s Role in Assuring Every Child’s Right to a High-Quality Education

Submitted By: Reginald M. Turner, Chair, ABA Commission on the Lawyer’s Role in Assuring Every Child’s Right to a High-Quality Education

1. **Summary of Resolution(s).** The resolution urges federal, state, local, territorial, and tribal governments to develop and implement age-appropriate curricula designed to instill in all students a sense of personal responsibility to cast informed votes and to teach them how to educate themselves regarding candidates and issues in elections.

2. **Approval by Submitting Entity.** The ABA Commission on the Lawyers’ Role in Assuring Every Child’s Right to a High-Quality Education approved the Resolution on April 20, 2017.

   The Council of the Section of Civil Rights and Social Justice approved co-sponsorship of the Resolution during its Spring Meeting on Saturday, April 29, 2017.

   The Commission on Youth at Risk electronically approved co-sponsorship of the Resolution on April 24, 2017.

   The Council of the Section of State and Local Government Law approved co-sponsorship of the Resolution during its Spring Meeting on Sunday, April 30, 2017.

   Standing Committee on Election law voted to co-sponsor the Resolution on May 4, 2017, at its Spring Business Meeting in Washington, DC.

   On May 4, 2017, the Center on Children and the Law approved co-sponsorship of this Resolution.

3. **Has this or a similar resolution been submitted to the House or Board previously?** No.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** This resolution builds upon the ABA’s 1990 policy, which supported efforts to increase voter registration through state and local agencies that have direct contact with the public; to encourage efforts to make the opportunity to vote easier; and to support educational programs to teach all citizens that voting is a responsibility as well as a privilege of citizenship. It also is consistent with the ABA’s 1995 Resolution 114 in which the ABA committed its support to public education to foster understanding of the Constitution and the rights and responsibilities of citizenship as fundamental to the continued functioning of our democracy, and urged the legal profession to engage the support of policy makers to further this goal through implementation and support of civics education in elementary and secondary schools.
5. The proposed resolution fits squarely with long standing Association efforts and policies to encourage voter participation by lawyers (Standing Committee on Election Law, August 1989) and college students (Special Committee on election law and Voter Participation and the Young Lawyers Division, August 1972). Most recently, the Standing Committee on Election Law has partnered with the Division for Public Education to create resources for the purpose of educating secondary school students about the process and importance of voting (http://www.americanbar.org/groups/public_services/election_law/voting_electionlaw_resources.html). The Standing Committee and the Division developed a video encouraging students to vote (http://youtu.be/NLHni3IwUM) and the Standing Committee also created a website www.voteyourvoicenow.org which includes information about voter registration and voting for each state and territory.

This resolution supports and furthers these efforts described above.

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. We will work with relevant stakeholders within and outside of the American Bar Association and the Governmental Affairs Office to implement the policy.

9. Cost to the Association. (Both direct and indirect costs) Adoption of this proposed resolution would result in only minor indirect costs associated with Section staff time devoted to the policy subject matter as part of the staff members’ overall substantive responsibilities.

10. Disclosure of Interest. (If applicable) There are no known conflicts of interest.

11. Referrals. By copy of this form, the Report with Recommendation will be referred to the following entities:

   - Section of Administrative Law and Regulatory Practice
   - General Practice, Solo and Small Firm Section
   - Section of Litigation
   - Section of State and Local Government Law
12. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Reginald M. Turner  
Clark Hill  
500 Woodward Avenue  
Suite 3500  
Detroit, MI 48226  
Tel: 313-965-8318  
Email: rturner@clarkhill.com

Tanya Terrell Coleman, Director  
Section of Civil Rights and Social Justice  
1050 Connecticut Avenue NW  
Washington, DC 20036  
Tel: (202) 662-1030  
Email: Tanya.terrell@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 address.)

Reginald M. Turner  
Clark Hill  
500 Woodward Avenue  
Suite 3500  
Detroit, MI 48226  
Tel: 313-965-8318  
Email: rturner@clarkhill.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution urges federal, state, local, territorial, and tribal governments to develop and implement age-appropriate curricula designed to instill in all students a sense of personal responsibility to cast informed votes and to teach them how to educate themselves regarding candidates and issues in elections.

2. Summary of the Issue that the Resolution Addresses

The American Bar Association (ABA) has long encouraged measures to instill or enhance civics education in our schools, including public education about the justice system and rule of law in our society.

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

In the words of the Standing Committee on Public Education in its 1995 Recommendation and Report to the House of Delegates (#114), “The timeliness of such support is critical to a renewed commitment and understanding of the fundamental relationship between rights, responsibilities, and the rule of law in preparing young people for effective citizenship.” Twenty-two years later, we must take stronger, more targeted steps to ensuring our citizens receive the tools they need to actively and effectively fulfill their civic duty to vote in all elections. This Resolution will allow the ABA to advocate to do so.

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

No minority views or opposition have been identified.
RESOLVED, That the American Bar Association endorses the Blueprint for Change: Education Success for Children in Foster Care (2007) and the Blueprint for Change: Education Success for Youth in the Juvenile Justice System (2016) (collectively, the "Blueprints"), dated August 2017;

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial, tribal, and local legislatures, government agencies, and courts to adopt laws, regulations, policies, and court rules to implement the Blueprints;

FURTHER RESOLVED, That the American Bar Association urges attorneys, judges, and state, territorial, tribal, and local bar associations to support improvements in practices, program resources, and legal strategies to ensure educational stability and success consistent with the Blueprints.
BLUEPRINT FOR CHANGE: EDUCATION SUCCESS FOR CHILDREN IN FOSTER CARE

1. Youth are entitled to remain in their same school when feasible.

1-A Youth’s foster care placement decisions take school stability into account, and school stability is a priority whenever possible and in the child’s best interests.

1-B Youth have sufficient foster home and permanent living options available in their home communities to reduce the need for school moves.

1-C When in their best interests, youth have a legal right to remain in the same school (school of origin) even when they move outside the school district, and schools that retain children are not financially penalized.

1-D Youth are entitled to necessary transportation to their school of origin, with responsibilities clearly designated for transportation costs.

1-E Youth have necessary support and information to make school of origin decisions; youth, birth parents, caseworkers, foster parents, courts, attorneys, schools, and educators are trained about legal entitlements and appeal and dispute procedures.

1-F Youth with disabilities continue in an appropriate education setting, regardless of changes in foster care placements, and transportation is provided in accordance with the youth’s Individualized Education Program (IEP).

2. Youth are guaranteed seamless transitions between schools and school districts when school moves occur.

2-A Youth have a right to be enrolled immediately in a new school and to begin classes promptly.

2-B Youth can be enrolled in school by any person who has care or control of the child (i.e., caseworker or foster parent).

2-C Youth enrollment and delivery of appropriate services are not delayed due to school or record requirements (i.e., immunization records, birth certificates, school uniforms); designated child welfare, education, and court staff facilitate and coordinate transitions and receive training on special procedures.

2-D Youth education records are comprehensive and accurate, and promptly follow youth to any new school or placement; records are kept private and shared only with necessary individuals working with the youth.

2-E Youth who arrive in a new school during the school term are allowed to participate in all academic and extracurricular programs even if normal timelines have run or programs are full.

2-F Youth receive credit and partial credit for coursework completed at the prior school.

2-G Youth have the ability to receive a high school diploma even when they have attended multiple schools with varying graduation requirements.

2-H Eligible youth with disabilities receive the protections outlined in federal and state law, including timelines for evaluations, implementation of an Individualized Education Program (IEP) or an Individual Family Service Plan (IFSP), and placement in the least restrictive environment, even when they change school districts.

3. Young children enter school ready to learn.

3-A Young children have all the appropriate health interventions necessary, including enrollment in the Medical Assistance Early Periodic Screening, Diagnosis, and Treatment (EPSDT) Program, and receive comprehensive evaluations and treatment.

3-B Young children are given special prioritization and treatment in early childhood programs (including Head Start, Early Headstart, and preschool programs).

3-C Young children receive developmentally appropriate counseling and supports in their early childhood programs with sensitivity to their abuse and neglect experiences.

3-D Young children have caretakers who have been provided information on the children's medical and developmental needs, and who have received training and support to be effective advocates.

3-E Children under age three with developmental delays, or a high probability of developing such delays, are identified as early as possible, promptly referred for evaluation for early intervention services, and promptly evaluated and served.

3-F Young children at high risk of developmental delays are screened appropriately and qualify for early intervention services whenever possible.

3-G Children under age three who have been involved in a substantiated case of child abuse and neglect, who have been identified as affected by substance abuse or withdrawal symptoms resulting from prenatal drug exposure, or who have experienced a substantiated case of trauma due to exposure to family violence are referred to the early intervention system for screening.

3-H Children with disabilities ages three to school age are referred and evaluated, and receive appropriate preschool early intervention programs.

4. Youth have the opportunity and support to fully participate in all aspects of the school experience.
4-A Youth are entitled and encouraged to participate in all aspects of the school experience, including academic programs, extracurricular activities, and social events, and are not excluded because of being in out-of-home care.

4-B Youth receive the additional supports necessary to be included in all aspects of the school experience.

4-C Youth’s records relating to his or her education and needs are made available to necessary individuals working with the youth, while respecting the youth’s privacy.

4-D Youth’s appointments and court appearances are scheduled to minimize their impact on the child’s education, and children are not penalized for school time or work missed because of court or child welfare case-related activities.

4-E Youth are not inappropriately placed in nonpublic schools or other alternative school settings, including schools for students with disabilities.

4-F Youth receive supports to improve performance on statewide achievement tests and other measures of academic success (such as attendance and graduation).

4-G Youth are surrounded by trained professionals that have the knowledge and skills to work with children who have experienced abuse and neglect; school curricula and programs utilize the research on trauma-informed care.

4-H Youth with disabilities are located, evaluated, and identified as eligible for special services.

4-I Youth with disabilities receive the special help they need to learn content appropriate to their grade level or, when that is not possible, the content that is appropriate to their learning level.

4-J Youth with disabilities receive their education in regular classrooms (with the necessary supports and accommodations) whenever possible.

5. Youth have supports to prevent school dropout, truancy, and disciplinary actions.

5-A Youth are not disproportionately subjected to school discipline or school exclusion, and are not placed in alternative schools for disruptive students as a means to address truancy or as a disciplinary measure.

5-B Youth have access to school counselors and other school staff familiar with the needs of children who have experienced abuse and neglect, and the staff has mastered effective remediation strategies.

5-C Youth have advocates at school disciplinary and other proceedings who are trained on procedures related to dropout, truancy, and discipline.

5-D Youth at risk of truancy or dropping out have access to programs and supports designed to engage them in school.
5-E Youth who have dropped out of school have access to programs and supports designed to reintegrate them into a school or a General Educational Development (GED) program.

5-F Youth with disabilities have behavior intervention plans in place to minimize inappropriate school behaviors and to reduce the need for disciplinary action or referral to the police.

5-G Youth with disabilities receive the procedural protections outlined in federal law so that they are not punished for behavior that is a symptom of their disability.

6. *Youth are involved and engaged in all aspects of their education and educational planning and are empowered to be advocates for their education needs and pursuits.*

6-A Youth are routinely asked about their educational preferences and needs, including their view on whether to change schools when their living situation changes.

6-B Youth receive training about their educational rights commensurate to their age and developmental abilities.

6-C Youth are given the opportunity to participate in court proceedings, and their engagement is supported with transportation and accommodations to decrease the impact on school attendance and schoolwork; attorneys, guardians ad litem, CASAs, and judges are trained on involving youth in court, and encourage youth participation.

6-D Youth participate in school and child welfare meetings and planning about their education and their future.

6-E Youth are surrounded by school and child welfare professionals with appropriate training and strategies to engage youth in education planning.

6-F Youth with disabilities actively participate in the special education process, especially in transition planning for post-school education and employment, and are provided with the supports necessary to effectively participate.

7. *Youth have an adult who is invested in his or her education during and after his or her time in out-of-home care.*

7-A Youth are entitled to have a knowledgeable and trained education advocate who reinforces the value of the youth’s investment in education and helps the youth plan for post-school training, employment, or college; efforts must be made to recruit appropriate individuals (i.e., foster parents, birth parents, child welfare caseworkers, teachers, and guidance counselors).

7-B Youth exiting care (because of age or because their permanency objectives have been reached) have significant connections to at least one adult to help the youth continue education pursuits.

7-C Youth have an education decision maker at all times during a child welfare case, who is trained in the legal requirements relating to education decisions for children with and without disabilities.
7-D Youth with disabilities who are eligible for the appointment of a surrogate parent have access to a pool of qualified, independent, and well-trained individuals who can serve in that role, and are assigned a surrogate in a timely manner, but no later than 30 days after a determination that a surrogate is needed.

8. Youth have supports to enter into, and complete, postsecondary education.

8-A Youth are exposed to postsecondary education opportunities, and receive academic support to achieve their future education goals.

8-B Youth in care and youth who have exited care (because of age or because their permanency objectives have been reached) have financial support or tuition fee waivers to help them afford postsecondary education.

8-C Youth have clear information and concrete help with obtaining and completing admission and financial aid documents.

8-D Youth have access to housing during postsecondary school vacations or other times when school housing is unavailable.

8-E Youth over 18 can remain in care and under the courts’ jurisdiction to receive support and protection while pursuing postsecondary education.

8-F Youth have access to academic, social, and emotional supports during, and through completion of, their postsecondary education.

8-G Youth with disabilities pursuing higher education goals receive the supports to which they are entitled to under federal and state laws.
BLUEPRINT FOR CHANGE: EDUCATION SUCCESS FOR CHILDREN IN THE
JUVENILE JUSTICE SYSTEM²

1. Youth are empowered and engaged to make decisions about their own education and future.

1.1 - Youth receive full information about educational opportunities available to them, and are regularly asked about their educational preferences and needs. Youth preferences, strengths, and needs are central to curricular and placement determinations.

1.2 - Youth receive training about their educational rights including due process and special education rights, and self-advocacy.

1.3 - Youth participate in school and juvenile justice system meetings about their education and future.

1.4 - Youth are given an opportunity to participate in court proceedings; courts and attorneys are trained on involving youth in court and in asking questions about educational interests, goals, and progress.

1.5 - Youths are supported by school and juvenile justice professionals with appropriate knowledge and training who engage youth in education planning.

1.6 - Youth opinions and wishes are prioritized in determining their educational decision maker, placement, educational goals and program, and post-secondary decisions, including living and school placement upon release.

1.7 - Youth with disabilities actively participate in special education meetings, the development of their Individualized Education Programs (IEPs) including transition planning, and receive the support they need to be self-advocates.

1.8 - Youth who are English language learners and/or limited English proficient receive the supports they need to be effective self-advocates for their educational needs.

2. Youth have at least one adult who is invested in their education, before, during, and after involvement in the juvenile justice system.

2.1 - Youth are supported by parents who are engaged and have received information and training about educational rights, special education law, and advocacy sufficient to maintain their engagement.

2.2 - When a youth’s parent is available but requires supports to fully engage in education advocacy, the juvenile justice system and other stakeholders collaborate to provide access and support to the parent in order to build capacity and best serve the youth.

2.3 - When the parent is not available to participate in the youth's education, even with supports for the parent, another legally-authorized education decision-maker is identified for the youth. All youth without an available parent, not just those with identified disabilities, are appointed an education decision-maker. The youth’s preference for an alternate education decision-maker, including other family members, is solicited and prioritized. If a family member is not available or appropriate, youth have access to a pool of qualified, independent, and well-trained individuals who speak the youth’s native language who can serve in this role and be timely appointed, and in compliance with the IDEA if applicable.

2.4 - Youth are engaged by staff sensitive to and supportive of the cultural and ethnic background of youth and their family.

2.5 - All youth, including youth with disabilities, youth of color, LBGTQ and gender non-conforming youth, and youth who are English language learners or limited English proficient, have mentors who are culturally competent to empower and support them and understand their strengths and unique barriers to educational success.

2.6 - Youth's parents who are limited-English proficient receive information about their children's education in their native language, including all information needed to advocate on behalf of their children.

2.7 - Youth are supported by trained professionals, including school staff, behavioral health staff, judges, defense counsel, case managers, Juvenile Probation Officers, child welfare workers, and facility staff, to gain access to high-quality education and career/technical programs. Youth receive assistance from interagency liaisons and/or transition specialists who get to know the youth and forge an ongoing relationship.

2.8 - Youth attend schools, including placement schools, that engage parents and families, and rely on parents/guardians as education decision-makers, including ensuring that parents or other legally authorized decision-makers make decisions with regard to a youth’s special education needs.

2.9 - Youth have access to legal representatives trained to identify and respond to education issues in juvenile justice cases, school disciplinary hearings, and special education matters.

2.10 - Youth appear before judges who consider their desires and educational needs in crafting dispositions and ordering placements, address education issues in depth at all review hearings, and consider the quality and consequences of education available in the juvenile justice placement in all decisions while maintaining the youth at home and in community schools wherever possible.

3. After being charged or adjudicated delinquent, youth remain in the same community school whenever feasible or enroll in a new community school.

3.1 - Youth remain in the same school unless an out-of-home placement is necessary for the rehabilitation and/or safety of the youth, or the youth’s decision-maker, in consultation with the youth, recommends a change in school placement, and the judge, placing agency and
youth/family determine the student should be placed in a different school district or school placement.

3.2 - Youth remain at home and in their local public schools for truancy or other status offenses, with needed interventions and supports, rather than being placed in juvenile justice placements and on-grounds schools or being transferred to alternative disciplinary schools.

3.3 - Youth of color are not subject to and negatively impacted by racial bias because individuals involved in youth’s placement are vigilant about identifying and correcting bias that leads to disproportionate out-of-home placement of students of color, and agencies and organizations collecting data on disproportionality, and enacting appropriate corrective policies when disparities are identified.

3.4 - Youth with disabilities are placed in the least restrictive, most inclusive school environment that can meet their individual needs.

3.5 - When out of home placement is necessary and used as a last resort, youth are placed close to home, taking into account distance and the ability of the youth to continue at the current school.

3.6 - Youth in placement are afforded the opportunity to continue to attend their home school or attend the local public school close to the placement (as opposed to an on-grounds program).

3.7 - Youth are not referred to alternative disciplinary schools or otherwise pushed out of school due to juvenile justice involvement.

3.8 - Youth are not held in detention awaiting appropriate community education programs.

4. Youth involved in the juvenile justice system who are educated in the community receive access to the full range of educational opportunities and supports.

4.1 - Youth participate in the full school experience, and are not excluded from extra-curricular or recreational activities due to juvenile justice system involvement, conditions of probation, or electronic monitoring.

4.2 - All youth— in local schools, alternative disciplinary schools, or during disciplinary exclusion— receive access to adequate education that meets their educational needs and provides a full array of educational opportunities.

4.3 - Youth receive needed academic and non-academic supports, including access to remedial programs, credit recovery, counseling and behavioral health services, gifted and talented education, career and technical programs, and job exploration opportunities.

4.4 - All youth feel safe, empowered, and free from discrimination on the basis of race, ethnicity, marital or parental status, religion, disability, HIV status, sexual orientation, gender identity or gender expression. If a school has sex-segregated activities such as gym class, health class, or extra-curricular sports, or facilities such as bathrooms or locker rooms, youth are permitted to participate in activities, programs and facilities consistent with their gender identity.
4.5 - Youth with disabilities receive the specially designed instruction, targeted interventions, services, and accommodations they need to make meaningful progress in the least restrictive environment.

4.6 - Youth who are English language learners and/or limited English proficient receive effective ESOL instruction and the modifications to curriculum and instruction to which they are legally entitled, and they and their families receive legally mandated interpretation and translation services.

4.7 - Youths’ appointments and court appearances are scheduled to minimize their impact on the child’s education, and youth are not penalized for missing school or work because of court or juvenile justice case-related activities.

4.8 - Youth are not subject to blanket education-related terms of probation that fail to take into account the youth’s individualized education needs and traumatic experiences. Education matters – attendance, engagement with school, homework – should not be addressed by the probation system but rather by the school, service providers, and caregivers/family.

4.9 - Youth receive full due process before any exclusion from school or placement in a restrictive setting, including meaningful manifestation determination reviews for youth with disabilities to determine if the youth’s conduct is related to or the result of a disability or the failure to follow the youth’s IEP, and includes an assessment of the student’s mental or behavioral health condition that may contribute to behavior, a functional behavioral assessment and the development of or revision to a youth’s positive behavior support plan.

4.10 – Youth are not subject to school policies and administration of school discipline that disproportionately impact youth of color.

4.11 - Students receive sufficient information to understand all policies and practices related to school discipline and their substantive and procedural rights.

5. Youth in juvenile justice placements are provided with a high quality educational experience.

5.1 - Upon arrival at all juvenile justice placements, a youth’s educational needs and levels are assessed, with input from the youth and parents or other authorized education decision-maker.

5.2 - Youth are assessed for special education needs early on, referred for an initial evaluation where necessary, provided with an immediate temporary IEP where necessary, and a comprehensive IEP is developed and implemented.

5.3 - Youth are offered programs and instructional services that are responsive to their individual needs and free from racial or other bias.

5.4 - Home school records are transferred immediately, both at the beginning of placement and at any point of transfer or exit from juvenile justice placement, and a student’s participation in individualized education services are never delayed because school records have not yet been received.
5.5 - Youth in placement schools are provided with high quality academics and the same state-aligned curriculum and instructional time as would be provided in traditional public schools. Short-term detention facilities work in collaboration with local school districts to provide educational modules or other approaches to keep young people on track with their home schools.

5.6 - Youth with disabilities receive a free appropriate public education in the least restrictive environment, including needed special education and related services, transition planning and other supports through meaningful IEPs that are timely updated; developed with parent/family and youth input; and reflect the full range of services, accommodations and modifications necessary for academic progress.

5.7 - Youth who are English language learners and/or limited English proficient receive the interventions and support they need while attending school in placement, including ESOL instruction, modifications to curriculum and instruction, and access to translation and interpretation services as required by law.

5.8 - Youth are taught by qualified teachers (including special education teachers when applicable) who are properly certified, trained and permanently assigned to a placement and able to provide consistent instruction. Youth who receive instruction online or through a computer program are also supported by “live” certified and trained teachers.

5.9 - Youth receive all needed educational supports in placement schools, including intensive research-based remedial education and targeted literacy support, credit recovery, access to AP or IB courses and gifted education.

5.10 - Youth receive year-round educational programs when in placement school settings. Youth are not denied meaningful education services due to disciplinary consequences.

5.11 - Youth in juvenile justice placements have access to technology, including the internet, in order to complete educational assignments and academic activities.

6. Youth in juvenile justice placements are educated in a supportive, positive school environment where they feel safe and empowered.

6.1 - Youth attend schools free from discrimination based on race, sex, sexual orientation, gender presentation, national origin, language, disability or other characteristics and are educated in facilities that engage in data analysis and independent review to survey youth and assess programs to identify concerns of and bias.

6.2 - Youth are taught by staff who are trained in culturally competent, gender responsive, trauma-informed, strengths based and developmentally appropriate responses to behavior.

6.3 - Youth are informed of the grievance or complaint procedure in any placement and are informed of their education rights. Youth are provided meaningful access to utilize the grievance process, even during a restrictive disciplinary placement like solitary confinement.

6.4 - Youth with disabilities are educated in a welcoming environment and are not segregated or excluded based on their disability or behavior that is a manifestation of their disability. Youth
with disabilities receive appropriate interventions to address any behavior that interferes with their access to special education, whether a manifestation of their disability or not.

6.5 - Youth have access to comprehensive, supportive mental health services and school staff are educated and informed about each youth's unique needs and the appropriate educational approaches for those needs.

6.6 - Youth have access to comprehensive sexual health education that is inclusive of LGBTQ sexual health needs.

6.7 - Youth who are learning English are educated in a welcoming environment and receive access to the full range of educational programming offered to native English speakers.

6.8 - Youth are not segregated or discriminated against in a school setting for their sexual orientation, gender identity or expression. Youth identifying as LGBTQ/GNC receive support and interventions by teachers trained to be culturally competent to issues facing LGBTQ/GNC youth including that they are at higher risk for attempting suicide, experiencing suicidal thoughts or engaging in self harm than straight cisgender youth.

6.9 - Youth in placement schools receive positive disciplinary responses that do not rely on restraints of any kind or duration, solitary confinement, or other punitive interventions.

6.10 - Youth are not denied education either as a punishment for misconduct outside the school setting, or because of correctional placements such as solitary confinement.

6.11 - Youth are provided meaningful and thorough due process protections before any exclusion from school, including meaningful manifestation reviews for youth with disabilities to ensure that they are not punished for conduct relating to their disability or the school's failure to follow their IEP.

6.12 - Youth in placement schools have regular meaningful family and community visits. Placement schools engage and involve parents in their child's education.

7. Youth have access to high quality career pathways programs, especially in juvenile justice placements.

7.1 - Youth, including those in placement, receive meaningful career exploration, career planning, guidance and job training services as well as comprehensive social emotional and "21st Century" skills to identify, obtain, and sustain employment.

7.2 - Youth, including those in placement, have access to career/technical education programs that offer industry-recognized credentials and certificates.

7.3 - Youth have equal access to career/technical education programs regardless of gender.

7.4 - Youth, including those in placement, have access to literacy and other academic programming that is fully integrated with career/technical education.
7.5 - Youth have access to their own employability documents (including social security card, birth certificate, resume).

7.6 - While in placement, youth are able to participate in internships and jobs in the placement and/or community.

7.7 - Youth with disabilities in juvenile justice placements are fully integrated and allowed full access to career pathways and career/technical education programs, with appropriate accommodations.

7.8 - Youth over age 16 (ideally 14) in juvenile justice placements receive thorough transition planning services that build on their identified strengths and interests, including, when applicable appropriate services and supports as required under the IDEA.

7.9 - Youth who are English Language Learners or limited English proficient receive the interpretation and translation services, ESOL instruction and modifications in career/technical education programs and equal access to employment opportunities to which they are entitled under federal and state law.

8. Youth receive supports to prepare for, enter, and complete postsecondary education and training.

8.1 - Youth are exposed early to postsecondary education opportunities, receive academic and other support to achieve their future education goals, and are supported by a culture that reinforces their ability to attend and succeed in higher education or training.

8.2 - Youth working toward a high school diploma have access to dual enrollment programs.

8.3 - Youth with high school diplomas or high school equivalency degrees have access to a variety of post-secondary education or training, including while attending education programs in juvenile justice placements.

8.4 - Youth are educated about their rights and availability of financial aid, and receive assistance with application for Pell Grants and other funding for higher education.

8.5 - Youth receive clear information and concrete help with obtaining and completing admission and financial aid documents.

8.6 - Youth receive support to expunge juvenile or adult records and advice on how to answer admission and job interview questions, so juvenile or criminal involvement does not foreclose post-secondary education options and access.

8.7 - Youth have access to optional peer groups, tutoring, and other supports for youth with juvenile justice involvement in higher education institutions.

8.8 - Youth who have drug-related convictions receive individualized support for navigating federal financial aid processes, including support in locating, enrolling in, and completing an approved drug rehabilitation program.
9. Youth have smooth transitions between home schools and schools in juvenile justice placements and receive effective reentry planning and supports.

9.1 - Youth receive robust education planning upon entering any juvenile justice placement – whether short- or long-term – to ensure continuation of their then-current credit-bearing coursework and career/technical training program.

9.2 - Youth receive re-entry planning from the moment they enter a juvenile justice placement, including planning relating to academic and career/technical education.

9.3 - Youths’ education records are comprehensive and accurate.

9.4 - Records promptly follow youth to any new school or placement, are kept private and are shared only with necessary individuals working with the youth. There are short and definitive timeframes set for record transfers and lack of records or a delay in receipt of records do not bar a student from enrolling in school (either in a placement school or a school in the community).

9.5 - Whether in a short- or long-term placement, youth have trained transition coordinators and multi-disciplinary transition teams to help them re-enroll in their next school and obtain needed supports before and upon reentry. The transition coordinator ensures that youth receive appropriate school programming when transitioning between school settings, sit for appropriate exams, obtain a transcript reflecting credits awarded and academic mastery, and register for appropriate coursework.

9.6 - Youth receive full or partial credit for coursework completed in prior school, or credit waivers for electives not required by state law, and youths’ credits promptly transfer to a school or juvenile justice placement.

9.7 - Youths’ career/technical competencies and credentials are passed along to the subsequent school, which takes into account the youth’s career interests and experience in making curricular and school placement decisions.

9.8 - Youth required to change schools because of juvenile justice involvement are allowed to participate in all academic, career/technical, and extracurricular programs upon reentry even if normal timelines have run or programs are full.

9.9 - Youth are not barred from enrolling in school for a high school diploma even if they obtained their high school equivalency while in placement.

9.10 - Youth are involved in an assessment of whether to return to their original school, and if it is not safe or appropriate for a student to return to their school of origin, placement staff assist with options and procedures to transfer to another school in the community.

9.11 - Youth are immediately enrolled in an appropriate school or job training program after leaving a juvenile justice placement, with a right to return to their school of origin, and are not placed automatically in alternative disciplinary programs nor automatically placed in a cyber education program.
9.12 - Youth with juvenile records are allowed equal access to neighborhood public schools, specific school programs, special admittance (e.g. "magnet"), and charter schools. Facility staff help youth complete school applications for the following year.

9.13 - Youth re-entering the community have access to credit-bearing coursework, career/technical education, job training and other career pathways programs, with needed accommodation and supports.

9.14 - Youth have a right to be enrolled in school and begin classes immediately and promptly receive all services required by IDEA or Section 504 when eligible.

9.15 - Youth have the ability to receive a high school diploma when they satisfy mandatory state requirements even when they have attended multiple schools with varying local graduation requirements.

9.16 - For students with IEPs, students' progress and continued need for intensive academic remediation post-release is documented and the school district provides these services post-release.

9.17 - Youth in detention or whose placement time is intended to be short remain enrolled in their home school.

10. All marginalized youth – and particularly youth of color, youth with disabilities, girls, LGBQ youth, gender non-conforming and transgender youth, English Language Learners, youth who are involved with both child welfare and juvenile justice systems, and those with intersectional identities – are educated in their home schools rather than being disproportionately assigned to juvenile justice placements, and receive the services, support and protections they need to address their unique barriers to education success.

10.1 Youth of color are offered programs and instruction free from racial or ethnic bias and individuals involved in youth's placement are vigilant about identifying and correcting bias that leads to disproportionate out of home placement of students of color.

10.2 Youth identifying as LGB/TGNC, at particular risk for attempting suicide or engaging in self harm, are not punished with segregation or isolation that is harmful to their mental health and excludes them from educational opportunities.
REPORT

INTRODUCTION

The American Bar Association is committed to supporting the educational needs of court involved children and youth, including those in the foster care and/or juvenile justice systems, and urges the prompt support and endorsement of the goals and benchmarks outlined in the two existing Blueprint for Change frameworks, created to comprehensively outline what is needed for court involved youth to experience educational success.

Promoting education for at risk youth

Nationally, 82% of high school students graduate within four years. It is commonly accepted that this number hides significantly lower rates for certain subgroups, including minorities, students with disabilities, and students who identify as LGBTQ. The Blueprints promote best practices for two vulnerable and frequently forgotten student populations: youth who are in the foster care and/or juvenile justice systems.

Education has long been viewed as an equalizer and a gateway to success. Yet court-involved youth are at risk for significantly worse educational outcomes than their peers due to unique circumstances and barriers that arise from agency and court involvement. The Blueprints provide a framework with comprehensive goals and benchmarks to improve educational access, stability, and success for court-involved youth, for the ABA to endorse and promote.

Legal Center for Foster Care & Education

In 2007, the ABA Center on Children and the Law, in partnership with the Education Law Center and Juvenile Law Center, recognized a gap in serving the educational needs of children in foster care. In response, experts from each organization formed the Legal Center for Foster Care & Education (Legal Center FCE) and developed the Blueprint for Change: Education Success for Children in Foster Care (“Foster Care Blueprint”). The Foster Care Blueprint identifies eight Goals for achieving educational success and is written from a youth’s perspective. Each Goal is broken down into Benchmarks, providing an easy to follow framework that ensures access to education, promotes stability and inclusion, and helps the youth prepare for higher education and the workforce. The Foster Care Blueprint’s website serves as a database with examples, fact sheets, templates, and checklists from school systems across the country. Using the fifty-six Benchmarks in the Foster Care Blueprint, the Legal Center FCE has successfully assisted programs across the country to change policies and practices to support educational success.

Legal Center for Youth Justice and Education

Recognizing a similar educational need for youth in the juvenile justice system, the Southern Poverty Law Center, Juvenile Law Center, Education Law Center, and the ABA Center on Children and the Law formed the Legal Center for Youth Justice and Education (LCYJE) in 2016. LCYJE produced its own Blueprint for Change: Education Success for Youth in the Juvenile

---

Justice System ("JJ Blueprint"). The JJ Blueprint has ten Goals and 96 Benchmarks, creating a framework for courts, schools, and child welfare agencies to follow. Together, the two Blueprints recognize the urgent need to improve education for youth that are part of the foster care and/or juvenile justice systems. They address common barriers these youth face, and can serve as a guide for policy and practice reforms.

YOUTH AT RISK FOR EDUCATIONAL FAILURE

Youth in the Foster Care System

Approximately 400,000 youth are in foster care on any day in the United States. Almost a quarter of a million are school age, but that does not guarantee that they are in school. Foster care youth move frequently, and are twice as likely as their peers to miss days of school. More than half of foster care youth change school when they are placed in foster care, and the average child changes placements 2.8 times, which may necessitate further school changes. Foster care students are more likely to be held back a grade and be older than their classmates, both predictors for dropping out. In Colorado, foster care students have four year high school graduation rates that are half that of the state average of 77.3%, and far below the rates of students in other at risk subgroups. Nationally, half of foster care youth complete high school, one in five begin college, and only 3% graduate from college with a bachelor’s degree. Eighty-four percent of foster care youth ages 17-18 want to attend college, but a number of roadblocks stand in their way.

Youth in the Juvenile Justice System

Each year, approximately 1.1 million youth are called into juvenile court. This includes acts of delinquency, criminal acts committed by a minor, and status offenses, acts that are only offenses because of the youth’s age. Ten percent of cases, impacting 109,000 youth, are status offenses.

---

6 Id.
7 Id.
8 Id.
9 At risk groups include low-income students, migrants, English Language Learners, students with disabilities, Title I students, and students who are homeless. State Policy Report: Dropout Prevention and Student Engagement 2013-2014, Colorado Department of Education, p15. https://goo.gl/lt2tmL.
10 Fostering Success in Education.
11 Id.
13 Status Offenses. Office of Juvenile Justice and Delinquency Prevention. https://www.ojjdp.gov/mpg/litreviews/Status_Offenders.pdf. "In 2013, the majority of petitioned status-offense cases included truancy (51 percent), followed by underage drinking violations (15 percent), ungovernability (9 percent), curfew violations (9 percent), runaways (8 percent), and miscellaneous (8 percent)."
such as running away from home, being truant from school, and not following a parent’s instructions, often labeled as “incorrigible youth.”

Youth that are adjudicated delinquent or held pre-adjudication may face a variety of punishments, from probation and community service to imprisonment in a locked facility. Youth that are committed to a secure facility may be offered one size fits all classes, without regard to their grade level or special needs. Nationally, two out of three youth that interact with the juvenile justice system eventually drop out of school.

**Impact of Court-Involvement on Youth**

Court-involved youth are especially at risk for receiving a poor or interrupted education. When a child is involved in a dependency or delinquency case, education is not often prioritized or considered as part of the court’s findings. Children change placements, leave school districts, and miss classes. They face enrollment delays, do not receive partial credit for classes completed, and are unable to join extracurricular and enrichment programs because of missed deadlines. Far too often legal advocates and courts do not incorporate improvements in a child’s educational experience into the legal court process and orders that emerge from the court.

Youth who are part of both the foster care and the juvenile justice systems, known as crossover youth, dual status, or dually involved youth, face even greater challenges. Additionally, court-involved youth are disproportionately students of color, students with disabilities, and/or students that identify as LGTBQ. For these children, becoming involved with the legal system compounds the disadvantages they face. Targeted policies addressing all of these challenges are necessary to reach all court-involved youth.

**Long-lasting Economic Consequences**

In 2009, Northeastern University prepared a groundbreaking report on the cost to society when youth drop out of school. *The Consequences of Dropping Out of High School* paints a bleak picture for youth ages 16-24 who dropped out of high school as compared to their peers:

- Approximately 54% of dropouts are not working and 30% live in poverty.
- Dropouts earn an average annual income of $8,358, compared to $14,601 for those who complete high school and $24,797 for college graduates.
- 38% of female youth who drop out are mothers, compared to 6% for youth who are college students or graduates, and they are nine times more likely to be single parents.
- They are 63 times more likely to be incarcerated than college graduates.

---

14 Id.
Comparing people of all ages in 2012, the average income for dropouts was $20,241, compared to $30,647 for high school graduates and $56,665 for those with bachelor degrees.\(^{17}\) In 2014, the employment rate for young adults ages 20-24 was 47% for dropouts, almost half the rate for those with a college degree (88%).\(^ {18}\)

*The Consequences of Dropping Out* concludes that “The average high school dropout will cost taxpayers over $292,000 in lower tax revenues, higher cash and in-kind transfer costs, and imposed incarceration costs relative to an average high school graduate.”\(^ {19}\) The consequences of educational failure are huge for both students and the community. When half of foster care youth and two-thirds of juvenile justice youth drop out of high school, there is an urgent need for change.

**Timely Federal Action Impacting All Students in the U.S.**

Education of all students in the United States consistently remains one of the top ten issues of national concern.\(^ {20}\) The 2015 reauthorization of the Elementary and Secondary Education Act as the Every Students Succeed Act (ESSA)\(^ {21}\) required significant changes in the services schools must provide to all students. For the first time, federal education law includes protections for foster care youth. The law also expands on supports for juvenile justice youth, particularly focused on smoothing transitions when children return to public school from detention.\(^ {22}\) The Department of Education, the Legal Center FCE, and the LCYJE have offered guidance through webinars and written materials as child welfare agencies and LEAs work to reach compliance.\(^ {23}\) Having an ABA Resolution in support of the Blueprints will bolster the work performed by Legal Center FCE and LCYJE.

**THE BLUEPRINTS IMPROVE EDUCATIONAL ACCESS, STABILITY, AND SUCCESS**

The Blueprints have the power to make a difference in the lives of thousands of court-involved students. They are comprehensive frameworks built to tackle complex issues. The Blueprints are research-based and were developed with input from a wide range of stakeholders, including

---


\(^{19}\) Sum, et al. Over their working lives, the average high school dropout will have a negative net fiscal contribution to society of nearly -$5,200 while the average high school graduate generates a positive lifetime net fiscal contribution of $287,000.


\(^{23}\) For more information ESSA and foster care visit www.fostercareandeducation.org; for more information on ESSA and juvenile justice visit www.jjeducationblueprint.org.
lawyers, judges, and educators. They serve as a vehicle to change the trajectory and outcome of students' lives. Summaries of the unique challenges facing court-involved youth and what the Blueprints say we should do are outlined below.

Youth should remain in the community school

Court-involved youth face a challenge that most other children do not experience – they change schools frequently and may not have an adult to advocate that they remain in their school of origin. Studies have shown that students in foster care are a “distinctly disadvantaged subgroup” that perform worse than their peers in almost every category, with a higher percentage of students diagnosed with disabilities and held back one or more grades, challenges that are compounded by changing schools.24 Once youth enter a secure placement, two out of three will not return to the community school to complete their education.25

The first goal of the Foster Care Blueprint and the third goal of the JJ Blueprint speak directly to this point. The Blueprints call for the judge, child welfare agency, and the youth/family to take into consideration school stability when making a placement decision. When a youth changes foster care placement and remains at the school of origin, the child welfare agency and local education agency must address how transportation will be provided, arranged, and funded. Youth adjudicated for status offenses and less serious delinquent acts should also remain in community schools, and they should be given the necessary interventions and supports so that they can succeed. Court involved youth with disabilities need even greater attention and should have continuity in an appropriate educational setting, regardless of changes in a foster care placement or a move to a secure placement.

Schools should facilitate prompt enrollment and transitions

The average youth in foster care experiences 2.8 living placements, and more than half change schools upon entering foster care, causing them to endure joining a new school, often in the middle of the academic year.26 Youth in the juvenile justice system may change schools for a fresh start or when returning from a secure placement. Students who have to change schools find that their involvement with the foster care or juvenile justice system delays their enrollment. Transferring students face multiple barriers, such as failure of the schools to deliver records in a timely manner, being placed in the wrong classroom, or failing to receive credit for the work done if they did not complete a full school term, leaving them further behind.27

Goal 2 of the Foster Care Blueprint and Goal 9 of the JJ Blueprint advocate for smooth transitions among schools, school districts, and juvenile justice placements. The Blueprints give guidance that students can be enrolled by a caseworker or a foster parent, and that a lack of records should not be an impediment to beginning school. Students should receive full or partial credit for work

25 Community and School Re-entry.
26 Id.
27 Fostering Success in Education.
completed at the prior school, and be permitted to participate in academic and extracurricular programs even if normal timelines have passed.

Court-involved youth need access to early childhood intervention

Research demonstrates that a significant number of young children that experience abuse and neglect also have developmental delays, and one quarter of all children taken into protective custody are between birth and three. They may have physical, cognitive, emotional, behavioral, and social problems, including attachment disorders, cognitive delays, and altered brain development.

Foster Care Blueprint Goal 3 strives for young children to enter school ready to learn. Children who are removed from their home due to neglect or abuse have often experienced trauma. The act of removal itself is considered a system-induced trauma. Because of this, young children in foster care need to be evaluated for developmental, emotional, and behavioral problems. However, children in foster care are less likely to participate in early intervention programs such as Head Start and receive counseling. Court-involved children should be evaluated early and receive priority registration in early intervention programs. The Infants and Toddlers with Disabilities Program, Part C of the Individuals with Disabilities Education Improvement Act of 2004, was created to respond to the special needs of children from birth to 3.

Youth are entitled to full participation in all aspects of the educational experience

Beyond issues of school stability, court-involved youth often face other hurdles to having the same academic and nonacademic experiences as their non-foster school peers. Court-involved students may miss deadlines to sign up for tutoring, extracurricular, and enrichment activities. This is a missed opportunity because studies have shown that involvement in sports for girls, and church and after-school community activities for boys, significantly reduces the risk of delinquency.

Foster Care Goal 4 and JJ Goal 4 focus on ensuring court-involved youth have access to all aspects of school, including academic supports and extracurricular activities. The Blueprints call for extra efforts to be made for court-involved youth so that they may experience a typical childhood and

---

29 Id.
31 Fostering Success in Education.
participate with their peers. Court-involved youth may need additional academic supports to help them make up for lost time in school. Court-involved youth with disabilities need to receive full protection of their rights under Individuals with Disabilities Education Act to an appropriate education, including receiving their education in the least restrictive environment possible.\textsuperscript{34}

**Preventing disciplinary actions and school dropout**

When youth are frustrated by frequent moves, rough transitions, or life circumstances that have led to child welfare or juvenile justice involvement, they are more likely to act out, skip school, or drop out altogether. The trauma of abuse, neglect, and removal, and frustration at being behind their peers in school may also contribute to misbehavior by court-involved youth.

Foster Care Blueprint Goal 5 is to prevent dropout, truancy, suspension, and expulsion. To prevent this, youth need access to counselors and staff that are trained in recognizing abuse, neglect, and trauma. Court-involved youth should not be disproportionately subjected to suspension and expulsion, and should not be pushed to alternative schools.

Court-involved youth are at particular risk in schools with zero tolerance policies that automatically enforce suspensions and expulsions, sometimes for minor infractions, without knowing more about a particular student’s unique circumstances. Zero tolerance only serves to push students out, in contradiction to the first goal of keeping youth in school.\textsuperscript{35}

**Youth should be empowered and included in educational decisions**

Court-involved youth are caught in a system where the courts and various adults control almost all aspects of their lives. The court can tell them where to live, who they can live with, and where to go to school. It is normal for teens, especially ages 15-19, to increasingly want to make decisions about friends, where they spend their time, and other aspects of their lives.\textsuperscript{36}

Foster Care Goal 6 and JJ Goals 1 and 6 provide for youth to be involved, engaged, and empowered in all aspects of their education. Youth should have a positive school environment where they can articulate their academic needs and interests. This goal can be achieved by including youth in meetings and court proceedings where educational decisions are made. Youth should be informed of their educational rights and encouraged to participate in decision-making by attorneys, judges, educators, and child welfare workers.

\textsuperscript{34} Individuals with Disabilities Education Improvement Act.


\textsuperscript{36} Parents & Teachers: Teen Growth & Development, Years 15 to 17, Palo Alto Medical Foundation.

Youth need an invested adult and clear education decision makers

Court-involved youth need at least one committed adult advocate to look out for their educational needs to make sure they do not fall behind and to ensure they receive any needed supports to stay on track with peers. Youth that feel supported by an adult are more likely to feel connected to school and less likely to be truant or use illegal substances.  

Foster Care Goal 7 and JJ Goal 2 call for each child to have at least one adult who is invested in the child’s education. This adult should be present before, during, and after the child’s time in a placement away from home. An educational advocate can push for special education testing and services, and make sure that the child is able to participate in all aspects of the school. Especially in situations where a parent is not available, an educational advocate provides stability for a child who may change placements and teachers multiple times. The advocate should be familiar with educational rights for children with and without disabilities. Youth in foster care must also have clear education decision makers to ensure that their education rights are protected while in foster care.

Youth in juvenile justice placements deserve high quality education and career pathways

Youth in the juvenile justice system, both pre- and post-adjudication, may be held in secure facilities with limited access to educational opportunities, and substandard classrooms and instructors. For example, youth who spent time in a locked facility told researchers, “Many of us were in facilities where all youth – no matter what age or grade level – were in the same classroom and doing the same work. We had teachers who did not seem qualified to teach us, and we did not have enough textbooks, workbooks or other resources that challenged and engaged us.” Teachers should be certified and equipped with the skills and knowledge to teach academic and technical subjects.

The JJ Blueprint Goals 5 and 7 call for high quality educational and career pathways in juvenile justice placements. Upon entering a placement, a youth’s educational needs and levels should be assessed and the services and programs should be individually tailored. Placement schools should follow the state curriculum so that credits can be transferred. Youth should be offered the same amount of instructional time as in a community school, and classes should be offered year-round. Youth should receive meaningful career training and the opportunity to earn certificates and participate in internships in the community.

Youth need supports to enter into and complete postsecondary education and training

Only half of foster care youth and one third of juvenile justice youth graduate from high school by age 18. Studies show that youth whose parents did not attend college are at a “distinct

---


39 Id.

40 Fostering Success in Education and Community and School Re-entry.
disadvantage” in reaching college, staying enrolled, and graduating. Court-involved youth may not have adult role models in their lives demonstrating that college is a possibility. For those that do reach postsecondary education and training, they need funding and supports such as housing to achieve success.

The eighth goal in both the Foster Care and JJ Blueprints focuses on providing support so that the youth can enter and complete postsecondary education and/or training. The youth must be exposed to these opportunities and given assistance in applying for college, career training programs, and financial aid. Youth in foster care should be given the option to remain in care beyond age 18 to receive financial support and housing while pursuing education and/or job training.

**Marginalized youth should be educated in their home schools rather than being disproportionately assigned to juvenile justice placements.**

Youth of color, youth with disabilities, LGTBQ youth, English language learners, and those with intersectional identities are disproportionately represented in the child welfare and juvenile justice systems. Studies show these marginalized youth have disproportionate contact with the school to prison pipeline and juvenile justice placements. As many as 70% of youth in the juvenile justice system have learning disabilities and would be better served in a community school rather than a secure placement.

JJ Goal 10 recognizes that marginalized youth are overrepresented within the child welfare and juvenile justice systems, and often have special needs that make them particularly vulnerable for educational failure. To ensure educational access, stability, and success for marginalized youth, programs should be free of racial and ethnic bias and individuals involved in the placement must be vigilant about identifying and correcting bias. Youth that identify as LGB, transgender, or gender non-conforming should not be punished with segregation or isolation and should be given equal educational opportunities.

**WHY THE ABA NEEDS THIS RESOLUTION**

Endorsing these Blueprints is important because these frameworks are comprehensive, researched, and well-vetted and can be critical tools for improvements in policy and practice for court-involved youth. Inclusion of this Resolution would fill a gap in ABA policy to comprehensively outline the needs of court-involved youth. The Blueprints are timely because they are directly impacted by

---


the 2015 passage of ESSA and federal, state, and local efforts to implement new federal education law throughout the nation. The ABA has been a strong voice, through the work being done by the ABA Center on Children and the Law, to support the needs of both youth in the child welfare system and juvenile justice system as they relate to education stability and success.

Specifically, this Resolution calls on judges, attorneys, legislators, and others to focus on improving policy and direct practices to meet the education needs of court-involved youth. Strong legal advocacy is needed, and new policies and practices are required to achieve the goals in these Blueprints. This includes promoting the following strategies and practices to improve and expand efforts in the following areas:

- **Legal Advocacy within Juvenile Court Cases:** Legal advocates in child welfare and juvenile justice cases need to raise education issues and seek court intervention to address barriers and challenges within the existing juvenile court cases. Too often education related issues are not addressed or the focus of those proceedings, leaving court-involved youth at risk of educational failure. Many jurisdictions have sought to address this issue through the use of court tools or checklists that remind judges and attorneys to raise issues such as educational stability, access to education, appropriate services and support, and clarity around education decision-making for court-involved youth.

- **Legal Advocacy in Ancillary Educational Matters:** We must increase focus and attention to legal education advocacy needed for students involved in the child welfare and juvenile justice systems. This includes: legal actions related to access to education; enrollment disputes; special education eligibility, needs, and services; and disciplinary actions, including suspensions and expulsions. More lawyers need to be trained to handle these important cases and pro bono opportunities increased to support attorneys in these actions.

- **Internal Agency and Court Attention to Policies to Support Education for Court-Involved Youth:** Courts can and should adopt court rules and policies that ensure education related issues are being addressed for all youth in the custody of child welfare and juvenile justice agencies. Those agencies – with support from attorneys for education agencies and schools, and child welfare and juvenile justice agency counsel – must also revise their own internal policies, protocols, and business practices to support educational stability and success for youth in their custody.

- **State and Local Cross System Collaboration:** Courts must work collaboratively with legal advocates, custodial agencies, and schools to ensure a comprehensive, systemic strategy to ensure education success of court involved youth. These collaborative efforts must exist both at the state level – where joint guidance and policies can be established – and at the local level so front line advocates, practitioners, and schools can work to ensure improved educational attention and supports for individual students. The leadership role of the court to bring together representatives from various systems and stakeholder groups, and oversee cross-system collaboration, can be a critical component to the success of court-involved youth.

- **Federal and State Legislative Action:** Supporting the education needs of court-involved youth can best be achieved through changes to federal laws and regulations guiding
schools, agencies, and courts. As was recently demonstrated by critical changes in federal education law through ESSA, these changes can make a big impact on ensuring all court-involved youth are protected. State action is also needed to expand on federal requirements and ensure uniformity in statewide implementation of supports and services.

HISTORY OF EDUCATION POLICIES

The ABA has a number of related policies on education, foster care, juvenile justice, and crossover youth.\(^\text{45}\) There is a long history of education policy generally, especially on the topic of civic education.\(^\text{46}\) The ABA supports the right to a high quality education, access to safe and supportive schools, limiting the use of suspension, expulsion, and zero-tolerance policies, and encouraging youth with interrupted education to return and complete school (Policies 118A, 118B, and 118C from August 2009 and 103B from February 2001, renewed August 2011). The ABA previously weighed in on education and transitional supports for foster care youth (Policies 113 from August 2004, renewed in 2014, and 112A from August 2012).

Previous policies were based on foster care youth being covered by McKinney-Vento\(^\text{47}\) regulations, not the recent ESSA regulations. ESSA requires local education agencies and child welfare agencies to designate staff to ensure educational stability and to jointly address issues that may arise, such as transportation and enrollment. Because of the changes in federal education law, this new Resolution is needed to keep the ABA up to date.

CONCLUSION

Youth in the foster care and juvenile justice systems are at risk for educational failure. Court-involved youth are dropping out at staggeringly high rates and there are long term societal costs when youth do not complete their education. The Blueprints provide a framework to improve educational access, stability, and success for this vulnerable group. This ABA Resolution endorsing both Blueprints and creating a call to action for judges, attorneys, and direct service providers is a critical step to improve legal advocacy in juvenile court and education matters, and shape policies and practices that ensure educational rights.

\(^{45}\) A summary of relevant ABA policies is included in the General Information Form, Question 4.

\(^{46}\) Current civic education policies: 300 Bar Associations Should Urge Civic Education Classes/Courses (August 2011); 300 Governments Should Mandate Civic Education Classes/Courses (February 2011); Requiring Civic Education in Nation's Public Schools (February 2011); 110 High Quality Civic Education Learning (August 2010); 122 Establishing a Coordination Office of Civic Education in the U.S. Department of Education (August 2009); 114 Adding Civic Learning to No Child Left Behind (August 2007); 102 Lawyers and Judges Should Support Civic Education (August 2006, renewed 2016); 114 Civic Literacy (February 1995); and 114 Judicial Participation in Public Education Programs (August 1992).

ABA Center on Children and the Law has been involved since the beginning in crafting both Blueprints and forming the Legal Center FCE and LCYJE. The Foster Care Blueprint has already been successfully deployed nationally. Now, with the release of the JJ Blueprint, it is crucial to make sure the ABA endorses these successful frameworks.

Respectfully submitted,

Reginald M. Turner
Chair, Commission on the Lawyer’s Role in Assuring Every Child’s Right to a Quality Education
August 2017
1. Summary of Resolution(s).

The resolution calls on the American Bar Association to endorse the Foster Care and Juvenile Justice Blueprints for Change. The Blueprints provide a framework to improve educational access, stability, and success for court-involved youth. The Resolution also calls on attorneys, judges, and bar associations to improve legal advocacy in juvenile court and education matters, and for legislators and policymakers to create policies and practices that ensure educational rights.

2. Approval by Submitting Entity.

The ABA Commission on the Lawyers' Role in Assuring Every Child's Right to a Quality Education approved the Resolution on April 20, 2017.

The Resolution is co-sponsored by the following entities:

On April 29, 2017, the Section of Civil Rights and Social Justice approved this Resolution.
On May 1, 2017, Commission on Youth at Risk approved this Resolution.
On May 4, 2017, the Center on Children and the Law approved this Resolution.

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

No, this Resolution has not been submitted before. There are previous education policies that focus on particular elements of education, foster care, juvenile justice, and crossover youth, but none provide the comprehensive framework of the Goals and Benchmarks of the Blueprints or are compliant with the latest federal education law changes under ESSA.

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

Existing policies are discussed in detail below. This Resolution reaffirms portions of policies 118A/B/C, 113, 112A, 104A, 103, 108B, 104C, 300, and 102A. Policy 107 McKinney-Vento Homeless Assistance Act and Children and Youth in Foster Care, which referred to the educational rights of foster youth protected by McKinney-Vento, is updated by this Resolution which recognizes under current federal law, the educational rights of foster care youth are covered under the Every Student Succeeds Act.

POLICIES ON EDUCATION THAT APPLY TO ALL STUDENTS
118B Pass Laws and Implement & Enforce Policies that Pertain to Children & School
Aug. 2009

- Promotes: children’s right to stay in school; safe and supportive schools; completion of school; decriminalization of status offenses; limiting exclusion because of disciplinary problems; and monitoring and reporting on graduation, dropout, suspension/expulsion disaggregated by race, disability and other disparately affected populations.

118A Pass Laws and Implement & Enforce Policies that Pertain to Children & School
Aug. 2009

- Urges legislatures to pass laws ensuring that all youth have the right to a high quality education, to implement and enforce existing laws, and to enable students, parents, and caregivers to participate in educational decisions.
- Urges bar associations and attorneys to provide representation in education cases, protect and advance the right to high quality education, and seek administrative and judicial remedies.

POLICIES ON ACCESS TO EDUCATION FOR SPECIFIC POPULATIONS

Foster Care


- Supports education access and stability for homeless youth and youth placed by public agencies into out-of-home settings.
- Supports the amendment of IDEA to ensure homeless and foster care youth with disabilities have prompt access to special education services.
- Requests guidance on children “awaiting foster care” under McKinney-Vento. (The reauthorization of the Elementary and Secondary Education Act as the Every Student Succeeds Act makes this piece of the policy outdated as of December 2016 in most states, and in all states by December 2017).

104A Support and Services for Youth who Age Out of Foster Care August 2007

- Urges bar associations, judges, and lawyers to support transitioning youth, and urges Congress to expand federal law to include youth in foster care up to age 21.
- Specific to education, this policy supports services to promote participation in school and extracurricular activities and urges policies to ensure foster care youth have the same rights as homeless youth pertaining to school enrollment, stability, and continuity. Additionally, this policy urges practices that mandate the maintenance, sharing and timely transfer of education records relating to school progress, attendance, and placement. Finally, this policy urges practices to assist youth in receiving assistance with accessing higher educational and vocational training, financial aid, and housing.
• It will be archived or renewed for a period of 10 years at the August 2017 meeting.

112A Postsecondary Education for Foster Care Youth August 2012

• Encourages postsecondary education for youth in (or youth who have exited) foster care, in accordance with the Fostering Connections to Success and Increasing Adoptions Act of 2008, which allows for federal funding to assist foster care youth until age 21.

• There is pending federal legislation to reauthorize the Higher Education Act and include specific provisions for foster and homeless youth.

Other Populations

103 Reauthorizing the Individuals with Disabilities Education Act Feb. 1996, renewed 2016

• Supports reauthorization of IDEA which guarantees children with mental or physical disabilities a free appropriate public education in the least restrictive environment.


• Children of deployed parents who live with caretakers may remain at their local public school, even if they move outside of the school district temporarily. Encourages states to make it simple for caregivers to show proof. Also allows for the use of earned leave and sick time by caretakers.

• It will be archived or renewed for a period of 10 years in February 2017.

118C Enact and Implement Statutes and Policies that support the Right of Youth who have Left School to Return August 2009

• Calls for assisting youth who have a past history of interrupted education to return and complete a high-quality, age-appropriate program. Specifically addresses youth that have been part of the juvenile justice system and may have a gap in education, be released mid-year, or have aged out.

POLICIES THAT SUPPORT KEEPING JUVENILE JUSTICE YOUTH IN THEIR COMMUNITIES

104C Policies and Programs that Divert Alleged Juvenile Status Offenders from Court Jurisdiction August 2007

• Encourages the use of evidence-based prevention, diversion, and community-based programs for status offenders. Recognizes that these youth are better served in the community, which may also address problems of disproportionality and disparate outcomes for minority youth.

• It will be archived or renewed in August 2017.
300 Revise Laws, Court Rules, Policies, and Practices Related to “Dual Jurisdiction”
Youth February 2008

- In light of data revealing that foster care youth are 47% more likely to pick up
delinquency cases, and once they do, they are more likely to be detained and spend
longer in custody, this policy focuses on dual jurisdiction/crossover youth, and
includes focus on poor educational outcomes. The policy urges legislatures to
recognize the unique challenges of crossover youth and use diversion and
intervention programs to keep the youth in the community, use integrated courts, and
create a legal preference to keep the dependency case open while the family receives
services.

102A Collateral Consequences for Juveniles February 2010

- Calls on governments, employers, colleges, and financial aid offices to “ban the box”
and not inquire about past juvenile arrests, adjudications, or convictions, or to use this
information against an applicant for educational, vocational, or employment
opportunities.

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

N/A.

6. Status of Legislation. (If applicable)

The Every Student Succeeds Act passed in December 2015. This Resolution is in
support of quality implementation of the new law, and will be supportive of any future
legislative actions that impact the education of court involved students.

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

The Center on Children and the Law, the Legal Center on Foster Care & Education, and
the Legal Center for Youth Justice and Education will share the Blueprints as frameworks
and provide technical assistance to state and local Education Agencies and child welfare
agencies. This ABA policy will be used as a tool to improve implementation in state and
local jurisdictions across the country.

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

Endorsement of this proposed resolution would result in only minor indirect costs
associated with Center staff time devoted to the policy subject matter as part of the staff
members’ overall substantive responsibilities.

9. Disclosure of Interest. (If applicable.)

There are no known conflicts of interest.
10. **Referrals.**

The Resolution has been referred to the following ABA entities:

- Section of Criminal Justice
- Section of Family Law
- State and Local Government Law
- Government and Public Sector Lawyers Division
- Judicial Division
- Young Lawyers Division
- Commission on Disability Rights
- Commission on Homelessness and Poverty
- Commission on Racial and Ethnic Diversity in the Profession
- Commission on Sexual Orientations and Gender Identity

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

Prudence Beidler Carr  
Executive Director  
Center on Children and the Law  
American Bar Association  
1050 Connecticut Ave NW  
Suite 400  
Washington DC 20036  
202-662-1740  
Prudence.beidlercarr@americanbar.org

Tanya Terrell Coleman  
Director  
Section on Civil Rights and Social Justice  
American Bar Association  
1050 Connecticut Ave NW  
Suite 400  
Washington DC 20036  
202-662-1030  
Tanya.terrell@americanbar.org

Kathy McNaught  
Assistant Director  
Center on Children and the Law  
American Bar Association  
1050 Connecticut Ave NW  
Suite 400  
Washington DC 20036  
202-662-1966  
Kathleen.mcnaught@americanbar.org
12. **Contact Name and Address Information.** (Who will present to the House? Please include name, address, telephone number, cell phone number and e-mail address)

Reginald M. Turner  
Member  
Clark Hill  
500 Woodward Ave  
Suite 3500  
Detroit, MI 48226  
313-965-8318  
Rturner@clarkhill.com
EXECUTIVE SUMMARY

1. Summary of the Resolution(s)

The Resolution calls on the American Bar Association to endorse the Foster Care and Juvenile Justice Blueprints for Change. The Blueprints provide a framework to improve educational access, stability, and success for court-involved youth. The Resolution also calls on attorneys, judges, and bar associations to improve legal advocacy in juvenile court and education matters, and for legislators and policymakers to create policies and practices that ensure educational rights.

2. Summary of the Issue that the Resolution Addresses

Youth in the foster care and juvenile justice systems often change schools, face delays in enrollment, fail to receive partial credit when transferring, and are pushed out or drop out of school. Only half of foster care youth and one third of juvenile justice youth graduate from high school by age 18, and those that do not graduate face a lifetime of reduced earning potential. The Blueprints provide a framework for attorneys, judges, legislators, and policymakers to ensure court-involved youth can remain in their community school, be empowered to make educational decisions, and have supports in post-secondary education and training.

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

This Resolution will allow the ABA, including the Center on Children and the Law and its partners the Legal Center on Foster Care & Education and the Legal Center for Youth Justice and Education, to share the Blueprints, promote collaboration through state networks, and provide technical assistance to local partners. This Resolution will enable the ABA to voice support for proposed legislation in Congress and in state legislatures that is consistent with the Blueprints.

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

No minority views or opposition have been identified.
RESOLVED, That the American Bar Association urges Congress to amend the Gun Control Act of 1968 to include, among the list of those ineligible to possess, purchase, sell, deliver, or otherwise transfer any firearm, persons who have been previously convicted of a misdemeanor crime of violence that was motivated by hate or bias because of the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity or diversity, or disability of any person; and

FURTHER RESOLVED, That the American Bar Association urges state, local, tribal, and territorial legislatures to enact laws rendering a person ineligible to possess, purchase, sell, deliver, or otherwise transfer any firearm if that person has been previously convicted of a misdemeanor crime of violence that was motivated by hate or bias because of the actual, or perceived race, color, religion, national origin, gender, sexual orientation, gender identity or diversity, or disability of any person.
REPORT

Introduction

This proposed resolution aims to prevent individuals convicted of misdemeanor hate crimes from possessing firearms. It is consistent with past ABA policies that restrict categories of individual possessing firearms.\(^1\)

The restriction proposed already exists for those convicted of felony-level hate crime offenses.\(^2\) But a prohibition based on misdemeanor-level hate crimes is somewhat uncharted territory. Still, underlying motivations of a hate crime are the same, whether the crime is a felony or a misdemeanor.

Hate crimes are singled out as being particularly odious for several reasons. There is evidence that victims of hate crimes are more likely to face greater physical harms\(^3\) and greater psychological effects in the aftermath of the violence as compared with non-hate crime victims.\(^4\) Additionally, research has shown that a prior misdemeanor charge makes one significantly more likely to reoffend—particularly with a violent crime\(^5\)—and that individuals who commit hate crimes tend to escalate their conduct—to ensure their message is received by the targeted individual or community\(^6\)—it is necessary that the law should recognize the destructive distinction hate crimes pose to society.

The issue has built some momentum on the national stage. In 2016, bills that would prohibit individuals previously convicted of misdemeanor hate crimes from purchasing firearms were introduced in both the House\(^7\) and the Senate.\(^8\) The Senate bill, known as the Hate Crimes Prevention Act, was introduced by Senator Bob Casey of Pennsylvania in response to the 2016...
Orlando nightclub shooting,\(^9\) which left 49 people dead and 53 wounded.\(^10\) However, both bills stalled and failed to gain a foothold.

State Laws

At the state level, three states—Minnesota,\(^11\) Oregon,\(^12\) and New Jersey\(^13\)—have already enacted firearm prohibitions against those convicted of misdemeanor hate crimes. Minnesota’s prohibition reads, in relevant parts:

The following persons shall not be entitled to possess ammunition or a pistol or semiautomatic military-style assault weapon or [...] any other firearm: [...] (11) a person who has been convicted of the following offenses at the gross misdemeanor level, unless three years have elapsed since the date of conviction and, during that time, the person has not been convicted of any other violation of these sections: [...] 609.2231, subdivision 4 (assaults motivated by bias)\(^14\); [...] . For purposes of this paragraph, the specified gross misdemeanor convictions include crimes committed in other states or jurisdictions which would have been gross misdemeanors if conviction occurred in this state.\(^15\)

Oregon’s statute states:

Unless relief has been granted under ORS 166.273 or 166.274 or 18 U.S.C. 925(c) or the expunction laws of this state or an equivalent law of another jurisdiction, a person may not intentionally sell, deliver or otherwise transfer any firearm when the transferor knows or reasonably should know that the recipient: (g) Has been convicted of a misdemeanor involving violence or found guilty except for insanity under ORS 161.295 of a misdemeanor involving violence\(^16\) within the previous four years.\(^17\)

---


\(^12\) O.R.S. § 166.470(1)(g) (2016) (with reference to O.R.S. § 166.155).

\(^13\) N.J.S.A. 2C:39-7 (2016) (with reference to N.J.S.A. 2C:16-1(a)(1), (2)).

\(^14\) The statute defines an assaulted motivated by bias as: “Whoever assaults another because of the victim’s or another’s actual or perceived race, color, religion, sex, sexual orientation, disability as defined in section 363A.03, age, or national origin [...].”

\(^15\) Supra, n.11.

\(^16\) The most relevant definition of “misdemeanor involving violence” for this discussion is O.R.S. § 166.155(1)(b), which states: “A person commits the crime of intimidation in the second degree if the person: Tamper or interferes with property, having no right to do so or reasonable ground to believe that the person has such rights, with the intent to cause substantial inconvenience to another because of the person’s perception of the other’s race, color, religion, sexual orientation, disability or national origin.”

\(^17\) Supra, n.12.
And lastly, New Jersey’s law prohibits:

[... ] any person, having been convicted in this State or elsewhere of the crime of [...] bias intimidation in violation of N.J.S.2C:16-18 [...], who purchases, owns, possesses or controls any of the said weapons is guilty of a crime of the fourth degree.19

**Background on the Heller Decision**

In the background of this Resolution is the United States Supreme Court’s decision in *District of Columbia v. Heller.*20 In *Heller*, the Supreme Court found for the first time that the Second Amendment provides for an individual right to possess firearms for defense in the home, and not limited to participation in an organized militia.21 Two years later, this holding was incorporated against the individual states in *McDonald v. City of Chicago.*22 These twin cases pose a layer of judicial review to any firearm regulation. And for laws like the misdemeanor hate crime prohibitions in Minnesota, Oregon, and New Jersey, the test is to see whether they pass the Second Amendment’s jurisprudential test.

*Heller* cryptically reminds us that “[l]ike most rights, the right secured by the Second Amendment is not unlimited...”23 and that “...nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”24 So while *Heller* and *McDonald* make clear that an individual Second Amendment right exists, they do not provide a clear guide for lower courts in the best way to apply that right.25

**The Two-Step Analysis**

Most federal circuits26 have coalesced around a two-step analysis when analyzing firearm regulations. New Jersey’s bias intimidation statute reads: “A person is guilty of the crime of bias intimidation if he commits, attempts to commit, conspires with another to commit, or threatens the immediate commission of an offense specified in chapters 11 through 18 of Title 2C of the New Jersey Statutes; [...] (1) with a purpose to intimidate an individual or group of individuals because of race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity; or (2) knowing that the conduct constituting the offense would cause an individual or group of individuals to be intimidated because of race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity.”

---

19 *Supra*, n.13.
22 561 U.S. 742 (2010).
23 *Heller*, 554 U.S. at 626.
24 Id. at 627.
25 See Rostron, *supra* at n.21 (citing Allen Rostron, *Justice Breyer’s Triumph in the Third Battle over the Second Amendment*, 80 Geo. Wash. L. Rev. 703, 716-17 (2012)).
26 Professor Allen Rostron writes that the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and District of Columbia Circuits have adopted the two-step analysis. Id. at 847 n.25 (collecting cases). Professor Rostron also notes that the First Circuit has applied intermediate scrutiny to firearm regulations, but has not “explicitly structured its analysis with the two-step approach.” *Id.* And “[t]he Eighth and Eleventh Circuits have not mentioned the two-
subject to the challenged regulation falls outside the Second Amendment's protections. This is a “historical inquiry” that “seeks to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification.” If the activity falls outside the historical scope of the Amendment's 1791 ratification, then no further analysis is needed; the regulation does not offend the Constitution. But if the activity does fall under the Second Amendment's historical umbrella (or the inquiry is inconclusive), then courts must move to a second analysis and determine whether the regulation passes muster under the appropriate level of constitutional scrutiny. This includes a determination of the standard of review to be applied, although the United States circuit courts have unanimously found that intermediate scrutiny, rather than strict scrutiny, is the appropriate standard.

Unfortunately, there is little post-Heller case law analyzing the issue of firearm prohibitions based on misdemeanor crime convictions. Of the three states previously discussed that have enacted such laws, none has faced a serious constitutional challenge on this issue. But federal law gives us corollaries to the current resolution, specifically, under 18 U.S.C. § 922(g). This law, known as the “Gun Control Act of 1968,” delineates a variety of crimes that render an individual ineligible to possess a firearm upon conviction. And while misdemeanor

step process in their Second Amendment decisions and have not specified a scrutiny level or other test for Second Amendment issues.” Id.


United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010).

Id.; Rostron, supra, n.21 at 823-24.

Chester, 628 F.3d at 680.

See, e.g., United States v. Booker, 644 F.3d 12 (1st Cir. 2011); Kachalsky v. County of Westchester, 701 F.3d 81 (2d Cir. 2012); United States v. Marzzarella, 614 F.3d 85 (3d Cir. 2010); Kolbe v. Hogan, 2017 U.S. App. LEXIS 2930, *47-50 (4th Cir. Feb. 21, 2017) (en banc); NRA v. McCraw, 719 F.3d 338 (5th Cir. 2013); Tyler v. Hillsdale Cnty. Sheriff's Dept., 837 F.3d 678, 692 (6th Cir. 2016) (en banc); Baer v. Lynch, 636 Fed. Appx. 695 (7th Cir. 2016); United States v. Chovan, 735 F.3d 1127 (9th Cir. 2013); United States v. Reese, 627 F.3d 792 (10th Cir. 2010); Heller v. District of Columbia (“Heller II”), 670 F.3d 1244 (D.C. Cir. 2011); see also Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013); see also Bonidy v. United States Postal Serv., 790 F.3d 1121 (10th Cir. 2015).

But see, some opinions (or dissents) suggesting strict scrutiny might apply in some circumstances as applied to particular cases, e.g.: United States v. Masciandaro, 638 F.3d 458 (4th Cir. 2011) (analyzing national park prohibition on possession of a loaded handgun in a motor vehicle under intermediate scrutiny, but assuming that “any law that would burden the ‘fundamental,’ core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny”); Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011) (calling for application of a “more rigorous” test than intermediate scrutiny, “if not quite ‘strict scrutiny,’” in challenge to law that comes close to “implicating the core of the Second Amendment right” to “maintain proficiency in firearm use, an important corollary to the meaningful exercise of the core right to possess firearms for self-defense.”); Mance v. Holder, 2015 U.S. Dist. LEXIS 16679 (N.D. Tex. 2009) (striking down interstate handgun transfer ban after concluding that strict scrutiny should apply because federal ban on transfers of handguns to out-of-state residents burdened the core Second Amendment right), appeal pending sub nom. Mance v. Lynch, No. 15-10311 (5th Cir.).

Supra, n.11-13
convictions are generally exempted from the law's ambit, there are a few misdemeanor classifications that can result in lifetime prohibitions.

For example, in Schrader v. Holder, the defendant was convicted of common law misdemeanor assault and battery in Maryland in 1968. At that time, Maryland did not have a statutory penalty for its common law crimes of assault and battery. So when the defendant applied for a firearm in 2008 the FBI denied his application, concluding that because Maryland lacked a statutory cap at the time of the defendant's convictions, his crimes fell outside of the federal statute's general exemption for misdemeanor crimes. The Schrader defendant sued, arguing in part, that this particular prohibition on misdemeanor crimes violated the edicts of Heller.

On appeal, the D.C. Circuit disagreed with the Schrader defendant and upheld the categorical prohibition on common law misdemeanors. The court began by invoking the two-step analysis, but quickly skipped over the first "historical inquiry" step because "even if common-law misdemeanants fall within the scope of the Second Amendment, the firearms ban imposed on this class of individuals passes muster under the appropriate level of constitutional scrutiny."

In deciding the appropriate level of judicial scrutiny, the D.C. Circuit in Schrader began by analogizing to First Amendment jurisprudence, writing,

As with the First Amendment, the level of scrutiny applicable under the Second Amendment surely depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right. That is, a regulation that imposes a substantial burden upon the core right of self-defense protected by the Second Amendment must have a strong justification, whereas a regulation that imposes a less substantial burden should be proportionately easier to justify.

The court then reiterated that the "core right" of the Second Amendment, as announced in Heller, is "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." Because individuals convicted of common law misdemeanors "cannot be considered law-abiding and responsible," the D.C. Circuit wrote, "we follow those courts of appeals that have generally applied intermediate scrutiny in considering challenges to Congress' effort under § 922(g) to ban firearm possession by certain classes of non-law-abiding, non-responsible

---

36 704 F.3d 980 (D.C. Cir. 2013).
37 Id. at 983.
38 Id. at 987.
39 Id. at 991.
40 Id. at 988 (“After Heller, the District of Columbia adopted new gun laws that were challenged in Heller v. District of Columbia, 670 F.3d 1244 (D.C.Cir.2011) (“Heller II”). There we adopted, as have other circuits, a “two-step approach” to analyzing Second Amendment challenges.”).
41 Id. at 989.
42 Id. (internal citations omitted) (internal quotations omitted).
43 Id. (citing Heller, 554 U.S. at 635).
persons who fall outside the Second Amendment's core protections." The court ultimately concluded that keeping firearms out of the hands of "presumptively risky people" and cubing crime was indeed an "important" government purpose. And additionally, the common law misdemeanor ban was "substantially related" to this important purpose because "in order to accomplish the goal of preventing gun violence firearms must be kept away from persons, such as those convicted of serious crimes, who might be expected to misuse them." 48

One other decision is worth mentioning in this analysis. In United States v. Skoien, the Seventh Circuit upheld a categorical firearms prohibition for misdemeanor crimes of domestic violence under 18 U.S.C. § 922(g). While the Skoien court did not use the two-step analysis, it did uphold the prohibition under intermediate scrutiny, finding this approach "prudent" and persuaded by the high recidivism rate of domestic abusers. 51

The current resolution follows naturally from this discussion, and it seems likely that such a prohibition would survive constitutional muster. Under intermediate scrutiny analysis, the government's purpose of preventing keeping dangerous firearms out of the hands of high-risk individuals and curbing future crime is clearly "important." And, as in Schrader and Skoien, the scientific literature shows a likelihood that a hate-crime offender will offend again and at an elevated level, 53 and a categorical prohibition is substantively related to the government's purpose of preventing that crime. Additionally, individuals convicted of misdemeanor hate crimes do not trigger the "core right" embedded in the Second Amendment because these individuals cannot be considered "law-abiding and responsible." 54

Conclusion

Case law supports that legislative bodies can constitutionally prohibit those convicted of a misdemeanor-level hate crime from possessing a firearm. The resolution proposes statutory language that would achieve that objective and allows the ABA to advocate for adoption of laws consistent with that language.

Respectfully submitted,

David W. Clark, Chair
Standing Committee on Gun Violence
August 2017

46 Id.
47 Id. at 889-990.
48 Id. at 990.
49 614 F.3d 638 (7th Cir. 2010).
50 It appears that the two-step analysis was sixteen days away from formulation at the time Skoien was decided, see supra at n.51.
51 614 F.3d at 641-42, 644; Coplowitz, supra at n.27, 906-7.
52 Id. at 889-990.
53 Supra, n.3-6.
54 Schrader, 704 F.3d at 989.
GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Gun Violence

Submitted By: David Clark, Chair

1. Summary of Resolution(s).

Urges Congress to amend the Gun Control Act of 1968 to include, among the list of those ineligible to possess, purchase, sell, deliver or otherwise transfer any firearm, persons who have been previously convicted of a misdemeanor crime of violence that was motivated by hate or bias because of the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity or diversity, or disability of any person.

Also urges state, local, tribal, and territorial legislatures to enact laws rendering a person ineligible to possess, purchase, sell, deliver or otherwise transfer any firearm if that person has been previously convicted of a misdemeanor crime of violence that was motivated by hate or bias because of the actual, or perceived race, color, religion, national origin, gender, sexual orientation, gender identity or diversity, or disability of any person.


3. Has this or a similar resolution been submitted to the House or Board previously? No.

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

The ABA has approved a number of policies regarding state and federal regulation of firearms. germane to, and consistent with, this resolution are past policies that support prohibitions of certain categories of individuals (e.g., felons) from selling, purchasing, or acquiring firearms (94M8D) and policies that support full implementation of background check systems so that these prohibition can be enforced (04A115).

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

6. Status of Legislation. (If applicable) NA

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

If adopted this policy can be the basis of advocacy at the federal and state level and possible
amicus brief applications. It will also be incorporated into trainings which the Gun Violence Committee offers.

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

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

10. **Referrals.** This resolution was circulated to all sections and interested committees and commissions, such as the Commission on Domestic and Sexual Violence, the Criminal Justice Section, the Section of Civil Rights and Social Justice, and the Commission on Youth at Risk on April 21, 2017, and to Diversity entities on June 1, 2017.

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

   David Clark, Chair  
   Bradley Arant Boult Cummings LLP  
   188 E Capitol St Ste 400  
   Jackson, MS 39201-2140  
   (601) 291-2596 (mobile)  
   (601) 592-9913 (Work)  
   dwclark1948@gmail.com

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

   David Clark, Chair  
   Bradley Arant Boult Cummings LLP  
   188 E Capitol St Ste 400  
   Jackson, MS 39201-2140  
   (601) 291-2596 (mobile)  
   (601) 592-9913 (Work)  
   dwclark1948@gmail.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

Urges Congress to amend the Gun Control Act of 1968 to include, among the list of those ineligible to possess, purchase, sell, deliver or otherwise transfer any firearm, persons who have been previously convicted of a misdemeanor crime of violence that was motivated by hate or bias because of the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity or diversity, or disability of any person.

Also urges state, local, tribal, and territorial legislatures to enact laws rendering a person ineligible to possess, purchase, sell, deliver or otherwise transfer any firearm if that person has been previously convicted of a misdemeanor crime of violence that was motivated by hate or bias because of the actual, or perceived race, color, religion, national origin, gender, sexual orientation, gender identity or diversity, or disability of any person.

2. Summary of the Issue that the Resolution Addresses

This resolution adds persons convicted of misdemeanor hate crime to Federal and state laws that already prohibit categories of individual from buying firearms. Like misdemeanor convictions for domestic violence, already excluded, hate crimes frequently entail use of weapons and can often escalate in the future due to the underlying biases and prejudices. For public safety it is imperative to keep firearms out of the hands of individual who have demonstrated this animus.

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

This policy directly addresses the issue at hand by making it illegal to own, possess, sell or transfer a firearm if you have been convicted of a misdemeanor hate crime.

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

Criminal Justice Section supports this resolution as applied to persons convicted of a hate crime. It is still debating whether it should apply to situations where a person’s sentence has been enhanced because the victim is a member of a protected class.
Resolved, That the American Bar Association urges state, local, territorial, and tribal
governments to enact statutes, rules, or regulations authorizing courts to issue gun violence
restraining orders, including ex parte orders, that include at least the following provisions:

1. That a person (a "petitioner") with documented evidence that another person (a
   "respondent") poses a serious threat to himself or herself or others may petition a court
   for an order temporarily suspending the respondent's possession of a firearm or
   ammunition poses a credible threat;

2. That there shall be a verifiable procedure to ensure the surrender of firearms and
   ammunition pursuant to the court order; and

3. That the issuance of the gun violence restraining order shall be reported to appropriate
   state or federal databases in order to prevent respondent from passing a background
   check required to purchase a firearm or obtain a firearm license or permit while
   restraining order is in effect.
REPORT

I. Introduction

There are few more contentious issues in our public policy debates than the contours of “the right to keep and bear arms.” Increasingly, however, there is consensus that guns should be kept away from those whose behavior suggests that they would be dangerous to themselves or others if they possessed a weapon. This resolution takes a small step toward translating that consensus into common-sense legal terms. A Gun Violence Restraining Order (GVRO) is a simple legal procedure to enable courts to remove guns from those who are proven likely to use them dangerously, and to do so in compliance with the Second Amendment and Due Process protections of the Constitution. The American Bar Association should continue its long tradition of being at the forefront of policy-making that meets the challenge of the gun violence crisis, which seriously threatens the health and welfare of the people of the United States.1

II. How GVROs Can Prevent Gun Violence

Studies have shown that individuals who are engaged in certain dangerous behaviors are significantly more likely to commit an act of violence towards themselves or others within the near future.2 Tragically, the current legal framework rarely provides a mechanism for witnesses to take preventive action, especially with respect to guns. Gun violence restraining orders—variously called gun violence protective orders, lethal violence protective orders, or other titles—fill this gap.

America’s recent experiences with mass shootings have demonstrated the urgent need for gun violence protective orders. In many of these incidents, community members noted warning signs beforehand, but there was nothing they could do to remove the shooter’s access to guns before the tragedy. Family members are the people most often in this position, such as the parents of Elliot Rodger, who killed six people in the college town of Isla Vista, California, before killing himself. Rodger’s parents contacted his therapist about three weeks before his killing spree with concerns about his behavior and YouTube videos, and the therapist contacted the police, who interviewed him. The police observed that he did not meet the criteria to be taken into custody for a mental health evaluation, however, so nothing was done to remove his access to guns.3

Similarly, Jared Lee Loughner shot and killed six people and wounded 13 others, including U. S. Representative Gabrielle Giffords, in a parking lot in Tucson in January 2011. At one point, his parents had become so concerned about his behavior that they took away his shotgun, but they could not take any further action to restrict his access to guns.4

---

1 The sponsors of this resolution wish to express their appreciation to the Law Center to Prevent Gun Violence in San Francisco, CA, for research assistance.
4 Michael Martinez and Chelsea J. Carter, New details: Loughner's parents took gun, disabled car to keep him
Dylann Roof, who shot and killed nine people at Emanuel African Methodist Episcopal Church in Charleston, South Carolina in June 2015, was known to have made violent, racist statements. These statements were so threatening that his friend, Joseph Meek, hid Roof’s handgun. Meek soon returned the handgun, however, at the urging of his girlfriend, because Meek himself was on probation.5

Gun violence restraining orders can help prevent such tragic shootings by allowing law enforcement officers, family, or other community members specified in the statute6 to obtain a court order to temporarily restrict a person’s access to firearms and ammunition based on a judge’s finding that the person poses a danger of committing violence against himself, herself, or others.

III. The Effect of the Resolution

This resolution proposes general standards for obtaining a GVRO that would give states wide latitude to states to enact laws best suited to their particular circumstances and existing public policy. GVROs are already a legal option in several states. In many cases, the laws are based on similar procedures in the state’s domestic violence laws.

Currently, domestic violence protective order laws in every state allow a victim of domestic abuse to seek a court order to prevent further acts of abuse. These court orders may restrict the abuser’s behavior in various ways, including through prohibitions on gun purchase or possession by the abuser. Research has shown these laws to be effective, and courts have upheld them against various constitutional challenges. Consequently, they serve as a useful model for state laws regarding gun violence protective orders.

In fact, California drew heavily from its domestic violence protective order law when – in response to the Isla Vista shooting described above – it enacted its Gun Violence Restraining Order law7 in 2014.

Similar laws have been enacted in Connecticut,8 Indiana, and Washington. In each of these states, a law enforcement officer or a family member may seek a court order for the temporary removal of guns from a potentially dangerous person pending a full hearing.9 Law enforcement officers in Illinois and Massachusetts may also seek the removal of guns from a potentially dangerous person through those states’ gun owner licensing law.10

---

6 The resolution does not specify who shall have standing to petition a court for a GVRO, leaving this decision to the states.
7 Cal. Penal Code §18150 et seq.
IV. Legal Challenges to Gun Violence Restraining Order Laws

Litigation challenging firearms laws has become a routine strategy of gun manufacturers, the National Rifle Association, and others. These challenges most often raise the following issues: (1) the Second Amendment to the U.S. Constitution; and (2) the Due Process Clause. The following brief discussion illustrates why a GVRO, as described in this resolution, comports with these constitutional provisions.

A. Second Amendment

The GVRO process is consistent with the Second Amendment. In the landmark case, District of Columbia v. Heller, 554 U.S. 570 (2008), the Supreme Court determined that the Second Amendment guarantees the right of “law-abiding, responsible citizens” to keep a handgun in the home for self-defense. However, the Supreme Court also stated that the Second Amendment is “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” The Court explicitly recognized “the problem of handgun violence in this country,” and confirmed that the “Constitution leave[s] ... a variety of tools for combating that problem.” Among those tools, the Court identified several examples of presumptively valid gun regulations, including those that prohibit firearm possession by felons and the mentally ill.

Since the 2008 decision in Heller, courts across the country have been faced with challenges to many kinds of gun regulations. Courts have almost uniformly upheld strong gun laws, and the Supreme Court has also repeatedly declined to hear any new cases raising Second Amendment claims, denying certiorari in 70 Second Amendment cases since Heller and McDonald v. Chicago, 561 U.S. 742, 778 (2010). The courts have consistently upheld laws aimed at reducing access to guns by those who are deemed likely to misuse them. Courts have also broadly upheld restrictions on firearm access by persons who have been detained or hospitalized for mental health treatment and evaluation, and they have affirmed law enforcement’s authority to provisionally remove firearms from individuals found to pose an imminent risk of danger to themselves or others as a result of mental illness. In 2013, an Indiana Appellate Court rejected a
Second Amendment challenge to that state’s gun violence restraining order law, ruling that the state may restrict access to firearms by dangerous individuals in the interest of public safety and welfare. The Court noted that “the United States Supreme Court has recently and repeatedly recognized the legitimate governmental purpose of prohibiting violent mentally ill persons from possessing firearms.” Because the state’s GVRO law provided ample due process protections, the Court found that it did “not place a material burden upon the core value of the individual’s right” under the Second Amendment. A similar law has been successfully implemented in Connecticut since 1999, and withstood a constitutional challenge in 2016.

B. Due Process

Procedures for obtaining a GVRO can also be instituted so as to satisfy the requirements of the Due Process Clause. These procedures are generally based on existing domestic violence laws that courts have repeatedly upheld against due process challenges. (The legal basis for these challenges lies in the court’s authority to issue an ex parte order before a full hearing occurs, which is neither explicitly required nor precluded by this resolution.)

In Blaze v. Bradley, 698 F. Supp. 756, 768 (W.D. Wis. 1988), a federal district court 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. The court emphasized that the procedure under Wisconsin law requires:

1. Judicial participation;
2. A verified petition containing detailed allegations before the ex parte order is issued;
3. A prompt hearing; and
4. An allegation of risk of imminent and irreparable harm based on personal knowledge of the respondent.

Courts across the country have come to similar conclusions. They have rejected due process challenges to ex parte domestic violence orders issued after these or similar requirements have been met.

extend Second Amendment protections to persons whose firearms are seized because they were found to be a danger to themselves by reason of their mental health”; Redington v. State, 992 N.E.2d 823 (Ind. Ct. Appls. 2013) (Law enforcement authorized to seize firearms from delusional man scop ing a bar with loaded firearms from a parking garage under Indiana statute permitting the seizure of firearms from “dangerous” individuals even in the absence of commission of a crime).


The resolution accompanying this report explicitly requires that a GVRO be consistent with the strictures of the Due Process Clause of the Constitution. In particular, the provisions outlined in subsections 1 through 3 of the resolution set specific standards that comport with due process. It is left to the states to determine whether or not to provide for an *ex parte* order, and, if so, to ensure that such a provision is consistent with due process.

**V. Conclusion**

Gun Violence Restraining Orders are a sensible approach to curbing the epidemic of senseless shootings, both the infamous events with which we are all familiar and the little-known incidents that take place regularly all over the country. This is only a modest step, to be sure, but the American Bar Association must advocate strongly for any legal step that may be employed to mitigate the crisis of gun violence in our midst.

Respectfully submitted,

David W. Clark, Chair
Standing Committee on Gun Violence
August 2017
118B

GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Gun Violence

Submitted By: David Clark, Chair

1. Summary of Resolution(s).

Urges state, local, territorial, and tribal governments to enact statutes, rules, or regulations that authorize courts to issue gun violence restraining orders, including *ex parte* orders.


3. Has this or a similar resolution been submitted to the House or Board previously? No.

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

The ABA has approved a number of policies regarding state and federal regulation of firearms. These include: Concealed Carry Permits licensing requirements (11A111); mandated use of micro-stamping technology with new semi-automatic weapons (10A115); restriction of sale and possession of sniper weapons (5A10C); and 1994 policy reaffirming many positions dating back to the 60s related to waiting periods for firearm purchases, mandatory background checks, prohibitions of certain individuals (e.g., felons) from selling, purchasing, or acquiring firearms (94M8D). The ABA also has policy expressly supporting the right of employers and private property owners to exclude firearms from their places of business or other private property. (7M107).

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

6. Status of Legislation. (If applicable) NA

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

If adopted this policy can be the basis of advocacy at the federal and state level and possible amicus brief applications. It will also be incorporated into trainings that the Gun Violence Committee offers.

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

9. Disclosure of Interest. (If applicable) none
10. **Referrals.** This resolution will be circulated to all sections and interested committees and commissions, such as the Commission on Domestic and Sexual Violence, the Criminal Justice Section, and the Commission on Youth at Risk.

11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)
   
   David Clark, Chair  
   Bradley Arant Boult Cummings LLP  
   188 E Capitol St Ste 400  
   Jackson, MS 39201-2140  
   (601) 291-2596 (mobile)  
   (601) 592-9913 (Work)  
   dwclark1948@gmail.com

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

   David Clark, Chair  
   Bradley Arant Boult Cummings LLP  
   188 E Capitol St Ste 400  
   Jackson, MS 39201-2140  
   (601) 291-2596 (mobile)  
   (601) 592-9913 (Work)  
   dwclark1948@gmail.com
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   Urges state, local, territorial, and tribal governments to enact statutes, rules, or regulations that authorize courts to issue gun violence restraining orders, including _ex parte_ orders.

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

   A Gun Violence Restraining Order (GVRO) is a simple legal procedure to enable courts to remove guns from those who are likely to use them to harm themselves or others.

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

   This resolution sets general standards for obtaining a GVRO and provides wide latitude to states to enact laws best suited to their particular circumstances and existing public policy. GVROs are already a legal option in several states. In many cases, the laws are based on similar procedures in the state’s domestic violence laws.

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

   None at this time.
RESOLVED, That the American Bar Association urges federal, state, local, tribal, and territorial governments to enact legislation prohibiting discrimination in housing on the basis of lawful source of income.
REPORT

The American Bar Association has a long tradition of actively opposing discrimination on the basis of classifications including race, gender, national origin, disability, age, sexual orientation, and gender identity and expression. The Association has adopted policies calling upon local, state, and federal lawmakers to prohibit such discrimination in housing, as well as in public accommodations, credit, education, and public funding and has sought to eliminate such discrimination in all aspects of the legal profession. The ABA’s fundamental position condemning such discrimination is based on its underlying commitment to the ideal of equal opportunity and advancement of human rights. These two principles united in August 2013, when the ABA adopted policy to urge governments to “promote the human right to adequate housing for all” and to “prevent infringement of that right.”

A common form of discrimination in housing is the denial of housing based on a housing applicant’s lawful source of income. As a threshold matter, lawful source of income includes income from: 1) a lawful profession, occupation or job; 2) any government or private assistance, grant, loan or rental assistance program, including low-income housing assistance certificates and vouchers issued under the United States Housing Act of 1937; 3) a gift, an inheritance, a pension, an annuity, alimony, child support, or other consideration or benefit; or 4) the sale or pledge of property or an interest in property. Lawful source of income does not prevent a property owner from determining, in a commercially reasonable and non-discriminatory manner, the ability of a housing applicant to afford to purchase or rent the property.

Every year, families are rejected from housing of their choice because their income, albeit lawful and sufficient in amount, is not accepted by a property owner. Often the denial of housing will serve as a pretext for a prohibited form of discrimination. For example, a property owner who does not want to rent to elderly persons will simply deny a housing application claiming that retirement benefits are not a sufficient source of income. A property owner who does not wish to rent to persons with disabilities will tell an applicant on Supplemental Security Income (SSI) that government benefits are not an acceptable source of income.

The most common form of source of income discrimination is the denial of housing to families who rely on government-funded rental assistance, such as the federally-funded Housing Choice Voucher Program.

---

1 See, e.g., resolutions adopted 8/65 (addressing race, color, creed, national origin); 8/78 (race); 8/72, 2/74, 2/78, 8/74, 8/75, 8/80, 8/84 (gender); 8/86 (race and gender); 2/72 (sex, religion, race, national origin); 8/77 ("handicap"); 8/87 (condemning hate crimes related to race, religion, sexual orientation, or minority status); 8/89 (urging prohibition of sexual orientation discrimination in employment, housing and public accommodation); 9/91 (urging study and elimination of judicial bias based on race, ethnicity, gender, age, sexual orientation and disability); 2/92 (opposing penalization of schools that prohibit on-campus recruiting by employers discriminating on the basis of sexual orientation); 8/94 (requiring law schools to provide equal educational and employment opportunities regardless of race, color, religion, national origin, sex or sexual orientation); 8/06 (addressing gender identity and expression).


3 Resolution adopted 8/2013.
The Housing Choice Voucher Program (HCVP), also known as “Section 8,” is the largest subsidized housing program in the United States. The HCVP provides participating low-income families with a housing subsidy that covers a percentage of private market housing costs. The HCVP serves elderly persons, persons with disabilities, veterans, families and other vulnerable populations through eight population-specific sub-programs and is administered locally by Public Housing Agencies (PHA). In 2015, the Program served approximately 2.2 million families comprised of 5 million people.

Low-income households wait years to receive HCVP vouchers, but not every voucher household succeeds in finding a housing unit. Those who receive vouchers typically must find a housing unit and a landlord willing to accept the voucher within two months. This search can prove to be prohibitive for many households.

**Discrimination against Voucher Holders**

A 2001 national study on voucher usage found that households had less than a 50% chance to use their vouchers in some jurisdictions. Furthermore, despite the HCVP’s stated goal to enable low-income families to relocate to communities of lower poverty or minority concentration, a recent study of voucher holders found that 41% are more likely to live in more impoverished and more racially segregated neighborhoods than non-voucher renters. This segregation of voucher holders restrains positive health outcomes for low-income women, educational progress for children, and

---

5 Regulations governing the Housing Choice Voucher Program at found at 24 C.F.R. Part 982.
6 HCVs for veterans are known as HUD-VASH (Veterans Affairs Supportive Housing). The HUD-VASH program has provided vouchers and supportive services to 79,000 veterans since 2008 and is the primary reason that the United States has reduced veteran homelessness to just over 47,000 veterans, a 35% decline since 2009. See National Alliance to End Homelessness, Veterans – Overview, available at http://www.endhomelessness.org/pages/veterans_overview (last visited Apr. 10, 2017).
12 Supra Note 10, at C-6.
15 Jens Ludwig, Ph.D, et al., Neighborhoods, Obesity, and Diabetes – A Randomized Social Experiment, The New England Journal of Medicine (Oct. 20, 2011) (finding that female heads of voucher households able to relocate to lower poverty communities reduced their risk for extreme obesity by 19% and reduced their risk of diabetes by 21%).
employment achievements that come from relocation to lower poverty and racially segregated communities.¹⁶

A primary cause of this segregation is landlord discrimination against voucher holders. A 2002 Chicago study found that voucher holders were denied access to 70% of the rental housing in the City because of landlord refusal or equivocation to accept households with vouchers.¹⁷ A recent HCVP participant summarized her experience as follows, “They [the owners] had the stigma about everybody that’s on Section 8 are nasty, the children tear up the house, that type of thing. So I ran into a lot of issues with that.”¹⁸ For veterans utilizing the Veterans Affairs Supportive Housing (VASH) vouchers, a sub-set of HCVP vouchers, the U.S. Department of Housing and Urban Development reports that landlord unwillingness to accept vouchers is a “primary challenge” in the administration of the program.¹⁹ In 2017, a veteran of the U.S. Coast Guard testified before the Maryland General Assembly about difficulties using her VASH voucher because of landlord discrimination. “I was only able to use my voucher after a housing specialist from the VA told me about properties in [a particular area] that take Section 8. Let me be clear, this is not where I want to live. But... I was at the point where my voucher was about to expire. I am a U.S. veteran – I signed on the line to protect my fellow citizens and I did so honorably. I have no Criminal Record. Yet... the same landlords that wanted me to sacrifice my life to protect them won’t even let me live in their buildings.”²⁰

Source of Income Non-discrimination Laws

To address discrimination against voucher holders and other persons with lawful source of income, state and local governments have enacted laws prohibiting discrimination based on lawful source of income. Currently, 12 states and the District of Columbia, including Utah, Oklahoma, and nearly 40 cities and counties including New York City, Chicago, Philadelphia, Boston, and Seattle, prohibit discrimination based on source of income.²¹

Laws prohibiting discrimination based on source of income have increased the ability of voucher holders to use vouchers and decreased concentrations of voucher holders.\textsuperscript{22,23} Indeed, source of income laws increase the number of voucher holders moving from high to low-poverty areas.\textsuperscript{21}

\textit{Laws Prohibiting Housing Discrimination are supported by International Human Rights Principles}

The international community has long recognized the United States' failure to adequately fight against tenant discrimination. The U.S. has also already ratified the International Covenant on Civil and Political Rights and the International Covenant on the Elimination of All Forms of Racial Discrimination (both with endorsement from the ABA), both of which recognize the right to be free from discrimination, including in housing.\textsuperscript{25}

In 2006, the UN Human Rights Committee expressed concern about the disparate racial impact of homelessness in the U.S. and called for "adequate and adequately implemented policies, to ensure the cessation of this form of racial discrimination."\textsuperscript{26} In 2008, the UN Committee on the Elimination of Racial Discrimination again recognized racial disparities in housing and ongoing segregation in the U.S.\textsuperscript{27}

\textit{Conclusion}

This policy will reaffirm the ABA's commitment to ensuring that decisions about housing are made on the basis of \textit{bona fide} qualification rather than stereotypes or prejudices. By adopting this Resolution, the ABA can assist the work of housing advocates, lawmakers, and litigators that have tirelessly worked to end the cycle of poverty and right the long effects of racial and economic housing segregation in the United States.

Respectfully submitted,

Kirke Kickingbird
Chair, Section of Civil Rights and Social Justice
August 2017

\textsuperscript{22} Supra Note 10 at 3-17 ("enrollees in programs that are in jurisdictions with laws that bar discrimination based on source of income (with or without Section 8) had a statistically significantly higher probability of success of over 12 percentage points").

\textsuperscript{23} Supra Note 14 at 556.


\textsuperscript{26} Concluding Observations of the Human Rights Committee on the Second and Third U.S. Reports to the Committee, CCPR/C/USA/CO/3 (2006), at. para. 22.

GENERAL INFORMATION FORM

Submitting Entity: Section of Civil Rights and Social Justice

Submitted By: Kirke Kickingbird, Chair, Section of Civil Rights and Social Justice

1. Summary of Resolution(s). The resolution urges federal, state, local, and territorial governments to enact legislation prohibiting discrimination in housing on the basis of lawful source of income.


The Council of the Section of State and Local Government Law approved co-sponsorship of the Resolution during its Spring Meeting on Sunday, April 30, 2017.

The Commission on Veterans Legal Services approved co-sponsorship of the Resolution on May 30, 2017.

3. Has this or a similar resolution been submitted to the House or Board previously? No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? The American Bar Association has a long tradition of actively opposing discrimination on the basis of classifications including race, gender, national origin, disability, age, sexual orientation, and gender identity and expression. The Association has adopted policies calling upon local, state, and federal lawmakers to prohibit such discrimination in housing, as well as in public accommodations, credit, education, and public funding and has sought to eliminate such discrimination in all aspects of the legal profession. The ABA's fundamental position condemning such discrimination is based on its underlying commitment to the ideal of equal opportunity and advancement of human rights. These two principles united in August 2013, when the ABA adopted policy to urge governments to "promote the human right to adequate housing for all" and to "prevent infringement of that right."

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

6. Status of Legislation. (If applicable) Currently, 12 states and the District of Columbia, including Utah, Oklahoma, and nearly 40 cities and counties including New York City, Chicago, Philadelphia, Boston, and Seattle, prohibit discrimination based on lawful source of income. This Resolution will allow the ABA to encourage other jurisdictions to adopt similar laws.
7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** We will work with relevant stakeholders within and outside of the American Bar Association and the Governmental Affairs Office to implement the policy.

8. **Cost to the Association.** (Both direct and indirect costs) Adoption of this proposed resolution would result in only minor indirect costs associated with Section staff time devoted to the policy subject matter as part of the staff members' overall substantive responsibilities.

9. **Disclosure of Interest.** (If applicable) There are no known conflicts of interest.

10. **Referrals.** The Report with Recommendation will be referred to the following entities in the month of June:
    - Section of Administrative Law and Regulatory Practice
    - Criminal Justice Section
    - General Practice, Solo and Small Firm Section
    - Section of Business Law
    - Section of Family Law
    - Section of Real Property, Trust, and Estate Law
    - Section of International Law
    - Section of Labor and Employment Law
    - Section of Litigation
    - Section of State and Local Government Law
    - Section of Taxation
    - Judicial Division
    - Forum on Affordable Housing
    - Law Student Division
    - Senior Lawyers Division
    - Young Lawyers Division
    - Center for Racial and Ethnic Diversity
    - Commission on Law and Aging
    - Commission on Homelessness and Poverty
    - Commission on Mental and Physical Disability Law
    - Commission on Racial and Ethnic Diversity in the Profession
    - Council on Racial and Ethnic Justice
    - Commission on Disability Rights
    - Commission on Youth at Risk
    - Commission on Women in the Profession
    - Commission on Domestic and Sexual Violence
    - Hispanic National Bar Association
    - National Asian Pacific American Bar Association
    - National Association of Women Judges
    - National Association of Women Lawyers
    - National Bar Association Inc.
    - National Conference of Women's Bar Associations
    - National Lesbian and Gay Law Association (National LGBT Bar Association)
    - Veterans Commission
    - National Native American Bar Association
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Antonia Kivelle Fasanelli  
Homeless Persons Representation Project, Inc.  
201 N. Charles St., Suite I  
West Newton, MA 02465  
Tel.: (410) 685-6589  
Email: afasanelli@hprplaw.org

Tanya Terrell Coleman, Director  
Section of Civil Rights and Social Justice  
1050 Connecticut Avenue NW  
Washington, DC 20036  
Tel: (202) 662-1030  
Email: Tanya.terrell@americanbar.org

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

Estelle H. Rogers, CRSJ Section Delegate  
111 Marigold Ln  
Forestville, CA 95436-9321  
Tel.: (202) 337-3332 (Work)  
E-mail: lestellerogers@gmail.com

Walter H. White, Jr., CRSJ Section Delegate  
McGuire Woods LLP  
11 Pilgrim Street  
London EC4V 6RN, United Kingdom  
Tel.: +44 (0)20 7632 1630  
Fax: +44 (0)20 7632 1638  
E-mail: wwhite@mcguirewoods.com

2001 K Street N.W.  
Suite 400  
Washington, D.C. 20006-1040  
Tel.: (202) 857.1707  
Fax: (202) 828.2969  
(alternate address)
EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution urges federal, state, local, and territorial governments to enact legislation prohibiting discrimination in housing on the basis of lawful source of income.

2. Summary of the Issue that the Resolution Addresses

A common form of discrimination in housing is the denial of housing based on a housing applicant's lawful source of income. As a threshold matter, lawful source of income includes income from: 1) a lawful profession, occupation or job; 2) any government or private assistance, grant, loan or rental assistance program, including low-income housing assistance certificates and vouchers issued under the United States Housing Act of 1937; 3) a gift, an inheritance, a pension, an annuity, alimony, child support, or other consideration or benefit; or 4) the sale or pledge of property or an interest in property. Lawful source of income does not prevent a property owner from determining, in a commercially reasonable and non-discriminatory manner, the ability of a housing applicant to afford to purchase or rent the property.

Every year, families are rejected from housing of their choice because their income, albeit lawful and sufficient in amount, is not accepted by a property owner. Often the denial of housing will serve as a pretext for a prohibited form of discrimination. For example, a property owner who does not want to rent to elderly persons will simply deny a housing application claiming that retirement benefits are not a sufficient source of income. A property owner who does not wish to rent to persons with disabilities will tell an applicant on Supplemental Security Income (SSI) that government benefits are not an acceptable source of income.

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

This policy will reaffirm the ABA’s commitment to ensuring that decisions about housing are made on the basis of bona fide qualification rather than stereotypes or prejudices. By adopting this Resolution, the ABA can assist the work of housing advocates, lawmakers and litigators that have tirelessly worked to end the cycle of poverty and right the long effects of racial and economic housing segregation in the United States.

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

No minority views or opposition have been identified.
RESOLVED, That the American Bar Association urges all state, local, territorial, and tribal legislative bodies to enact statutes and school districts to adopt policies that:

a) rigorously protect the ability of student journalists at the secondary and postsecondary levels to make the independent editorial judgments necessary to meaningfully cover issues of social and political importance without fear of retaliation or reprisal, provided that such statutes should also allow for reasonable restrictions on the time, place, and manner of student expression, and should neither authorize nor protect expression by students that is defamatory or invasive of privacy, is obscene or otherwise unlawful, or is reasonably anticipated to incite students to act unlawfully;

b) safeguard advisors who supervise students participating in school-sponsored journalism against punitive action for supporting their students in gathering and publishing news of interest and concern to their communities;

c) expressly declare that criticism of government policies or programs, or the discussion of issues of social or political controversy, is protected speech in journalistic media, regardless of the medium’s school affiliation or sponsorship; and

d) ensure that student journalists have the right to exercise freedom of speech and of the press in school-sponsored media.

FURTHER RESOLVED, That the American Bar Association urges secondary and postsecondary educational institutions to offer students meaningful opportunities in school-sponsored journalism to enhance their civic learning and to promote all students’ media literacy.
REPORT

Schools and colleges are, in many ways, self-contained communities. As with any community, an editorially independent source of news is essential for an informed civic dialogue. There is a growing and well-founded sense of national urgency that young citizens are graduating from high school, and even college, ill-prepared for participation in civic life. Central to improving civic readiness is cultivating an appetite for verified information about issues of social and political importance. Preparing young people to have civil discussions about polarizing issues is central to the civic mission of America’s public education system.

At a time of great national anxiety over the civic readiness of young Americans, about escalating hostility toward journalism and journalists, and about the inability of all users of social media to differentiate between fact and fabrication, it is timely and appropriate for states, territories, and tribes to take decisive action to fortify the quality of journalism education for the benefit of participants and consumers alike. Meaningful civic education requires that students feel safe and empowered to discuss issues of social and political concern in the responsible, accountable forum of journalistic media.

High-quality student journalism contributes to the civic health of the school and college community in many ways. It gives marginalized students opportunities for recognition; it sheds light on ways in which schools are performing unsatisfactorily and could be improved; and it builds healthy news readership habits that can carry over into adult life. With encouragement and guidance, students can and do produce journalistic work of remarkable sophistication. Recently, high-school journalists in Pittsburg, Kansas, achieved national acclaim for their investigative reporting that exposed résumé-padding by a newly hired principal, leading to her resignation and reforms in their district’s hiring procedures.1 College journalists at the University of Alabama were nominated for the Pulitzer Prize for their searing exposé of de facto segregation in college sororities.

Journalism thrives in communities like Pittsburg, Kansas, in no small part because of state statutes that enable students, not school administrators, to choose the content of journalistic publications. These state statutes are necessary because the U.S. Supreme Court significantly diminished students’ protection against institutional censorship in its 1988 ruling, Hazelwood School District v. Kuhlmeier.2

Schools have essential safety responsibilities that require latitude to regulate speech in ways that would not be permissible outside the schoolhouse gate. Bullying and harassment are, and must remain, legally unprotected speech to which administrators can apply their best educational judgment. But when it comes to student journalism, it is possible to strike a sensible balance that protects journalistic speech with the schools’ authority to respond to bullying and harassment. Indeed, the ability to be heard on issues of public concern is itself a matter of student safety. Students can and do use journalism to call public attention

---

1 Samantha Schmidt, These high school journalists investigated a new principal’s credentials. Days later, she resigned. THE WASHINGTON POST, April 5, 2017.
to safety hazards, when they are allowed to do so. Students at Pennsylvania’s Conestoga High School won national awards for spotlighting inadequacies in their district’s employee criminal background checks. At Maryland’s Rockville High School, students prompted the state to reassess its water-testing regime after they exposed elevated lead levels in school drinking fountains. The law must ensure that this type of whistleblowing speech is heard.

Before Hazelwood, speech in journalistic publications enjoyed substantial protection against censorship by school authorities under the standard set by the Supreme Court in Tinker v. Des Moines Independent Community School District. In Tinker, the Supreme Court held that nothing short of a material and substantial disruption of school activities could justify content-based censorship of student expression. In its most quoted passage, Justice Abe Fortas’ majority opinion reaffirmed that “(I)t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”

Nineteen years later, the Hazelwood Court carved out a less-protected tier of student speech when the vehicle conveying the message is provided by the school as a part of its educational offerings – in that case, a newspaper produced as an extension of a high-school journalism course. The Hazelwood majority, led by Justice Byron White, found that the students of Missouri’s Hazelwood East High School had minimal free-expression protection when publishing in a school-financed newspaper, because the newspaper had not been designated as a “forum” for the indiscriminate use of student speakers.

Justice William Brennan, joined by Justices Harry Blackmun and Thurgood Marshall in dissent, decried the school’s censorship decision as an act of “unthinking contempt for individual rights” and lamented the Court’s retreat from Tinker:

Instead of teaching children to respect the diversity of ideas that is fundamental to the American system ... and that our Constitution is a living reality, not parchment preserved under glass, ... the Court today teaches youth to discount important principles of our government as mere platitudes. ... The young men and women of Hazelwood East expected a civics lesson, but not the one the Court teaches them today.

In the 29 years since Hazelwood was decided, Justice Brennan’s admonition has proven prophetic. Attorney Christine Snyder, a former high-school journalism teacher, has written that state statutory protection for student journalists and journalism educators is urgently needed to restore the civic and educational benefits of consuming and creating news in schools:

As protection of free speech in schools has eroded over the last forty years through a series of court cases, censorship of student speech has increased, and

---

4 Id. at 506.
5 Hazelwood, 484 U.S. at 269-70.
6 Id. at 290-91 (Brennan, J., dissenting) (internal quotes, brackets and citations eliminated).
student journalists, instead of valuing free speech, press, and expression, have been taught to shy away from controversy and to stifle differing views. Similarly, when teachers assigned to advise student journalists have acted in support of their students’ rights, they have been punished, threatened, and terminated.\textsuperscript{7}

Although the \textit{Hazelwood} standard contemplates that a student could still contest censorship that lacks a legitimate educational justification, the standard is applied deferentially and successful student challenges are almost nonexistent.\textsuperscript{8} In practical effect, the \textit{Hazelwood} ruling has greatly diminished students’ access to the courts even to attempt to vindicate their rights, because attorneys are rarely willing to take on the pro-bono representation of students knowing that the odds are so formidable. Even though the Student Press Law Center reports receiving hundreds of requests for assistance with censorship cases every year, a 2012 study found just one appellate-level court case since \textit{Hazelwood} involving the censorship of a journalistic publication.\textsuperscript{9} (The Second Circuit ruled against the journalists’ challenge to the removal of a political cartoon questioning the efficacy of the school’s sex-education curriculum.\textsuperscript{10}) As Professor Sonja West has written: “Schools are essentially free to censor the student press even when the speech at issue is truthful, legally obtained, non-disruptive, and about matters of public concern.”\textsuperscript{11} Multiple commentators have arrived independently at the same description to characterize \textit{Hazelwood}’s impact on the quality of the journalism education experience: “Devastating.”\textsuperscript{12} Nor has \textit{Hazelwood}’s impact been limited to the “captive audience” K-12 educational setting. At least four federal circuits have stated that the \textit{Hazelwood} level of institutional control constrains the rights of college students as well,\textsuperscript{13} including one ruling – the Seventh Circuit’s 2005 opinion in \textit{Hosty v. Carter} – expressly applying \textit{Hazelwood} to journalistic speech in a student-edited publication.\textsuperscript{14}

\textsuperscript{7} Christine Snyder, \textit{Reversing the Tide: Restoring First Amendment Ideals in America’s Schools Through Legislative Protections for Journalism Students and Advisors}, 2014 B.Y.U. EDUC. & L.J. 71, 72 (2014).

\textsuperscript{8} See Dan V. Kozlowski, \textit{Hazelwood’s Application in the Circuit Courts}, 3 U.B. J. OF MEDIA L. & ETHICS 1, 6 (2012) (“Circuit courts have broadly applied Hazelwood – both in terms of when it is applied and to whom – and expansively interpreted the ‘legitimate pedagogical concerns’ standard, generally granting wide discretion to school officials.”).

\textsuperscript{9} Id. at 12.

\textsuperscript{10} R.O. ex rel. Ochshorn v. Ithaca City Sch. Dist., 645 F. 3d 533 (2d Cir. 2011).


\textsuperscript{13} See Ward v. Polite, 667 F. 3d 727 (6th Cir. 2012); Hosty v. Carter, 412 F.3d 731 (7th Cir. 2005) (en banc); Axson-Flynn v. Johnson, 356 F.3d 1277 (10th Cir. 2004); Alabama Student Party v. Student Gov’t Ass’n, 867 F.2d 1344 (11th Cir. 1989).

\textsuperscript{14} Hosty, 412 F.3d at 734. For a contrary view, see the Sixth Circuit’s ruling in Kincaid v. Gibson, 236 F.3d 342 (6th Cir. 2001) (en banc), holding that student-produced media at the college level operate as a public forum for student expression insulated from the \textit{Hazelwood} level of school control. \textit{Hosty} and \textit{Kincaid} are the only appellate cases squarely confronting \textit{Hazelwood} in the college newsroom setting, leaving uncertainty as to the level of protection that college journalists enjoy nationally.
It is the consensus of every leading expert in journalism education that *Hazelwood* has fostered censorship for purposes of image control rather than education, and that *Hazelwood* has diminished the opportunity for students to make their voices heard on issues of social and political importance. As the Society of Professional Journalists stated in a resolution calling on states to renounce the *Hazelwood* level of control over student journalism:

> [N]o legitimate pedagogical purpose or the public’s right to know is served by censorship of student journalism on the grounds the reporting may be unflattering toward school programs or policies, that it candidly discusses sensitive social and political issues or that it voices opinions which challenge the majority views on matters of public concern because all of these are essential to critical thinking, collaboration and communication skills necessary for an informed public.15

Other leading organizations that train future journalists — among them the Journalism Education Association, the Association for Education in Journalism and Mass Communication, the National Conference of Teachers of English and the American Society of News Editors — agree that the quality of journalism education is inhibited when educational institutions exercise total authority over what can be published. As the ASNE stated in its August 2016 resolution calling on states to enact comprehensive protection for student journalism, “a free and independent student media is an essential ingredient of a civically healthy campus community, conveying the skills, ethics and values that prepare young people for a lifetime of participatory citizenship.”16

Recently published research by University of Kansas journalism professors Genelle I. Belmas and Piotr B. Bobkowski documents that high-school journalists are prone to “self-censor” in anticipation of adverse reaction from school administrators, and that the toll of school censorship falls disproportionately on female students. In a survey of 461 high-school students attending journalism workshops in a southeastern state during the fall of 2015, 38 percent of students (41 percent of girls and 28 percent of boys) reported having been told that certain topics were categorically off-limits for discussion in student media, and 47 percent of students (53 percent of girls and 27 percent of boys) reported that they restrained themselves from pursuing an article because they anticipated a negative reaction from school authorities.17 Among the responses that Bobkowski and Belmas received to a prompt inviting students to describe their censorship experiences, one student wrote: “We were told not to write about standardized tests that would make the school look bad.” Another volunteered: “We are asked to refrain from discussing any topic that would shed

---


negative light on our school even if it is honest and important." Other research has
documented a similar erosion in the ability, or willingness, of student journalists to
challenge the decisions of school authority figures since Hazelwood was decided.

Excellent journalism educators have lost their jobs as punishment for speech by their
students that calls attention to their schools' shortcomings or provokes controversy by
addressing sensitive social or political issues. A highly regarded Indiana teacher, Amy
Sorrell, recently testified before her state's House Education Committee that she was fired
because she supported a student's decision to publish an opinion column calling for
tolerance toward gay and lesbian students. A former journalism adviser at Chicago State
University successfully sued his institution for reinstatement after being removed (along
with the student editor) in retaliation for coverage of a controversy involving profligate
spending of student activity fees. More such instances at the college level are documented
in a December 2016 white paper, "Threats to the Independence of Student Media," issued
by the American Association of University Professors and a consortium of free-expression
organizations. The report recommends strengthening state statutory protections to outlaw
direct acts of censorship as well as indirect censorship by way of financial pressure on
student media outlets or the removal of supportive faculty advisers.

The National Education Association, the nation's largest teacher organization, marked the
20-year anniversary of the Hazelwood decision by enacting a resolution calling on schools
to forswear censorship of student journalism:

The National Education Association believes that freedom of speech and press
are fundamental principles in our democratic society granted by the First
Amendment of the United States Constitution, and these freedoms provide all

18 Id. at 99.
19 See Carol S. Lomicky, Analysis of High School Newspaper Editorials Before and After Hazelwood School
a study of 144 editions of one school's newspaper covering a 16-year period, that students were significantly
less likely to use the editorial page to express dissent with school policies after Hazelwood was decided). Tyler
Buller's research similarly finds that students in states without statutes protecting press freedom are far
more likely than students in speech-protective states to publish editorials criticizing the disobedience of their
peers — in other words, hewing to the school administration's line rather than focusing their criticism on
administrative policies. See Tyler Buller, The State Response to Hazelwood v. Kuhlmeier, 66 ME. L. REV.
89, 143-44 (2013).

20 Alexa Chryssovergis, Committee hears testimony on student press freedom protection bill, THE
INDIANA DAILY STUDENT (Feb. 14, 2017). For more information on the Sorrell case, see The Associated Press,
"Teacher's job on line over 'tolerance' column (April 23, 2007), available at
http://www.nbcnews.com/id/18268259/ns/us_news-education/t/teachers-job-line-over-tolerance-
column#.WP1qz1PytBw. For more instances of retaliatory removals of journalism educators, see Tyler J.
Buller, Subtle Censorship: The Problem of Retaliation Against High School Journalism Advisers and Three
Ways to Stop It, 40 J.L. & EDUC. 609 (October 2011). See also Snyder, supra note 7, at 85 ("[M]any
journalism teachers face the conflict between risking their jobs and speaking out against censorship,
Administrators often exploit the precarious position of the journalism advisor as yet another way to control
the content in student newspapers.").


22 American Association of University Professors et al., "Threats to the Independence of Student Media"
Substantive journalism in student media has demonstrable civic benefits

The era of Hazelwood has coincided with a sharp diminution in news readership among all audiences, most especially the young. The Pew Research Center reports that only 16 percent of Americans ages 18 to 24 read a daily newspaper, down from 40 percent in 2000, and viewership of local news on television is declining sharply among Americans 29 and under. While many factors are at play in the erosion of news consumption, making news uninteresting to young people at a time when they are forming lifelong viewing habits is self-evidently counterproductive.

Meaningful journalism education opportunities are especially crucial in today’s society, for two primary reasons. First, it is now widely documented that young people are entering into adulthood inadequately prepared for informed civic participation, unable to differentiate between “fake” and “real” news they consume online. Cultivating an appetite for well-researched, factual news is an essential function of the civic mission of the public school system. Censorship devalues journalism. When coverage is purposefully slanted to reflect only a favorable impression of school policies and events, it ceases to be news. As Judge Arthur Tarnow memorably wrote in Dean v. Utica Community Schools, a rare post-Hazelwood victory in which a student journalist successfully challenged school censorship:

A core value of being a journalist is to understand the role of the press in a free society. That role is to provide an independent source of information so that a citizen can make informed decisions. It is often the case that this core value of journalistic independence requires a journalist to question authority rather than side with authority. Thus, if the role of the press in a democratic society is to have any value, all journalists—including student journalists—must be allowed to publish viewpoints contrary to those of state authorities without intervention or censorship by the authorities themselves. Without protection, the freedoms of speech and press are meaningless and the press becomes a mere channel for official thought.

Second, 73 percent of teens now have internet-enabled smartphones and 71 are active users of Facebook, the most popular social media platform. It is no longer possible, as it was in Principal Robert Reynolds’ day at Hazelwood East High School, to insulate teens from learning about “mature” subjects by withholding articles from newspapers. Because

---

23 National Education Association, Resolution B-56 (adopted 2008).
“mature” discussions are unstoppably taking place online, schools can most effectively respond by equipping students with the skills, ethics and values to navigate the digital world safely: Verifying sources, correcting mistakes, entertaining opposing views, and considering the legal and ethical impact of one’s words on other people. Now that everyone can be a publisher, every student should graduate K-12 school having been trained in the skills, ethics and values of journalism. The McCormick Foundation, a leading philanthropic supporter of scholastic journalism, took note in a 2010 report of the healthful benefits that uncensored journalism can provide as an “antidote” to social-media incivility:

Students seek out the uncensored venue of social networking sites to criticize school policies and personnel because schools offer no meaningful alternative forum for them to be heard. Online ‘drive-by’ grievances can and should constructively be channeled into peer-moderated student media where discussion can occur civilly but without undue restraint.28

The public depends more today than ever before on students as primary gatherers and providers of news. Employment in professional newsrooms is in free-fall. U.S. Department of Labor statistics show that news publishing companies lost more than half of their workforce (from 412,000 jobs to 174,000) between 2001 and 2016.29 The Pew Research Center found in a 2014 survey that 14 percent of all reporters covering America’s statehouses are students.30 The Knight Foundation and other leading philanthropic funders of journalism have called on journalism schools to reconceive their mission as primary providers of information to underserved audiences just as medical schools operate teaching hospitals to meet the healthcare needs of their communities.31 If student journalists are to assume responsibility as the primary newsgatherers for their communities, they must be assured of independence from viewpoint-based institutional control or reprisal, as nonstudent professionals are. Writing in The Atlantic, First Amendment lawyers Jonathan Peters and Frank LoMonte observed that today’s college journalists “are being asked to fulfill community needs for professional-caliber news without the assurances that keep professionals safe when fearless journalism provokes a backlash.”32

Coverage of schools and colleges has been particularly hard-hit by the decline in newsroom staffing. The Brookings Institution reported in 2009 that education accounted for just 1.4

percent of the coverage provided by major television, print and online news outlets (and much of that 1.4 percent was disaster-driven rather than policy-focused). The information safety net, particularly for those interested in the performance of schools and colleges, is more fragile than anytime in modern history. The Brookings report provided a partial solution: “Some school officials discourage student reporters from asking difficult questions or raising controversial issues. In fact, student journalism of this kind should be encouraged. Student newspapers often lead the media to important education stories.” Tyler J. Buller, a former Iowa school board member turned lawyer, has written that Americans are increasingly dependent on students to cover local education news:

Today, there are more high school student newspapers than there are commercial weekly and daily newspapers combined. If you look around the audience at your local school board meeting, it would not be surprising that the most common – and perhaps only – reporter you encounter is a student, writing for one of the nation’s 12,000 student publications. These student journalists fulfill a crucial function, as adults need candid, uncensored student journalism if they are to have any idea what is going on inside the schools they support.

As Buller’s research documented, when given the freedom to pursue serious news stories, students have brought public attention to gang activity, hazing, wasteful contracts and other school maladies that might have gone unaddressed.

Protective state laws can reinvigorate the journalism education experience

The impact of Hazelwood can be mitigated by state, territorial, and tribal law. The Hazelwood standard represents a floor, not a ceiling, on the level of freedom that students can be granted, and a growing number of states are concluding that federal law inadequately protects journalists’ rights. Since the Court issued its ruling in February 1988, ten states have enacted statutes (referred to as “New Voices” statutes) giving students a state-guaranteed level of press freedom comparable to that recognized under federal law before Hazelwood. These protections are now on the books in Arkansas, California, Colorado, Illinois, Iowa, Kansas, Maryland, Massachusetts, North Dakota and Oregon. Pennsylvania and the District of Columbia extend comparable protection by way of State

---

34 Buller, supra note 17, at 89, 97 (internal quotes and citations omitted).
35 See id. at 97-98 (enumerating examples of impactful journalism by high-school students). See also West, supra note 9 at 139 (citing substantive student coverage of elections, gun control, housing issues, the minimum wage and other current events).
Board of Education rule rather than by statute,\textsuperscript{37} for a total of 12 jurisdictions in which the \textit{Hazelwood} level of institutional control no longer governs. Four states – California, Kansas, Maryland and North Dakota – go further and explicitly protect faculty advisers against retaliatory personnel actions for defending the journalistic independence of their students.

The movement to moderate the impact of \textit{Hazelwood} received renewed impetus in 2015 with the enactment of the John Wall New Voices of North Dakota Act, the first “New Voices” statute passed since Oregon’s in 2007. The New Voices Act passed with bipartisan sponsorship and without a negative vote on the House or Senate floors, invigorating a nationwide movement that takes its name – “New Voices” – from the North Dakota statute.\textsuperscript{38} Illinois and Maryland followed North Dakota’s lead in 2016, and comparable bills have since been introduced in 11 other states. While the details of these statutes and proposals vary, the core objective of each is to restore to journalistic media the more robust level of freedom recognized by the Supreme Court in \textit{Tinker}, which has stood for almost 50 years as the standard governing public schools’ regulation of student speech outside the curricular setting.

The \textit{Tinker} standard strikes a commonsense balance between authority and autonomy, with the benefit of a well-developed body of interpretive caselaw. As Professor Sonja West has observed, it is counterintuitive that the one place in which students are assured of no legally protected freedom to voice political opinions is in the pages of a newspaper.\textsuperscript{39} The movement to restore \textit{Tinker} protection to student media has received broad editorial support from professional news organizations across the country, including endorsements in the \textit{Seattle Times} and the \textit{Bergen Record}, among many others.\textsuperscript{40}

To be sure, safeguards are appropriate – particularly at the K-12 level where the audience is predominantly minors – to enable school authorities to respond appropriately if student publications become vehicles for defamation, bullying or other injurious behavior. The \textit{Tinker} standard provides ample discretion to police harm-causing speech, just as it has allowed schools to respond outside the newsroom setting where it is reasonably foreseeable that student speech will provoke others to act disruptively.\textsuperscript{41} Existing state statutes protecting the freedom of the student media do, and future statutes should continue to, provide K-12 schools with the \textit{Tinker} level of authority needed to regulate the publication

\textsuperscript{37} See Pa. Code § 12.9; D.C. Mun. Regs. tit. 5-E, § 2401.

\textsuperscript{38} Jonathan Peters, How a new campaign is trying to strengthen the rights of student journalists, COLUMBIA JOURNALISM REVIEW (Feb. 19, 2016).

\textsuperscript{39} See West, supra note 9.

\textsuperscript{40} Editorial, Remove gag from student journalists, \textit{THE SEATTLE TIMES} (Feb. 5, 2017) (“the best education is rooted in critical thinking and forceful writing – the definition of good journalism.”); Editorial, Free Student Press, \textit{THE BERGEN RECORD} (Aug 12, 2016) (“Being free to criticize school officials without the fear of censorship or retribution isn’t an unreasonable expectation for students in New Jersey. It’s called democracy.”).

\textsuperscript{41} In an illustrative recent application, the Ninth Circuit U.S. Court of Appeals cited \textit{Tinker} to permit a California school to enforce an edict banning American flag apparel on a day set aside to celebrate Latin-American heritage, because of documented instances in which students had used flags tauntingly in ways that inflamed racial tensions. \textit{Dariano v. Morgan Hill Unified School Dist.}, 745 F. 3d 354 (9th Cir. 2014).
of material that is genuinely injurious, as opposed to merely controversial or unflattering. (Importantly, these statutes have no effect on schools’ authority over non-journalistic speech, including text messages or social media posts, none of which are subject to the Hazelwood standard.)

“New Voices” statutes have proven safe and effective. Contrary to initial concerns that granting students even a limited degree of press freedom would provoke costly and time-consuming legal disputes, research published in the University of Maine law review documents only six court cases over a combined history of more than 170 years’ experience with “New Voices” statutes in which one of the statutes has been cited in a published judicial opinion. Indeed, clarifying the boundaries of schools’ authority and students’ rights by way of a statutory checklist of well-defined categories of unprotected speech holds the promise of facilitating, rather than complicating, the resolution of censorship disputes. Nor is there any evidence that students in states with the benefit of statutory protection have abused that protection to publish harmful material. There are no known cases in which any K-12 school or district has ever been judicially ordered to pay damages to anyone injured by material published in student media.

New Voices statutes in no way affect the ability of schools to maintain order in the classroom, to restrict disruptive behavior such as walkouts or demonstrations, or to respond to cases of online bullying on social media. These statutes are, properly, limited to students’ use of journalistic media (like the Spectrum newspaper at Hazelwood East High School) that is advised by faculty as an extension of school educational or extracurricular programming.

Enhancing Civic Literacy and Promoting Students’ Media Literacy

To achieve the American Bar Association’s Goal IV (advancing the rule of law), lawyers and the legal profession should aid the public in understanding and respecting the legal system at home and throughout the world. Central to this is a public equipped with strong civic and media literacy skills. Such skills allow individuals to effectively participate in civic life by “knowing how to stay informed and understanding governmental process; exercising the rights and obligations for citizenship at local, state, national and global levels; and understanding the local and global implications of civic decisions.” High-quality civic learning in the K-12 environment goes beyond the social studies classroom. We should view civic learning as “not just as acquisition of factual information about the nation’s founding principles and government structures but as how students experience and practice democracy in their daily lives.” As the Partnership for 21st Century Learning noted, today’s citizens must exhibit “a range of functional and critical thinking skills related to information, media and technology” that includes the ability to “understand and

---

42 See Tyler J. Buller, The State Response to Hazelwood v. Kuhlmeier, 66 ME. L. REV. 89, 116 (2013) (enumerating one case in Iowa, three in California and two in Massachusetts in which courts cited student press-freedom statutes). The dearth of California cases is especially noteworthy because California’s press-freedom statute has been on the books since 1977, even predating the Hazelwood decision.

utilize media creation tools, characteristics and conventions. By supporting quality journalism education that fosters civic learning, the American Bar Association and the legal profession plays an integral role in shaping tomorrow’s civic leaders and protecting the rule of law.

Respectfully Submitted,

Kirke Kickingbird
Chair, Section of Civil Rights and Social Justice

August 2017
1. **Summary of Resolution(s).** The Resolution urges all state, territorial and tribal legislative bodies to enact statutes that:

   (a) rigorously protect the ability of student journalists at the secondary and postsecondary levels to make the independent editorial judgments necessary to meaningfully cover issues of social and political importance without fear of retaliation or reprisal, provided that such statutes should also allow for reasonable restrictions on the time, place, and manner of student expression, and should neither authorize nor protect expression by students that is defamatory or invasive of privacy, is obscene or otherwise unlawful, or is reasonably anticipated to incite students to act unlawfully;

   (b) safeguard the student media advisors who supervise students participating in school-sponsored journalism against punitive action for supporting their students in gathering and publishing news of interest and concern to their communities;

   (c) expressly declare that criticism of government policies or programs, or the discussion of issues of social or political controversy, is protected speech in journalistic media, regardless of the medium’s school affiliation or sponsorship;

   (d) urge school districts to adopt written student freedom of expression policies in accordance with their jurisdiction’s statutes; and

   (e) ensure that student journalists have the right to exercise freedom of speech and of the press in school-sponsored media.

The Resolution also urges secondary and postsecondary educational institutions to offer students meaningful opportunities in school-sponsored journalism to enhance their civic learning and to promote all students’ media literacy.

2. **Approval by Submitting Entity.** The Council of the Section of Civil Rights and Social Justice approved the Resolution during its Spring Meeting on Saturday, April 29, 2017.

   The Standing Committee on Public Education approved co-sponsorship of the Resolution on April 22, 2017.

3. **Has this or a similar resolution been submitted to the House or Board previously?**
   No.
4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

The American Bar Association has longstanding policy on civic learning. In particular, the ABA has resolved to "[encourage] all lawyers to consider it part of their fundamental responsibility to ensure that all students experience high quality civic learning, including the study of law, government, and history" (10A-110, Standing Committee on Public Education) and to "[urge] policymakers at all levels of government to ensure that all students experience high quality civic learning." (06A-102, Commission on Civic Education and the Separation of Powers)

To achieve the American Bar Association’s Goal IV (advancing the rule of law), lawyers and the legal profession should aid the public in understanding and respecting the legal system at home and throughout the world. Central to this is a public equipped with strong civic and media literacy skills. Such skills allow individuals to effectively participate in civic life by “knowing how to stay informed and understanding governmental process; exercising the rights and obligations for citizenship at local, state, national and global levels; and understanding the local and global implications of civic decisions[.]” High-quality civic learning in the K-12 environment goes beyond the social studies classroom. We should view civic learning as “not just as acquisition of factual information about the nation’s founding principles and government structures but as how students experience and practice democracy in their daily lives.” By supporting quality journalism education that fosters civic learning, the American Bar Association and the legal profession plays an integral role in shaping tomorrow’s civic leaders and protecting the rule of law.

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

6. Status of Legislation. (If applicable)

Since the Court issued its Hazelwood ruling in February 1988, ten states have enacted statutes (referred to as “New Voices” statutes) giving students a state-guaranteed level of press freedom comparable to that recognized under federal law before Hazelwood. These protections are now on the books in Arkansas, California, Colorado, Illinois, Iowa, Kansas, Maryland, Massachusetts, North Dakota and Oregon. Pennsylvania and the District of Columbia extend comparable protection by way of State Board of Education rule rather than by statute, (See Pa. Code § 12.9; D.C. Mun. Regs. tit. 5-E, § 2401), for a total of 12 jurisdictions in which the Hazelwood level of institutional control no longer governs. Four states – California, Kansas, Maryland and North Dakota – go further and explicitly protect faculty advisers against retaliatory personnel actions for defending the journalistic independence of their students.
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. We will work with relevant stakeholders within and outside of the American Bar Association and the Governmental Affairs Office to implement the policy.

8. Cost to the Association. (Both direct and indirect costs) Adoption of this proposed resolution would result in only minor indirect costs associated with Section staff time devoted to the policy subject matter as part of the staff members’ overall substantive responsibilities.

9. Disclosure of Interest. (If applicable) There are no known conflicts of interest.

10. Referrals. The Report with Recommendation will be referred to the following entities (When will this be done?):

   - Section of State and Local Government Law
   - Law Student Division
   - Young Lawyers Division
   - Forum on Communications Law
   - Commission on the Lawyer’s Role in Assuring Every Child’s Right to a High-Quality Education
   - Solo, Small Firm and General Practice Division
   - Center or Children and the Law
   - Government and Public Sector Lawyers Division

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

   Steve Wermiel, Chair, First Amendment Committee, Section of Civil Rights and Social Justice
   Professor of Practice
   American University Washington College of Law
   4300 Nebraska Ave NW
   Washington, DC 20016
   Tel: 202-274-4263
   Email: swermiel@wcl.american.edu

   Tanya Terrell Coleman, Director
   Section of Civil Rights and Social Justice
   1050 Connecticut Avenue NW
   Washington, DC 20036
   Tel: (202) 662-1030
   Email: Tanya.terrell@americanbar.org
12. **Contact Name and Address Information.** (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

    Estelle H. Rogers, CRSJ Section Delegate  
    111 Marigold Ln  
    Forestville, CA 95436-9321  
    Tel.: (202) 337-3332 (Work)  
    E-mail: estellerogers@gmail.com

    Walter H. White, Jr., CRSJ Section Delegate  
    McGuire Woods LLP  
    11 Pilgrim Street  
    London EC4V 6RN, United Kingdom  
    Tel.: +44 (0)20 7632 1630  
    Fax: +44 (0)20 7632 1638  
    E-mail: wwhite@mcguirewoods.com

    2001 K Street N.W.  
    Suite 400  
    Washington, D.C. 20006-1040  
    Tel.: 202/857.1707  
    Fax: 202/828.2969  
    (alternate address)
EXECUTIVE SUMMARY

1. Summary of the Resolution

That Resolution urges all state, territorial and tribal legislative bodies to enact statutes that rigorously protect the ability of student journalists at the secondary and postsecondary levels to make the independent editorial judgments necessary to meaningfully cover issues of social and political importance without fear of retaliation or reprisal, provided that such statutes should also allow for reasonable restrictions on the time, place, and manner of student expression, and should neither authorize nor protect expression by students that is defamatory or invasive of privacy, is obscene or otherwise unlawful, or is reasonably anticipated to incite students to act unlawfully; safeguard the student media advisors who supervise student journalists; declares that criticism of government policies or programs, or the discussion of issues of social or political controversy, is protected speech in journalistic media, regardless of the medium’s school affiliation or sponsorship; urge school districts to adopt written student freedom of expression policies in accordance with their jurisdiction’s statutes; and ensure that student journalists have the right to exercise freedom of speech and of the press in school-sponsored media. It also urges secondary and postsecondary educational institutions to offer students meaningful opportunities in school-sponsored journalism to enhance their civic learning and to promote all students' media literacy.

2. Summary of the Issue that the Resolution Addresses

The Resolution addresses the great national anxiety over the civic readiness of young Americans, about escalating hostility toward journalism and journalists, and about the inability of all users of social media to differentiate between fact and fabrication.

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

Given the current national climate, it is timely and appropriate for states, territories, and tribes to take decisive action to fortify the quality of journalism education for the benefit of participants and consumers alike. Meaningful civic education requires that students feel safe and empowered to discuss issues of social and political concern in the responsible, accountable forum of journalistic media. This policy will allow the ABA to effectively advocate and educate on this issue.

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

No minority views or opposition have been identified.
RESOLVED, That the American Bar Association urges the Administration and the Congress to support review of the processes by which military records are corrected, discharge status petitions are considered, and the character of a veteran’s discharge reviewed, in order to enhance the accessibility, availability, and timeliness of such determinations, including through the recommendations set forth below;

FURTHER RESOLVED, That the American Bar Association urges the U.S. Department of Defense to examine how post-traumatic stress (PTS), traumatic brain injury (TBI), and military sexual trauma (MST) correlate to the specific types of misconduct resulting in less-than-honorable discharges;

FURTHER RESOLVED, That the American Bar Association urges the U.S. Department of Defense to create policies for discharge upgrade petition review that consider: (1) clear standards for establishing proof of a nexus between PTS, TBI, and MST and the resulting discharge status; (2) implementing an evidentiary rule that the initial burden of production by a veteran as to nexus may be satisfied where the veteran is diagnosed with PTS, TBI, or MST, provided that mitigating factors such as distinguished service in the field or aggravating factors such as particularly egregious conduct are considered; and (3) authorizing flexible application of standards in light of a nexus between the misconduct and the medical condition(s);

FURTHER RESOLVED, That the American Bar Association urges the U.S. Department of Defense to establish panels within each of the military services’ boards for correction of military records exclusively to specialize in expeditiously adjudicating discharge upgrade petitions involving PTS, TBI, or MST, comprised of members with appropriate medical expertise to recognize the potential nexus between the misconduct and these conditions, and to provide counsel to assist petitioners in the drafting and presentation of their cases.

FURTHER RESOLVED, That the American Bar Association urges the Office of the President and the U.S. Department of Veterans Affairs to explore whether certain executive powers such as clemency may be exercised consistent with existing discharge
upgrade procedures in order to expedite such procedures for certain veterans utilizing standards such as categorical eligibility.

FURTHER RESOLVED, That the American Bar Association urges Congress to allocate new and adequate funding to support the special panels and provision of petitioners' counsel for the panels and processes described above, as well as identifying new sources of funding to be administered by the U.S. Department of Veterans Affairs, Legal Services Corporation, and other relevant entities, to support civil legal aid and pro bono organizations in the delivery of free legal services to advise and assist petitioners, particularly those whose cases involve PTS, TBI, MST, and other mental health issues.

FURTHER RESOLVED, That the American Bar Association encourages the U.S. Departments of Defense and Veterans Affairs, state departments of veterans affairs, veteran service organizations, and all other stakeholders to undertake programs to identify veterans who may be eligible for discharge upgrades, notify those veterans and their caregivers of such opportunities, and to educate them about upgrade availability, the processes to petition for upgrade, and supportive resources to assist with obtaining such upgrades and the steps and stages involved.
Since World War II, the wide range of benefits available to our nation's veterans as provided by the federal government have derived from the Servicemen's Readjustment Act, otherwise known as the G.I. Bill of Rights. These benefits include medical services, vocational training, disability compensation, rehabilitation, housing, and education benefits. When enacting this statute, Congress gave the U.S. Department of Veterans Affairs (VA) responsibility for determining eligibility for these benefits based on the discharge status of the veteran. When implementing these standards by regulation, the result has been that the VA has rendered a significant proportion of veterans ineligible for benefits due to discharge status. While in many of these cases the ineligibility determination by the VA is consistent with Congress's intent to deny those "undeserving" of benefits due to misconduct in military service, often the underlying characterization of the veteran's discharge status may have been imposed without consideration of mitigating factors, including the role that mental traumas such as post-traumatic stress (PTS), traumatic brain injury (TBI), and military sexual assault trauma (MST), may have played in the misconduct. This may be especially true for veterans who served and were discharged in past eras when the role of these types of traumas was not well understood.

A just-released study by the U.S. Governmental Accountability Office (GAO) reviewed U.S. Department of Defense (DoD) data on discharges based on misconduct between 2011 and 2015. It found that a staggering 62 percent of those servicemembers discharged for misconduct had been diagnosed within the 2 years prior to separation with PTS, TBI, or "certain other conditions that could be associated with misconduct." And of this group of 57,141 veterans, 23 percent (13,283 veterans) received "Other Than Honorable" discharges that often rendered them ineligible for VA benefits. Compounding this problem, the GAO found significant deficiencies among the military services in screening for, and recognizing, the role that such injuries play in misconduct discharges.

While the GAO report makes clear that there are many improvements needed in the separation process to address the role of mental health injuries in the underlying misconduct, this proposed ABA Resolution advocates for examination of ways of improving the processes by which veterans may subsequently petition for, and potentially receive, upgrades to their discharge statuses, particularly in situations where service-connected traumas were a causal factor in the misconduct. By improving these processes, more veterans who may be otherwise deserving of access to federal benefits that have been previously denied due to discharge status will have the chance to have their cases reviewed as a matter of fundamental fairness and due process.

An Overview of Military Discharge Status

There are five basic types of discharge characterizations that determine eligibility for VA benefits:

Honorable: To receive an honorable discharge, a servicemember must have received a rating from good to excellent for his or her service. Servicemembers who meet or exceed the required standards of duty performance and personal conduct, and who complete their tours of duty, normally receive honorable discharges. However, one need not complete a term of service to receive an honorable discharge, provided the reason for involuntary discharge is not due to misconduct. For instance, servicemembers rendered physically or psychologically incapable of performing assigned duties normally have their service characterized as honorable, regardless of whether they incurred the condition or disability in the line of duty, provided they otherwise met or exceeded standards. Similarly, servicemembers selected for involuntary discharge due to a Reduction in Force (RIF) typically receive an honorable discharge, assuming their conduct while on active duty met or exceeded standards.

General (Under Honorable Conditions): General discharges are given to servicemembers whose performance is satisfactory but is marked by a considerable departure in duty performance and conduct expected of military members. Reasons for such a characterization of service vary, from medical discharges to misconduct, and are utilized by the unit commander as a means to correct unacceptable behavior prior to initiating discharge action (unless the reason is drug abuse, in which case discharge is mandatory). A commander must disclose the reasons for the discharge action in writing to the servicemember, and must explain reasons for recommending the service be characterized as General (Under Honorable Conditions). The servicemember is normally required to sign a statement acknowledging receipt and understanding of the notification of pending discharge memorandum. The person is also advised of the right to seek counsel and present supporting statements.

Other Than Honorable (OTH): An OTH is a form of administrative discharge. This type of discharge represents a departure from the conduct and performance expected of all military members. Recipients of OTH discharges are barred from reenlisting into any component of the Armed Forces including the Reserve and National Guard components.

Bad Conduct: A bad conduct discharge (BCD) can only be given by a court-martial (either Special or General) as punishment to an enlisted service-member. Bad conduct discharges are often preceded by a period of confinement in a military prison. The discharge itself is not executed until completion of both confinement and the appellate review process.

Dishonorable: A dishonorable discharge (DD) can only be handed down to a servicemember by a general court-martial. Dishonorable discharges are handed down for what the military considers the most reprehensible conduct. This type of discharge may be rendered only by conviction at a general court-martial for serious offenses (e.g., desertion, sexual assault, murder, etc.) that call for dishonorable discharge as part of the sentence.
There is another, much narrower type of discharge known as Clemency Discharge. By Presidential Proclamation 4313, President Ford created a procedure for those military personnel who resisted against the Vietnam War to receive a Presidential Pardon and have their punitive discharges changed to a Clemency Discharge. It also provided a path for those who left the country to return. If the military personnel fulfilled certain requirements of alternative service, they would also receive a Certificate of Completion from the Selective Service System. This type of discharge, and how it may be applied today, is discussed later in this report.

The VA has determined that servicemembers with “Honorable” and “General” discharges are presumptively eligible for benefits, though a general discharge status may result in a narrower range of benefits available. Conversely, those with “Bad Conduct” and “Dishonorable” discharge characterizations are presumptively ineligible for any VA benefits.

Those with OTH discharges face a more complicated situation. An OTH discharge is presumptively ineligible for VA benefits, but a veteran with an OTH discharge may seek a “Character of Service Determination” (CSD) from the VA. If the veteran has either a service-connected injury or illness, at least two years of active-duty service, or has received at least one Honorable discharge, the veteran will be able to enroll in the VA health care system. Based on this, the VA make a character of service determination to decide if the veteran’s service was “Honorable (for VA purposes),” “Honorable (for medical purposes),” or “Dishonorable” (and therefore ineligible for benefits). These veterans with an OTH discharge who qualify for VA healthcare are then eligible to submit claims for disability compensation pay and participation in educational, volunteer, and vocational rehabilitation programs.

It is important to note that the above eligibility determinations are made by the VA pursuant to regulation, in particular 38 CFR § 3.12. When enacting the G.I. Bill of Rights, Congress expressly rejected imposition of a standard requiring an honorable discharge for benefits eligibility and intended only that a dishonorable discharge status may be a bar to benefits. In short, the VA’s implementation of eligibility standards is considerably more restrictive than what Congress intended.

According to the DoD, out of 207,000 servicemembers discharged in 2014, of which, more than 18,000 were issued less-than-honorable discharges, including 4,143 other-than-honorable discharges, 637 bad conduct discharges, and 157 dishonorable discharges. Since 2000, 352,000 veterans received discharges ranging from general discharge to bad conduct and dishonorable discharge.

In a study conducted by the Veterans Legal Clinic of the Legal Services Center of Harvard Law School, along with Swords to Plowshares and the National Veterans Legal Services Program, a number of findings about the degree to which veterans are excluded from benefits by the VA based on ineligible discharge status (also known as “bad paper” discharges) were made:

---

4 Jim Salter, Some levels of military discharge can mean no benefits for former servicemembers, U.S. NEWS, Dec. 24, 2015.
The VA excludes 6.5 percent of veterans who served since 2001, compared to 2.8 percent of Vietnam era veterans and 1.7 percent of World War II era veterans.

Over 125,000 veterans who served since 2001 are unable to access basic veteran services, even though the VA has never completed an evaluation of their service.

Only 1 percent of servicemembers discharged in 2011 are barred from VA services due to Congress' criteria. VA regulations cause the exclusion of an additional 5.5 percent of all servicemembers.

Three out of four veterans with bad paper discharges who served in combat and who have PTS are denied eligibility by the Board of Veterans’ Appeals.

In 2013, VA Regional Offices labeled 90 percent of veterans with bad paper discharges as “Dishonorable”—even though the military chose not to dishonorably discharge them.

VA Regional Offices have vast disparities in how they treat veterans with bad paper discharges. In 2013, the Indianapolis Regional Office denied eligibility to each and every such veteran who applied—a denial rate of 100 percent—while the Boston Regional Office denied eligibility to 69 percent.

The VA’s policies cause enormous and unjustified differences depending on branch of service. Marine Corps veterans are nearly 10 times more likely to be ineligible for VA services than Air Force veterans. 5

In summary, thousands of veterans whose discharge characterizations below honorable are barred from benefits, even though the conduct leading to the discharge may have arisen from a service-connected mental condition, trauma, or injury. For these veterans, their only ability to have their discharges reviewed with consideration given to contributing exculpatory factors and evidence which may result in an upgrade of discharge status, is through a system administered by the DoD. This ABA resolution focuses on improvements to this system to ensure that veterans who have been excluded from VA benefits, especially those whose offenses may be connected to (PTS), (TBI), or MST, have the best possible opportunity to petition for upgrade of their discharge statuses and thereby receive the VA benefits that, in many cases, are desperately needed.

The Process for Upgrading Discharge Characterization

Congress has recognized that errors in discharge status determinations have long-term repercussions, including the above-noted loss of VA and other benefits. Thus following World War II, Congress established the Military Discharge Review Boards (MDRBs) and the Boards for Correction of Military Records (BCMRs). The intent of both boards is to correct any regulatory errors or inequities found in military personnel records, though their composition, authority, and procedures are different. While these boards annually correct or amend thousands of records, a significant majority of applications are denied for two primary reasons: First, petitions are reviewed subject to a presumption in favor of the initial determination of the military based on “regularity in the conduct of government affairs,” and second, former servicemembers often cannot adequately fully develop their cases and issues for review without

5 Veterans Legal Clinic et al., UNDER SERVED: HOW THE VA WRONGFULLY EXCLUDES VETERANS WITH BAD PAPER (March 2016).
the assistance of counsel or other competent support, which is not provided to them by the boards.

The following describes the structures and standards under the MDRB and BCMR processes:

**Military Discharge Review Boards:** Authorized under 10 U.S.C. § 1553, the Secretary of the service department concerned (Army, Navy/Marine Corps, Air Force or Coast Guard) has authority to upgrade characterizations of service and correct narrative reasons for discharges of former servicemembers through the each of the services' MDRBs. The MDRBs are composed of panels consisting of five senior military officers who review the discharge or dismissal of any former servicemember, not sentenced by a general court-martial, applying within 15 years from the date of discharge, and then recommend to the Secretary relief or denial of the application. The relief that may be granted involves upgrade of: Uncharacterized (Entry Level Separation); General (Under Honorable Conditions); Under Other Than Honorable Conditions; and Bad Conduct discharges issued by special court-martial. Further, the MDRBs may amend all incorrect narrative reasons or change them to current regulatory standards so long as the change represents an enhancement of the applicant's rights.

Matters not within the review authority of MDRBs are:
- applications of former members discharged for more than fifteen years;
- discharges issued by general court-martial (Bad Conduct or Dishonorable);
- applications to change reenlistment codes, separation program designator codes, the narrative reason for discharge from or to physical disability; or
- requests to recall or reinstate former servicemembers to active duty.

Cases involving any or all of these would be handled by the BCMRs, described below.

**Boards of Correction of Military Records:** Authorized under 10 U.S.C. § 1552, the Secretary of the service department concerned (Army, Navy/Marine Corps, Air Force or Coast Guard) has authority to review and correct military personnel records of currently serving and former servicemembers through the each of the services' BCMRs. The BCMRs are composed of panels consisting of three senior civil service personnel who make recommendations to the Secretary for relief or denial of the application. The relief that may be granted involves correction of any error or injustice in the service record of active-duty or discharged members, though subject to the following two requirements: Other administrative remedies, including MDRB review if applicable, must first be exhausted, and the application must be filed within three years of the date of discovery of the record for which relief is sought. That said, while the three year rule is to ensure that all pertinent records will be available for the BCMR's consideration, the Boards are authorized to waive the rule if doing so will advance the interests of justice.

In summary, a veteran whose discharge status has resulted in ineligibility for VA benefits must, in most cases, petition one or both of these boards for review of the conditions under which the discharge was issued. Given the number of affected veterans who may be eligible to petition for such upgrades, several recommendations are made here to improve this process to ensure the

---

* All special court-martials are reviewed for legal errors by the Military Review Courts. Thus, MDRBs, being administrative review boards, are allowed to consider only clemency issues and post-service conduct when reviewing Bad Conduct discharges.
best possible outcomes for them, particularly those for whom service-connected traumas may be causally linked to the conduct for which the discharge status was determined.

Review of Discharge Upgrade Petitions Must Include Consideration of the Connection Between Mental Traumas and Misconduct

The discharge upgrade process can be substantially improved by policies creating flexible and deferential standards with respect to certain mental health traumas for which there may be a nexus with the conduct that resulted in the less-than-honorable discharge characteristic. An example can be found in the changes to the way PTS evidence is handled in the discharge review process. Until 1980, PTS was not recognized as a medical diagnosis, but once this was established, some Vietnam-era and other veterans realized that there was a connection between their undiagnosed PTS symptoms and the misconduct resulting in their bad paper discharge. They subsequently applied for discharge upgrades, but their petitions were rejected on a near-categorical basis. Between 1998 and 2013, for example, the Army's BCMR reviewed 371 upgrade applications from OTH Vietnam veterans whose petitions were based on a PTS diagnosis, and granted upgrades for only 4.6 percent of them.7

Today there is a much better understanding of how PTS contributes to misconduct that might result in a bad paper discharge. It is likely that tens of thousands of veterans had undiagnosed PTS at the time of their discharge. One major study conducted by the VA estimates that 30.9 percent of Vietnam veterans have had PTS in their lifetimes.8 The growing understanding of the role of PTS in military misconduct has led to a growing criticism of the record correction boards’ near-categorical rejection of applications by Vietnam veterans with undiagnosed PTS. In September 2014, in response to the filing of proposed nation-wide class-action lawsuit on behalf of Vietnam veterans with PTS who received an OTH, then-Secretary of Defense Chuck Hagel directed the boards to reform their practices with respect to PTS. In his PTS Upgrade Memo (often referred to as the “Hagel Memo”), he ordered the boards to give “liberal consideration” to PTS-based applications for discharge upgrades. The Hagel Memo also requires military boards to create a comprehensive public messaging campaign to inform veterans of this new opportunity. The directives of the Hagel Memo profoundly changed the way PTS-based petitions have been handled by the boards, and a study conducted one year after the issuance of the Hagel Memo at the direction of the Vietnam Veterans of America and National Veterans Council for Legal Redress found that liberalization of PTS policies has resulted in a number of positive changes, though with areas of improvement still noted. Key findings were:

- The overall grant rate for all veterans applying for PTS-based discharge upgrades at the Army Board for the Correction of Military Records (ABCMR) has risen more than twelve-fold from 3.7 percent in 2013 to 45 percent.
- The grant rate for Vietnam veterans applying for PTS-based discharge upgrades at the ABCMR has increased more than ten-fold from 5.6 percent in 2013 to 59 percent.

---

7 Sundiata Sidibe and Francisco Unger, UNFINISHED BUSINESS: CORRECTING "BAD PAPER" FOR VETERANS WITH PTSD (2015), at 3.
- Vietnam veterans are the most numerous applicants (67 percent) and have a higher grant rate at the ABCMR (59 percent) than veterans of other conflicts.
- The ABCMR granted 67 percent of applications by a veteran with a PTS diagnosis (74/110) and 0 percent of applications by a veteran claiming to suffer PTS but without medical records establishing that diagnosis (0/54).
- Total PTS upgrade decisions across the military’s record correction boards have increased from approximately 39 per year to approximately five times that number.
- Of upgrades awarded by the ABCMR, 97 percent have been to General Under Honorable Conditions (72/74) and 3 percent have been to Honorable (2/74).9

As the Hagel Memo experience demonstrates, policies that recognize a connection between mental health trauma and conduct resulting in a bad paper discharge can greatly improve the ability for those petitioners to obtain the discharge upgrades they seek. This ABA resolution, encourages the DoD to both further enhance existing policies with respect to PTS to reduce the evidentiary burden of production on petitioners by better defining the nexus between the condition and the conduct, as well as considering mitigating factors where appropriate. This ABA resolution further encourages extension of liberalized policies under the Hagel Memo with respect to PTS to other areas of mental health trauma incurred in service, notably TBI and MST.

Discharge Upgrade Processes and Policies Must Include Flexible Application of Standards, Particularly in Cases Involving Mental Trauma like PTS, and Mitigating Factors like Distinguished Service

An alarming number of combat veterans, many highly decorated for valor under fire, have been dismissed with OTH status. For their sake in particular, the OTH process needs to be streamlined, made more efficient and user-friendly, and counsel should be provided for any veteran who has received, for example, a Purple Heart or medal for valor in combat. Precedent for this flows from President Gerald Ford’s decision during his last day in office to award clemency to any OTH veteran who was “wounded in combat or who received decorations for valor in combat in Vietnam…”

At the core of our common veneration of honor is the perception that it is embodied most in a person who voluntarily exposes him or herself to enemy fire to protect the unit. It is this volitional response to conditions that would panic many that we deem worthy of respect and commendation. For example, we were never consider awarding the Silver Star to a robot or a nuclear bomb.

Simple justice and national honor demand that anyone who risked his or her life defending others in battle, whose psyche was wounded by PTS, and whose heart broken by the loss of a beloved brethren to battle deserves a very special examination of whether the “misconduct” leading to the OTH owes its genesis to combat PTS, the more so because its potency is incubated within the warrior culture of denial that is calculated to produce the most lethal and resilient fighting machine on the planet. Support for this principle is apparent from the most elementary examination of PTS and recognition of how it disorders one’s proper brain functioning. A

9 Sidibe, supra note 6, at 2.
disordered brain leads to disordered behavior. Any finding of misconduct assumes that basic norms of expected volitional behavior apply when categorically the nature of this affliction indicates that assumption is fundamentally flawed.

**Combat PTS is a natural, predictable, and often inevitable wound of war that manifests itself in disoriented, erratic and unpredictable behavior.**

Emerging studies on PTS make clear that it is a natural, predictable, and inevitable by-product of war. Its signature effect is to unnerve one’s psyche which translates into disordering ones behavior. We know that a certain high percentage of our service-members will suffer this affliction in varying degrees of intensity. This is recognized in the U.S. Army’s FM 6-22.5 Combat and Operational Stress Control Manual for Leaders and Soldiers, 18 March 2009, recognizing the causal relationship between combat stress and “misconduct stress behaviors”: “Misconduct stress behavior is a form of COSR (Combat and Operational Stress Reaction) and most likely to occur in poorly trained, undisciplined units. Even so, highly trained, highly cohesive units, and individuals under extreme combat and operational stress may also engage in misconduct.... Excellent combat Soldiers that have exhibited bravery and acts of heroism may also commit misconduct stress behaviors.”

Consider too the honor culture that is bred in military service. From basic training to deployment, our soldiers are taught to embrace a warrior attitude that is dismissive of one’s wounds so that one can continue charging forward unwaveringly in battle. Warriors take pride in not heeding their wounds generally, but when it comes to a psychological condition, they are even more reticent about acknowledging that they may suffer from a destabilizing affliction. Combat PTS derives its most toxic effect from being incubated within a warrior’s culture for fear of shame. Indeed this very culture of being “combat resilient,” reinforced with denial and shame, becomes a catalyst for the progression of PTS.

Diagnosis is half the cure, yet our military culture has ingrained an expectation not to applying any diagnostics to one’s potential fallibility while in battle. In sum, we precondition our warriors to live in denial of the onset of this unnerving affliction, heightening the chances it will become progressively more disorienting and disorienting, leading to the erratic behavior the military then deems to be “misconduct.”

Examining these factors yields a fundamental question; namely, if we ask our bravest men and women to risk their all in combat knowing that many will end up with their lives profoundly disoriented by PTS, and if we have conditioned a culture of shame and denial that renders the onset of PTS more toxic, and if the predictable result of this chemistry is disoriented and erratic behavior under the throes of PTS, why then are we not exacting greater collective responsibility for the resulting “misconduct”?

**PTS must be evaluated through the lens of our collective responsibility for the collective values we inculcate and most honor**

Consider the foremost goals of our military. The key to developing an effective fighting machine is to train and acculturate the enlistees to adapt to a mindset that focuses upon collective
responsibility, coordination, responsibility, and execution. As a character in the movie about Vietnam, "Platoon," reflected, "When the machine breaks down, we break down."

From basic training to battle, our military machine exhorts our troops to forget personal needs and adapt a willingness to sacrifice all for the sake of the team and country. The concept of honor is the binding force and center of gravity for this allegiance to the collective whole and to the principle that "it is better to sacrifice your life for the sake of your brethren and your country than to survive the war." The core commitment is that when we go into battle, you will "leave no one behind" and your leadership will not leave you behind.

The end game is to create a military that functions with a collective set of values, conscience, commitment, and capacity to be unwaveringly lethal under fire. Desertion is the ultimate betrayal of this collective conscience.

The concept of "honor" provides the neuroplasticity to this collective conscience. It is our nation's core foundational principle. Our founders pledged to one another "our lives, our liberty and our sacred honour." Honor is recognized, celebrated and epitomized in the heroics of the most selfless and courageous actions of those whose exploits in battle are worthy of historic reckoning. We have created medals designed to single out and collectively salute the valor of those who embody this honor in battle by showing no regard for their personal safety and complete devotion to the needs of their battle buddies.

Why then, after we have applauded and awarded medals to heroes for their exploits in battle and their proven self-sacrifice in devotion to protect the collective whole, do we so swiftly disavow any collective responsibility when their conduct deteriorates and they act out erratically under the corrosive effects of combat PTS after years of sacrifice?

Is this not the ultimate form of desertion? Consider the repeated scenario that those working with traumatized veterans confront: You have risked your all countless times to protect your country and your battle buddies; you saved lives and protected others from harm. But now that the wounds of war have eroded your capacity to live with ordinary "order," we will wash our hands of any collective responsibility. Even though we know that this is a natural consequence of the disordering impact of repeated exposure to the unnerving pressures of combat? Even though the evidence is replete with countless soldiers who historically ended up with their lives disordered, disoriented, disaffected and alienated by the toxic effects of combat PTS? Even though we now know that the fundamental character of this uniquely unnerving affliction is to set one's life, one's thought processes, one's social life and one's psyche into chaos?

_The Reforms Called for in This Resolution Promote National Security Objectives by Reinforcing Collective Loyalty_

Consider the example below of a highly decorated combat veteran whose combat-related PTS directly contributed to his OTH discharge, which has since affected his life post-service:
"I have scars from my 178 firefights but none stab deeper than my feeling disowned and disgraced in receiving an Other Than Honorable discharge." — U.S. Army combat veteran, Garrett Lee Ferguson.

Garrett Ferguson served in a combat infantry division of the US Army for four years in both Iraq and Afghanistan. During that time, he underwent 178 gruesome firefights, in which he experienced unimaginably horrific situations. Many of his closest friends and fellow soldiers died by his side and in his arms during combat. On his wrist he carries a bracelet bearing the name of a soldier he was mentoring who was killed on his first day of combat by a sniper while under Garrett's charge. The boy had just turned 18. He rattles off the name of more than a half dozen of dear friends who fought with him who have since committed suicide. His best friend whom he considered the most "ferocious and effective warrior I've ever known" is now a chronic alcoholic in the throes of PTS, isolating himself in a stupor in Columbus, Ohio.

Garrett received multiple medals for valor under fire. Following his 170th firefight, his Sergeant Major informed Garrett he was nominating him for the Silver Star. He kept a blog of his repeated narrow escapes from the "valley of death." After one particularly hellish firefight in which he expended "more than 3000 rounds," he was decompressing and had taken medication prescribed by Army doctors to help him cope with the pressures of combat. He overheard a friend complaining to his girlfriend about feeling scared "shitless" and chided his buddy for causing his girlfriend stress and told him to "f-ing man up!" The soldier cold-cocked Garrett, who described his reaction thus: "I lost it and actually blacked out. I discovered I had stabbed him in the shoulder."

The Military Machine responded mercilessly. Garrett was told he would face a court-martial and potentially twenty-five years in Leavenworth Prison unless he agreed to an OTH discharge. Garrett has now been diagnosed with 100 percent disability for combat-connected PTS, but he does not qualify for the GI Bill despite having put his life on the line in nearly 200 battles. Though he personally saved countless lives, his command felt his life was not worth saving from the stigma, disgrace, and shame that the OTH status inflicts. As he stated, "I have scars from my 178 firefights but none stab deeper than my feeling disowned and disgraced in receiving an Other Than Honorable discharge."

He reflected "I understand now that I snapped because of PTS, but I often wonder if I wouldn't have snapped if I weren't on all the drugs the doctors put me on to help cope with the pressures of combat..."

He shares that due to his discharge he feels no respect for the government or authority and would never encourage a young person to join. "I would die rather than desert my country in battle. I can't deal with feeling now how my country has deserted me."

Like Garrett, many OTH combat veterans leave their service embittered and feeling betrayed. Many confess that they would never have served had they known how their country would treat them after the havoc the war wreaked in their lives. Moreover, they admit that not only would they never encourage a young person to join our military, but to the contrary they would aggressively discourage them and warn against it. The magnitude of this problem is underscored
in a recent study from USC, The State of The American Veteran: “One-third of pre-9/11 veterans and 43 percent of post-9/11 veterans with a non-honorable discharge status report they would never encourage someone to join the military. These veterans also report similar negative perceptions from civilians.”

In pondering the merits of this Resolution, consider the overarching impact upon national security of having tens of thousands of combat veterans disavow their loyalty to their country because of their treatment and warning young people not to follow in their footsteps.

The Military Services Should Establish Panels with Specialized Training in Mental Trauma and Provide Counsel for Petitioners

In discussions with the DoD and the Department of Veterans Affairs, the drafters learned that discharge upgrade petitions in cases involving PTS, TBI, and/or MST are accorded no special substantive or procedural treatment. All petitions are adjudicated by each service’s MDRB or BCMR using the same procedures and the same panels as all other cases. None of the panels that adjudicate these cases is purposefully staffed with members who have special competence in or understanding of the nexus between PTS, TBI, or MST and the associated administrative discharges.

Furthermore, neither the MDRBs nor BCMRs have any statutory duty to assist former servicemembers in correctly developing their cases to ensure that the issues are properly formulated. Complicating matters, the presumption of “regularity of government affairs” is applied in all decisions unless there is clear, substantial, creditable evidence presented to rebut the presumption. Thus it is easy to understand how an unrepresented petitioner, particularly one who may have experienced a mental health trauma, when confronted with a process requiring an understanding of complicated procedure combined with a legal evidentiary standard, faces very long odds in obtaining an upgrade that her or she may otherwise achieve if assisted by counsel.

In discussions with DoD and VA attorneys, the drafters were affirmed in the belief that one of the greatest difficulties veterans face when attempting to upgrade their discharges based on PTS, TBI, or MST is establishing a causal relationship between the petitioner’s trauma and the basis for the OTH discharges, due in most cases as much to the complexity of the MDRB/BCMR process and the absence of legal representation as to a lack of evidence. Logically, petitioners could more easily meet the Boards’ evidentiary standards, and thereby establish the requisite causal nexus, if at least one panel member is a mental health professional and if each petitioner has attorney help.

There is ample precedent for affording military respondents both an attorney and an adjudicative body that understands the nexus between mental health and misconduct. Each military service branch has Medical Evaluation Boards (MEBs) that consider whether a military member should be discharged for service-limiting physical or mental conditions. At MEBs, each respondent’s case is considered by a panel that includes medical professionals. Additionally, each respondent not only has a right to counsel, he or she is assigned a “disability counsel” free of charge.
Because discharge upgrade petitions based on PTS, TBI, and MST involve both behavioral and medical issues, they should be adjudicated in a manner appropriately reflecting their hybrid nature. This means that, while they continue to be considered by the MDRBs and BCMRs, they should be assigned to panels consisting of at least one mental health or medical professional who is familiar with the relationship between these forms of trauma and the kinds of misconduct in which they are often manifested. Additionally, because the evidence necessary to demonstrate this relationship is often difficult to establish, a practice similar to that of MEBs where counsel is available, should also be instituted. These changes to the current MDRB/BCMR process would not only provide greater and, therefore, more appropriate due process, but also timelier processing would be a collateral benefit.

Though the benefits of specialized panels and legal counsel are clear, provision of these will require funding from Congress. Expanding the MDRBs and BCMRs to add new panels will necessitate new funds in order to ensure that the work of existing panels will not be undermined by reallocation of existing funds, which would only shift the adjudicatory burdens from one group of veterans to another. Similarly, unlike with MEBs where funding exists to provide counsel through the various services' judge advocates general (JAG) offices, the MDRB and BCMR processes fall outside the jurisdiction of the JAG programs. Instead, a number of law firms, pro bono programs, and legal aid offices have begun providing discharge upgrade assistance to veterans in different parts of the country, and these projects have proven very effective. New sources of federal funding administered by the VA, Legal Services Corporation, and/or other appropriate entities, are critically necessary to ensure that those who petition for discharge upgrades, particularly those limited by mental health issues, have claims that are fully heard and receive the fullest extent of due process available.

President’s Pardon Power Should Be Considered as an Alternate Means of Upgrading Certain Types of Discharge Characterizations

Article II, Section 2, Clause 1 of the United States Constitution provides that the President of the United States shall have the power to grant reprieves and pardons for offenses against the United States. That Presidential power has been exercised on at least two occasions to address other than honorable discharges from military service. Perhaps the best known instance in which this power was exercised occurred in the 1970s during the Administration of President Gerald Ford. President Ford issued an executive order on September 16, 1974 by which veterans who received dishonorable discharges for desertion (absences without leave) could have those discharges upgraded to a clemency discharge upon application to a newly created board (the “Presidential

---

10 President Ford’s clemency program was designed to begin to heal the substantial divisions that existed in the United States over the Vietnam War. It not only addressed veterans who served in the war in the face of domestic strife and strong anti-war sentiments, but it provided a clemency opportunity for those who evaded the draft by not complying with the Selective Service law. At the time the uniqueness of the Vietnam War experience as contrasted with the experience of the country in fighting previous wars (e.g., World War II) called for a solution that held the promise of reunifying the country.
Clemency Board”) provided they complied with certain criteria including completing a period of alternative service set by the Board. Approximately 19,000 veterans applied for clemency.

The effect of President Ford’s clemency program was generally viewed as limited because a clemency discharge was not equivalent to an honorable discharge, and importantly it did not guarantee entitlement to VA benefits. Instead, the VA was simply not barred from considering the circumstances of a veteran’s initial less than honorable discharge in evaluating whether the veteran would be eligible for VA benefits. This enabled the VA to look beyond the clemency discharge in deciding whether to grant VA benefits to recipients of such a discharge. As a consequence, on his last day in office on January 19, 1977, President Ford exercised his pardon power for a second time by directing the Presidential Clemency Board to grant honorable discharges to veterans “who were wounded in combat or who received decorations for valor in combat in Vietnam and subsequently received [less than honorable] discharges.” This additional proclamation was intended to put qualifying veterans in the same position they would have been had they initially received honorable discharges.

Two days later, on January 21, 1977, President Jimmy Carter issued his own proclamation that applied to civilians who violated the Military Selective Service Act during the Vietnam War provided that their violations were non-violent and not subject to other exclusions. Then, two months later in March of 1977, President Carter ordered the creation of a Special Discharge Review Program (SDRP) by the DoD for the purpose of reforming the discharge upgrade process for Vietnam era veterans. However, later that year, in reaction to President Carter’s proclamation creating the SDRP, Congress passed legislation that effectively required previously existing review boards to review upgrades granted by the SDRP prior to granting VA benefits. This legislation had the effect of making the availability of benefits for veterans whose upgrades came about through an alternative upgrade process like the SDRP subject to a case-by-case review under existing benefits standards.

While the prospective application of the 1977 legislation has not been tested because no subsequent use of the pardon power for discharge upgrades on a large scale has occurred, the

---

12 Memorandum from Gerald R. Ford, President of the United States, to the Secretary of the Army, Secretary of the Air Force, and Secretary of the Navy (Jan. 19, 1977), http://www.presidency.ucsb.edu/ws/?pid=5576 [hereinafter Ford Memorandum].
15 Section 5303(e)(1)(A) limits the availability of benefits for veterans who receive discharge upgrades through the discharge review boards under 10 U.S.C. § 1553 by requiring a case-by-case review for benefits eligibility under “published uniform standards” that are “historically consistent with criteria for determining honorable service.” 38 U.S.C. § 5303(e)(1)(A) (2012).
legislation still may not apply to a Presidential pardon that directly provides for discharge upgrades because such a pardon does not involve the use of a review board like the SDRP. However, another provision of the legislation requires a case-by-case review for benefits in the event a veteran is “awarded a general or honorable discharge under revised standards for the review of discharges ... implemented subsequent to April 5, 1977” in the event those revised standards are “not made available to all persons administratively discharged” under other than honorable conditions. Whether this provision would apply to future exercises of the pardon power is not entirely clear and would likely depend on how the pardon power is exercised; for example, whether the President directly issues upgrades, sets up a review board, creates “revised standards,” and the like.

The exercise of the pardon power for the purpose of upgrading discharges by Presidents Ford and Carter has not been disputed, but the scope of veterans benefits that follow is dependent on how that power is exercised. A pardon of the type issued by President Ford on his last day of office that directly upgraded discharges to an honorable discharge for a narrow category of Vietnam era veterans is an example of the use of the pardon power in a way that presumably would provide those veterans receiving such a pardon with VA benefits. However, the exercise of the pardon power in a way that sets up an expedited review board for classes of veterans with less than honorable discharges, or which establishes revised standards for review of discharges (such as revised standards based on PTS, TBI and MST) may be subject to the 1977 legislation.

Accordingly, a coordinated effort by the Office of the President, including the Departments of Defense and Veterans Affairs, and Congress would obviate any legal risk with respect to the use of the pardon power, although the President has considerable authority standing alone to address military discharges. This authority is further bolstered by the President’s authority as the Commander-in-Chief. But, if the pardon power is exercised in conjunction with legislative concurrence, any risks can be eliminated. In addition, concurrence by Congress would more directly result in the authorization of the necessary VA budget for expansion of VA benefits to categories of veterans who previously were discharged from the services with other than honorable discharges (e.g., those afflicted with PTS, TBI, and MST).

The objective of this paragraph of the resolution is not to recommend specific parameters for the use of the pardon power, but instead to recommend consideration of its use in a coordinated administrative and legislative effort to expedite the consideration and resolution of discharge upgrades for veterans otherwise caught up in a system that is overloaded with cases, subject to excessive delay, and which often imposes burden and cost to individual veterans. For many veterans, the current procedures and processes present insurmountable obstacles, and their implementation often exacerbates the distress they experience, particularly if those veterans are suffering with PTS, TBI and MST. That distress is potentially heightened when those veterans had exemplary records of service prior to the conduct that resulted in their discharges.

---

16 Section 5303(e)(2)(A) requires a case-by-case review for benefit entitlement of persons discharged with an other than honorable discharge who were “awarded a general or honorable discharge under revised standards for the review of discharges ... as implemented subsequent to April 5, 1977,” where these revised standards were “not made applicable to all persons administratively discharged” under OTH conditions. 38 U.S.C. § 5303(e)(2)(A) (2012) (emphasis added).
Most importantly, an appropriate exercise of the pardon power has the potential of providing necessary care and benefits to at least certain categories of veterans, and to do so on an expedited basis. It also has the secondary benefit of materially improving the handling of discharge upgrades and benefit requests by non-qualifying veterans because a significant reduction in the case overload could occur if a significant number of veterans are eliminated from that caseload through the exercise of the pardon power. Lastly, the appropriate use of the pardon power in upgrading discharges would greatly improve the chances for full integration of veterans who receive those upgrades back into their communities and into the employment market because the stigma of their discharge status would be eliminated or significantly diminished.

In summary, the exercise of the pardon power in a coordinated way with other actions would be quintessentially presidential. It will significantly advance access to justice for those who volunteered to risk their lives, their fortunes and—what's more—their “sacred honor” defending our liberty. It will establish greater administrative efficiencies to ensure our heroes receive the healing, help and support they have earned by shedding their blood, having their psyches wounded and their hearts broken with the unspeakable losses and horrors they experienced in combat. And it will promote a collective consciousness that the wounds of service should be judged deferentially to minimize the chances that those who have never put their lives in harm's way may view combat veterans dismissively because of their OTH discharge status.

Veterans Who May be Eligible for Discharge Upgrades Need to be Identified and Reached with Information and Resources

Hundreds of thousands of veterans are barred from VA benefits due to discharge characterizations that render them presumptively ineligible—approximately 260,000 from the Vietnam War alone, and a significant percentage of these may be able to establish a claim based on PTS. Although the Hagel Memo set out a requirement that the DoD develop a messaging and outreach campaign, early data show that information about the availability of the discharge upgrade process has not yet been widely received. According to a 2015 Senate Armed Services Committee report, only 201 veterans applied to the boards at that point since issuance of the Hagel Memo. This small number of applicants strongly suggests that more needs to be done to identify veterans with bad paper, inform them of the September 2014 directive, or communicate how they apply for discharge upgrades. The ABA encourages the DoD, its component branches, and the VA to engage in significant, coordinated outreach efforts to identify eligible veterans and provide information about the standards for upgrade as well as supportive resources to help them submit applications to the boards.

Respectfully submitted,

Nanette M. DeRenzi and Dwight L. Smith, Co-chairs
ABA Commission on Veterans Legal Services

Steven J. Lepper, Chair
ABA Standing Committee on Legal Assistance for Military Personnel

August 2017
GENERAL INFORMATION FORM

Submitting Entity: Commission on Veterans Legal Services and the Standing Committee on Legal Assistance for Military Personnel

Submitted By: Dwight L. Smith and Nanette M. DeRenzi, Commission Co-Chairs; Steven J. Lepper, Standing Committee Chair.

1. Summary of Resolution(s).

Recommending review and improvement of the processes by which military records are corrected, discharge status petitions are considered, and the character of one’s discharge is reviewed.

2. Approval by Submitting Entity. Friday, May 12, 2017 (by both entities)

3. Has this or a similar resolution been submitted to the House or Board previously? No

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? This Resolution reinforces, and is fully consistent with, a number of existing Association policies related to Access to Justice for low-income and/or military-connected individuals and families, including policy adopted at the 2017 Midyear urging the identification and removal of legal barriers between veterans and their due benefits, services, and treatment.

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

6. Status of Legislation. (If applicable) No legislation is pending on the specific, broad principles of the resolution, but congressionally-proposed changes to the Servicemembers Civil Relief Act, Uniformed Services Employment and Re-employment Rights Act, proposals to increase funding for homeless veteran service programs that include legal services, and proposals to expand the Department of Veterans Affairs authority to support direct legal services, etc., are each examples of legislation intended to remove barriers for veterans in accessing their rights and benefits.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. Implementation will be undertaken by ABA Governmental Affairs working with the Commission and Standing Committee, as well as other military- and veteran-focused ABA entities, most notably the Standing Committee on Armed Forces Law, GPSolo Military Law Committee, Coordinating Committee on Veterans Benefits and Services, Commission on Homelessness and Poverty, Standing Committee on Legal Aid and Indigent Defendants, and the Center for Pro Bono.
8. **Cost to the Association.** (Both direct and indirect costs) Adoption of the Resolution implicates no cost to the Association.

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

10. **Referrals.** Input and support is being sought from relevant ABA entities involved with military- and veteran-related legal issues such as those identified as member entities of the Military Lawyers Coordinating Committee and the Coordinating Committee on Veterans Benefits and Services.

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

   - **Dwight L. Smith**
     1636 S. Cincinnati Avenue
     Tulsa, OK 74119-4418
     Tel: (918) 585-1446
     Email: dls@dlstulsalaw.com

   - **Steven J. Lepper**
     Association of Military Banks of America
     28 Blackwell Park Lane, Ste 203
     Warrenton, VA 20186
     Ph: 540-347-3305
     Cell: 540-621-5670
     Email: steven.j.lepper@gmail.com

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

   - **Nanette M. DeRenzi**
     1401 K Street N.W. Suite 900
     Washington, DC 20005
     Tel: (202) 626-8505; Cell: (703) 717-1104
     Email: nderenzi@jeffersonconsulting.com

   - **Dwight L. Smith**
     1636 S. Cincinnati Avenue
     Tulsa, OK 74119-4418
     Tel: (918) 585-1446; Cell: (918) 630 6813
     Email: dls@dlstulsalaw.com

   - **Steven J. Lepper**
     28 Blackwell Park Lane, Ste 203
     Warrenton, VA 20186
     Ph: 540-347-3305; Cell: 540-621-5670
     Email: steven.j.lepper@gmail.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

Recommending review and improvement of the processes by which military records are corrected, discharge status petitions are considered, and the character of one's discharge is reviewed.

2. Summary of the Issue that the Resolution Addresses

Discharge upgrades are necessary for many veterans to ensure that they receive the full range of benefits to which they should otherwise be entitled. Historically, it was not well understood how post-traumatic stress, traumatic brain injury, and sexual assault trauma could give rise to conduct that would subsequently result in less-than-honorable discharge, which has left a large population of veterans without access to benefits due to discharge status arising from these forms of injury.

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

The proposed policy position makes a number of recommendations about how the discharge upgrade process could be improved in order to ease the burden on petitioners whose post-traumatic stress, traumatic brain injury, and/or sexual assault trauma was connected to conduct that resulted in less-than-honorable discharge. These include better recognition of the connection between the injuries and discharge; establishing rebuttable presumptions based on such connection and consideration of mitigating factors; creating specialized panels that deal specifically with petitions based on these conditions; and exploring alternative means, such as clemency, for the affected veteran population. The policy also calls for funding to create specialized panels and support free legal services for petitioners, as well as improving education and outreach to veterans who may be eligible for discharge upgrades but not aware of the process.

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

No minority views or opposition have been identified. The proponents have consulted with the offices of general counsel within the Department of Defense and Department of Veterans Affairs to ensure that the proposed policy does not run counter to programs and policies within those agencies to address discharge upgrade process issues.
RESOLVED, That the American Bar Association urges all courts to develop plans of action to make de-biasing training an important part of both initial judicial training and continuing judicial education; and

FURTHER RESOLVED, That the American Bar Association urges local and state bar associations to work with courts to offer de-biasing training to judicial officers free of cost and at the convenience of the courts.
All of us have implicit biases—biases that are in our subconscious, which we use to make decisions. Like the rest of us, the judiciary and its staff have these biases. Recognizing them and being trained to overcome these biases is an important way to help the judiciary and its staff to fairly administer the cases that come before them.

I. Courts Should Make Judicial De-Biasing Training A Priority.

Understanding implicit bias is the first step to implementing de-biasing strategies. Judges should be trained on how to recognize and address their own biases to ensure that litigants and counsel are afforded a fair opportunity to be heard solely on the merits of their cases.

A. Implicit Bias in General

Everyone carries with them implicit biases formed throughout their life. While sometimes innocuous and generally subconscious, these biases inform our everyday lives. They help us make decisions, for better or for worse, and they are ever present in our interactions with others. The judiciary is not immune. Judges, after all, are only human and come to the bench with implicit biases that could, if unabated, leak into their decision-making. As with everyday individuals, judges likely do not notice their own biases and may not fully understand the effect such biases have on their decision-making.

As Kathleen Nalty of Kathleen Nalty Consulting LLC in Denver explained, “Today’s biases are common and mundane and that is why people don’t always notice them.”

Nalty explains in her book Going All In on Diversity and Inclusion: The Law Firm Leader’s Playbook, that there are five types of implicit bias: availability bias, attribution bias, anchoring bias, confirmation bias, and affinity bias. During a 2016 ABA webinar, Nalty explained these five types of bias as follows:

1. **Availability bias** – This is where we automatically employ information that is top of mind or what’s most likely based in our available memory. Nalty explained how availability bias can play out in the practice of law: You are at a deposition and a woman of color walks into the room and you assume she is a court reporter or client and instead she is the lawyer on the case.

2. **Attribution bias** – “We tend to give people in our inner group second chances and people in our outer group less of the benefit of the doubt and we judge them by stereotypes,” Nalty said. “An example of attribution

---


2 Id.
bias would be making a judgment about someone’s ability to be a successful lawyer based on the law school they attended.”

3. **Anchoring bias** – This is a type of bias in which the initial valuation influences the final valuation without you knowing it, and is most common in supervisors evaluating employees. Women typically grade themselves harder on self-evaluations than men, Nalty said, which could have an anchoring effect in which the supervisor will grade them harder as well.

4. **Confirmation bias** – This type of bias allows you to naturally pay more attention to things that confirm your beliefs and disregard things that are contrary to your beliefs.

5. **Affinity bias** – This is the one to focus on with respect to diversity and inclusion efforts in the legal profession, Nalty said. “Affinity bias is at the heart of the hidden issues that are fueling higher attrition rates – who is being invited to networking events, who gets the key assignments, who is getting mentored, who is getting promotions, the benefits of the best intangibles and who is falling through the cracks?” “Affinity bias supports gravitating more toward people who are more like you, which causes you to underinvest in people who are different from you in the organization.”

Implicit bias has been a bit of a hot button issue lately. In 2015-16, a special ABA commission, called the Diversity and Inclusion 360 Commission, published numerous articles addressing implicit bias, for example within law firms, in attorney-client relationships, and during arbitrations. There are also a number of scholarly and popular articles on implicit bias in everyday life and in specific situations.

Recognizing the impact of implicit bias, the U.S. Department of Justice announced on June 27, 2016, that “it will train all of its law enforcement agents and prosecutors to recognize and address implicit bias as part of its regular training curricula.” The DOJ’s statement recognized that: “The Department of Justice has a responsibility to do everything we can to ensure that our criminal justice system is fair and impartial,” and that “[s]ocial

---

3. Id.
science has shown that all individuals experience some form of implicit bias but that the effects of those biases can be countered through training. 19

B. Implicit Bias in the Judiciary and Efforts to Address It

“A judge’s task to be the most impartial member of the legal system is a great responsibility for any single person to carry, but nearly impossible when it comes to implicit bias.” 10 But Judges are not immune from implicit bias. A study by Cornell Law School and Vanderbilt Law School professors and a U.S. Magistrate Judge found that these words rung true. 11 It concluded that “judges harbor the same kinds of implicit biases as others; that these biases can influence their judgment; but that given sufficient motivation, judges can compensate for the influence of these biases.” 12

As Sixth Circuit Court of Appeals Judge Bernice B. Donald recognized during an August 2016 ABA program, “Implicit Bias and De-Biasing Strategies: A Workshop for Judges and Lawyers,” all judges “view[] the functions of [their] job through the lens of [their] experiences, and all of [them] are impacted by biases, stereotypes and other cognitive functions that enable [them] to take shortcuts in what [they] do.” 13 The ABA workshop featured a 10-minute training video for judges titled “Hidden Injustice: Bias on the Bench.” 14 The video was produced by the ABA’s Diversity and Inclusion 360 Commission and is said to be the “first tool of its kind to raise awareness and provide practical tips for America’s judge on the damage caused by implicit bias and the necessary steps to combat it.” 15 In addition to the video, the ABA plans to publish a book for judges titled: De-Biasing Strategies for the Judiciary. 16

Stakeholders have begun efforts to address implicit bias in the judiciary. For example, the National Consortium on Racial and Ethnic Fairness in the Courts provided implicit bias training to judges and court staff in 14 states and the District of Columbia. 17 The National Center for State Courts reported that some jurisdictions formed racial fairness task forces and commissions. 18 Individual jurisdictions are also providing implicit bias training to judges and court staff. 19 However, implicit bias training and de-biasing training are by no means universal and should be implemented in all jurisdictions.

9 Id.
12 Id.
14 Id.
15 Id.
16 Id.
C. De-Biasing Strategies

A recent ABA article recommends six strategies to “mitigate implicit bias and successfully ‘de-bias[.]’”\textsuperscript{20} It recommends that judges re-evaluate their implicit biases and undertake these strategies on a weekly basis:

1. \textit{Becoming Aware}

Before trying to de-bias, judges should address their current implicit biases to identify the stereotypes that affect, often unknowingly, personal perceptions of the character and qualities of different races and ethnic groups. There are Implicit Association Tests available online, prepared by Harvard University.\textsuperscript{21} These tests will shed light on biases judges may have.

2. \textit{Individuation}

Individuation is a strategy that “involves gathering very specific information about a person’s background, tastes, hobbies and family so that your judgment will consider the particulars of that person, rather than group characteristics.”\textsuperscript{22} In the judicial context, it is a reminder that judges should evaluate the persons before them as individuals and not as parts of particular racial, socio-economical, or other groups or categories.

3. \textit{Stereotype Replacement}

Stereotype replacement requires that judges by present and mindful. It involves judges actively thinking about their actions to ensure that they can recognize when they are being stereotypical and, once recognized, can think through “the reasons and factors leading to th[e stereotypical] response and actively replace th[e] biased response with an unbiased one.”\textsuperscript{23} Coupled with taking and understanding the Implicit Association Tests, it becomes much easier to begin to see biases in action, and address them.

4. \textit{Counter-Stereotypic Imaging}

In conjunction with stereotypic replacement is counter-stereotypic imaging, where a judge can reflect on and supplant her stereotypes by “think[ing] of examples of famous people that show the stereotype to be inaccurate.”\textsuperscript{24} These counter-stereotypic people can serve as “concrete examples that demonstrate the inaccuracy of stereotypes.”\textsuperscript{25} Individuals can also endeavor to use personal connections in counter-stereotypic imaging.

\textsuperscript{20} Id.
\textsuperscript{21} https://implicit.harvard.edu/implicit/takeatest.html.
\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} Id.
\textsuperscript{25} Id.
5. **Taking Perspective**

A strong de-biasing strategy is to try to place oneself in the shoes of the person whom you are stereotyping. "Think about how you would feel to have your abilities questioned, or to be viewed as lazy and potentially violent on the basis of your appearance."\(^{26}\) Doing so promotes an understanding of the fairness of stereotypes and biases and forces the individual to step into the shoes of those they are judging.

6. **Increasing Opportunities for Contact**

The final de-biasing strategy urges individuals to go outside of their comfort zones and to branch out to groups unlike themselves. It asks people to "[a]ctively seek out situations where you are likely to have positive interactions with stereotyped groups."\(^{27}\) This strategy is incredibly important for judges who may encounter stereotyped groups in unfavorable situations (i.e., when the individuals are in front of them on criminal charges or facing a civil lawsuit).

II. **Bar Associations Should Help Defray The Cost of De-Biasing Training.**

As we know, funding for the judiciary is already strained. Consequently, while de-biasing training should become an integral part of the training afforded judges and court staff, it is important to provide low- or no-cost resources. Consequently, the ABA will continue its efforts regarding implicit bias training to provide resources, and encourages state and local bar associations to develop resources that the judicial may use as well. Examples might include video series that could be streamed on the web, and only have to be produced once. Law firms might assist with the cost or production of such videos as part of their commitment to pro bono service.

III. **Courts Should Plan for Initial and Refresher Training.**

Again, while there are courts that have provided implicit bias training, it is important to recognize that this training is part of a process. Consequently, it is important to have periodic refresher trainings or, at the least, periodic reminders to the judiciary and its staff to keep implicit bias and the de-biasing strategies in their minds.

Respectfully submitted,

Anna M. Romanskaya, Chair
Young Lawyers Division
August 2017

\(^{26}\) *Id.*

\(^{27}\) *Id.*
1. **Summary of Resolution(s).** This resolution urges courts nationwide, federal and state, to make training on implicit bias and de-biasing strategies for both new and existing members of the judiciary priority. As expressed in a recent ABA article: “A judge’s task to be the most impartial member of the legal system is a great responsibility for any single person to carry, but nearly impossible when it comes to implicit bias. Implicit bias in judges may alter the way justice is delivered in a courtroom, including the ruling on the admissibility of evidence, sentencing, instructions or how they interact with others.” While the Judicial Division held an informative and helpful workshop for judges and lawyers on recognizing and working against implicit bias at the ABA’s Annual Meeting, more should be done nationally and in a uniform manner to ensure all judicial officers are aware of the potential for implicit judicial bias and are taught de-biasing strategies.

2. **Approval by Submitting Entity.** This resolution was approved on February 4, 2017 by the ABA Young Lawyers Division Assembly. This resolution was also approved by the ABA Judicial Division’s Council and the ABA Section of Litigation’s Council on January 15, 2017.

3. **Has this or a similar resolution been submitted to the House or Board previously?** No.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** The resolution is consistent with and supports ABA Goals II, III, and IV. This resolution is also consistent with Resolution 116, approved by the House of Delegates at the 2016 Annual Meeting, which, in relevant part, amended Principle 6(C) of the *ABA Principles for Juries and Jury Trials* to state that the court should “[i]nstruct the jury on implicit bias and how such bias may impact the decision making process without the juror being aware of it.” Similarly, this resolution is consistent with, and indeed is a logical follow-up to Resolution 115, approved by the House of Delegates at the 2016 Annual Meeting, which, in relevant part, urged all federal, state, territorial and local legislative bodies and governmental agencies to “support ongoing implicit bias training for teachers, administrators, school resource officers, police, juvenile judges, prosecutors, and lawyers and others involved with students.”
5. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A

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

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. The Young Lawyers Division would provide support to local and state bar associations on implementing the policy in a way that works for each state and federal court by providing consultation, advice, and the ABA Commission of Diversity and Inclusion 360 materials.

8. Cost to the Association. (Both direct and indirect costs). There are no known costs to the Association.

9. Disclosure of Interest. (If applicable) There are no known conflicts of interest.

10. Referrals.
    On January 15, 2017, the ABA Judicial Division and the ABA Section of Litigation agreed to cosponsor this resolution.

    The Young Lawyers Division will disseminate this resolution to all interested ABA entities, including the Section of Civil Rights and Social Justice, Center for Racial and Ethnic Diversity, Commission on Racial and Ethnic Diversity in the Profession, Coalition on Racial and Ethnic Justice, Council for Racial and Ethnic Diversity in the Educational Pipeline, Commission on Hispanic Legal Rights & Responsibilities, Commission on Sexual Orientation and Gender Identity, Commission on Disability Rights, and Commission on Women in the Profession, among others.

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

    Lauren Marsicano
    ABA YLD Litigation Committee Co-Chair
    Marsicano + Leyva PLLC
    777 Brickell Ave., Suite 500
    Miami, FL 33131
    (305) 721-2917
    lauren.a.marsicano@gmail.com
Shenique A. Moss
Assembly Speaker, ABA Young Lawyers Division
Wayne County Commission
500 Griswold Street, Ste. 810
Detroit, MI 48226
(313) 224-0909
sheniquemoss@gmail.com

Andrew M. Schpak
House of Delegates Representative, ABA Young Lawyers Division
Barran Liebman LLP
601 SW 2nd Avenue, Ste. 2300
Portland, OR 97204
(503) 276-2156
aschpak@barran.com

Myra L. McKenzie-Harris
House of Delegates Representative, ABA Young Lawyers Division
Wal-Mart Stores, Inc. Legal Department
2101 SE Simple Savings Drive, MS 0745
Bentonville, AR 72716
(479) 277-2710
myra.mckenzie@walmartlegal.com

Lacy L. Durham
House of Delegates Representative, ABA Young Lawyers Division
Deloitte Tax, LLP
2200 Ross Avenue, Ste 1600
Dallas, TX 75201
(212) 840-1926
lacydurhamlaw@yahoo.com

Stefan M. Palys
House of Delegates Representative, ABA Young Lawyers Division
Stinson Leonard Street LLP
1850 N. Central Avenue, Suite 210
Phoenix, AZ 85004-4584
(602) 212-8523
stefan.palys@stinson.com
12. **Contact Name and Address Information.** (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

Lauren Marsicano  
ABA YLD Litigation Committee Co-Chair  
Marsicano + Leyva PLLC  
777 Brickell Ave., Suite 500  
Miami, FL 33131  
(305) 721-2917  
lauren.a.marsicano@gmail.com

Stefan M. Palys  
House of Delegates Representative, ABA Young Lawyers Division  
Stinson Leonard Street LLP  
1850 N. Central Avenue, Suite 210  
Phoenix, AZ 85004-4584  
(602) 212-8523  
stefan.palys@stinson.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges courts nationwide, federal and state, to make training on implicit bias and de-biasing strategies for both new and existing members of the judiciary a priority.

2. Summary of the Issue that the Resolution Addresses

As expressed in a recent ABA article: “A judge’s task to be the most impartial member of the legal system is a great responsibility for any single person to carry, but nearly impossible when it comes to implicit bias. Implicit bias in judges may alter the way justice is delivered in a courtroom, including the ruling on the admissibility of evidence, sentencing, instructions or how they interact with others.” While the Judicial Division held an informative and helpful workshop for judges and lawyers on recognizing and working against implicit bias at the ABA’s Annual Meeting, more should be done nationally and in a uniform manner to ensure all judicial officers are aware of the potential for implicit judicial bias and are taught de-biasing strategies.

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

The proposed policy would address the above issue by incorporating implicit bias training into the judicial training process, both upfront and through periodic refreshers, to ensure that judicial officers are able to understand, recognize, and combat their judicial biases when serving as impartial members of the legal system.

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

The only opposition which has been voiced to the submitting entity is the potential for added costs and time constraints with implementation. These have been addressed by recommending that the training use free tools already prepared by the ABA and by recommending that the training be a priority and not a requirement.
RESOLUTION

RESOLVED, That the Association policies set forth in Attachment 1 to Report 400A, dated August 2017, are archived and no longer considered to be current policy of the American Bar Association and shall not be expressed as such.

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

FURTHER RESOLVED, That the Board of Governors may act to reactivate policies when the House of Delegates is not in session.
30. Certification Programs  
   Standing Committee on Specialization  
   August, 2007

54. Sunshine Act  
   Section of International Law  
   August, 2007

61. Civil Rights Act  
   Commission on Women  
   August, 2007
30. Certification Programs
Standing Committee on Specialization
August, 2007 (Report 100-07AM100)

RESOLVED, That accreditation by the American Bar Association be continued for the lawyer specialty certification programs as reorganized and described as follows:

The accredited Criminal Law, Civil Law and Family Law Trial Advocacy lawyer specialty certification programs sponsored by the National Board of Trial Advocacy of Wrentham, Massachusetts which is now a division of a new organization called the National Board of Legal Specialty Certification; and

The accredited Social Security Disability Law lawyer specialty certification program sponsored by the National Board of Trial Advocacy of Wrentham, Massachusetts be transferred to the National Board of Social Security Disability Advocacy, which is a division of a new organization called the National Board of Legal Specialty Certification.

54. Sunshine Act
Section of International Law
August, 2007 (Report 118B-07AM118B)

RESOLVED, That the American Bar Association supports the International Trade Commission's ("ITC") adoption of procedures relevant to its compliance with the Government in the Sunshine Act, 5 U.S.C. § 552(b), that:

1. Support the ITC's interpretation of the term "meeting" under the Government in the Sunshine Act to permit Commissioners to meet in a non-public manner as a body to discuss aspects of a particular investigation, prior to making a decision;

2. Urge the ITC to employ, when applicable, Exemptions Four (discussion of confidential information) and Ten (formal agency adjudication) of the Government in the Sunshine Act; and

3. Upon announcing their votes to the public, the Commissioners individually explain the rationale underlying the Commissioner's vote.

61. Civil Rights Act
Commission on Women
August, 2007 (Report 302-07AM302)

RESOLVED, That the American Bar Association urges Congress to amend Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e), and federal age or disability employment discrimination laws to ensure that in claims involving discrimination in compensation, the statute of limitations runs from each payment reflecting the claimed unlawful disparity.
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 to be presented to the House at the Annual Meeting. See Report 400 attached as Appendix A. The Resolution now before the House affects policies 10 years old or older. The Board of Governors or House of Delegates adopted these policies in 2007.

To accomplish this objective, the Division for Policy and Planning compiled an index of such policies set forth in the ABA Policy and Procedures Handbook. Some 61 policies were thus identified. Each entity, which had been the original sponsor, was sent a list of the policies it had sponsored. In cases where the original sponsoring entity was no longer in existence, the policies were sent to an appropriate successor entity. The 32 entities to which the policies were sent are listed in Appendix B.

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

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

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

Respectfully submitted,

Mary T. Torres, Secretary
American Bar Association

August 2017
APPENDIX A
Approved by the House of Delegates, August, 1996

Report No. 400
The resolution was approved as amended as follows:

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

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

1. All policies adopted by the House of Delegates shall be reviewed, with the exception of uniform state laws, model codes, guidelines, standards, ABA Constitution and Bylaws, and House Rules of Procedures.

2. To phase in this process, the periodic mandated review will in the first year, 1997, address policies 20 years old or older; in the second year policies 15 years old or older; and in the third year and each year thereafter, policies 10 years old or older.

3. Prior to each Annual meeting, a list of affected policies will be complied and circulated to the original sponsoring entities and to each member of the House identifying those policies which will be placed on the archival list.

4. At each Annual Meeting, a recommendation will be submitted to archive certain policies and the House will vote on the recommendations.

5. Those policies which are not archived will be subject to review every ten years thereafter.

6. Any policy 10 years old or older that is not contained within the ABA Policy and Procedures Handbook (The Green Book) or any Legislative Issues list published by the ABA and that has not been subject to the review set forth in these principles is considered to be archived.

7. This archival process is not intended to affect the rights of any member of the House to propose amendments or rescission of any policies as presently permitted under House rules.

FURTHER RESOLVED, That an approved Uniform Act promulgated by the National Conference of Commissioners on Uniform State Law (NCCUSL) shall be placed on the archival list only when such an Act has been removed from the active list of the NCCUSL.
The entities below reviewed and recommended disposition of the policies contained in the report:

Section and Divisions

Antitrust Law
Civil Rights and Social Justice
Criminal Justice
Health Law
Intellectual Property Law
International Law
Judicial Division
Legal Education and Admission to the Bar
Litigation
Public Contract Law
Real Property, Trust and Estate Law
Senior Lawyers Division
Tort Trial and Insurance Practice Section

Standing Committees

Client Protection
Gun Violence
Legal Assistance for Military Personnel
Medical Professional Liability
Paralegal
Public Education
Specialization

Commissions

Disability Rights
Domestic Violence
Homelessness and Poverty
Law and Aging
Rule of Law Initiative
Women in the Profession
Youth at Risk

State, Local and Territorial Bar Associations

Bar Association of the District of Columbia
Colorado Bar Association
Florida Bar
New York State Bar Association
New York City Bar Association
1. Independence of the Judiciary
   Colorado Bar Association
   February, 2007

2. Pro Bono Work
   New York State Bar Association
   February, 2007

3. Judicial Compensation
   The Florida Bar
   February, 2007

4. Paralegal Education Programs
   Standing Committee on Paralegals
   February, 2007

5. Sherman Act
   Section of Antitrust Law
   February, 2007

6. Domestic Violence Programs
   Criminal Justice Section
   February, 2007

7. Prison Litigation Reform Act
   Criminal Justice Section
   February, 2007

8. Community Supervision
   Criminal Justice Section
   February, 2007

9. Community Detention
   Criminal Justice Section
   February, 2007

10. Graduated Sanctions
    Criminal Justice Section
    February, 2007

11. Policy Governing Criminal Records
    Criminal Justice Section
    February, 2007
12. Collateral Consequences of Conviction
   Criminal Justice Section
   February, 2007

13. Criminal Justice Professionals
    Criminal Justice Section
    February, 2007

14. Model Rules of Professional Conduct
    Standing Committee on Client Protection
    February, 2007

15. Problems of Homeless Individuals
    Commission on Homelessness and Poverty
    February, 2007

16. Traditional Property Rights
    Standing Committee on Gun Violence
    February, 2007

17. Civil Legal Assistance
    Standing Committee on Legal Assistance for Military Personnel
    February, 2007

18. Children of Deployed American Military Personnel
    Standing Committee on Legal Assistance for Military Personnel
    February, 2007

19. Foreign Investment
    Section of International Law
    February, 2007

20. Terrorism Risk Insurance
    Tort Trial and Insurance Practice
    February, 2007

21. Civil Action for Medical Negligence
    Standing Committee on Medical Professional Liability
    February, 2007

22. At-Risk Children Treatment Facilities
    Commission on Youth at Risk
    February, 2007
23. Goal IX
   Section of Civil Rights and Social Justice
   February, 2007

24. Model Code of Judicial Conduct
   Judicial Division
   February, 2007

25. Federal Rules of Criminal Procedure
   Criminal Justice Section
   February, 2007

26. Advice-of-Counsel Defense
   Section of Intellectual Property Law
   February, 2007

27. Mandatory Retirement
   New York State Bar Association
   August, 2007

28. Presidential Executive Order
   New York City Bar Association
   August, 2007

29. Partisan Politics
   Bar Association of the District of Columbia
   August, 2007

31. Paralegal Programs
   Standing Committee on Paralegals
   August, 2007

32. Federal Bankruptcy Code
   Section of Real Property, Trust and Estate Law
   August, 2007

33. Law School Standards
   Legal Education and Admission to the Bar
   August, 2007

34. Approval Standards in Law Schools
   Legal Education and Admission to the Bar
   August, 2007

35. Law School Rules of Procedure
   Legal Education and Admission to the Bar
   August, 2007
36. Foster Care
   Commission on Youth At Risk
   August, 2007

37. Permanent Placement of LGBTQ Youth
   Commission on Youth At Risk
   August, 2007

38. Early Intervention Youth Services
   Commission on Youth At Risk
   August, 2007

39. Law Firm Contingency Plans
   Senior Lawyers Division
   August, 2007

40. Drug and Alcohol Health Insurance
    Health Law Section
    August, 2007

41. Vento Homeless Assistance Act
    Commission on Homelessness and Poverty
    August, 2007

42. Accessible Website for the Disabled
    Commission on Disability Rights
    August, 2007

43. Civil Protection Order Cases
    Commission on Domestic and Sexual Violence
    August, 2007

44. Rule of Law
    ABA Rule of Law Initiative
    August, 2007

45. Corporate Citizenship
    ABA Rule of Law Initiative
    August, 2007

46. Victims of Trafficking
    ABA Rule of Law Initiative
    August, 2007

47. Principles on Judicial Independence and Fair and Impartial Courts
    ABA Rule of Law Initiative
    August, 2007
48. International Standards on Judicial Independence
   ABA Rule of Law Initiative
   August, 2007

49. Disaster Preparedness
   Section of Litigation
   August, 2007

50. No Child Left Behind Act
    Standing Committee on Public Education
    August, 2007

51. CLE Requirements for U.S. Armed Forces
    Section of Public Contract
    August, 2007

52. State Secret Privilege
    Section of Civil Rights and Social Justice
    August, 2007

53. Natural Disasters
    Section of Civil Rights and Social Justice
    August, 2007

55. Medical Legal Partnership
    Health Law Section
    August, 2007

56. Emergency Care System
    Health Law Section
    August, 2007

57. Voting for the Disabled
    Commission on Law and Aging
    August, 2007

58. Medicaid Eligibility
    Criminal Justice Section
    August, 2007

59. United Nation Convention
    Section of International Law
    August, 2007

60. Civil Trial Practice Standards
    Section of Litigation
    August, 2007
GENERAL INFORMATION FORM

Submitting Entity: Secretary of the Association

Submitted By: Mary T. Torres

1. **Summary of Resolution:**

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

2. **Approval by Submitting Entity:**

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

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

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

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

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

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

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

6. **Status of Legislation:**

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

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

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

None.

9. Disclosure of Interest: N/A.

10. Referrals.

The policies identified in the Resolution with Report have been circulated to 32 entities as noted in Appendix B and also will be sent to the Government Affairs Office.

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

Mary T. Torres  
Law Offices of Mary T. Torres  
201 Third Street NW Suite #500  
Albuquerque, NM 87102  
(505) 944-9030  
mtt@marytorreslaw.com

Richard Collins  
American Bar Association  
321 North Clark Street  
Chicago, Illinois 60610  
312/988-5162  
Richard.Collins@americanbar.org

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

Mary T. Torres  
Law Offices of Mary T. Torres  
201 Third Street NW Suite #500  
Albuquerque, NM 87102  
(505) 944-9030  
mtt@marytorreslaw.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

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

2. Summary of the Issue which the Recommendation Addresses

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

3. An Explanation of How the Proposed Policy will Address the Issue

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

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

None at this time.
RESOLVED, That the Association policies adopted in 1997 which were previously
considered for archiving but retained as set forth in Attachment 1 to Report 400B dated
August 2017, are archived and no longer considered to be current policy of the American
Bar Association and shall not be expressed as such.

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

FURTHER RESOLVED, That the Board of Governors may act to reactivate policies
when the House of Delegates is not in session.
   Section of Litigation
   February, 1997

17. Health Insurance
    Ohio State Bar Association
    February, 1997

24. Electronic Commerce
    Section of Business Law
    August, 1997

27. Hague Convention
    Section of Family Law
    August, 1997

38. Political Contributions
    New York City Bar Association
    August, 1997
Section of Litigation  
February, 1997(Report 116-97MM116)  

RESOLVED, That the American Bar Association expresses its general support, with the exceptions noted, to the proposed revisions to Rule 23 of the Federal Rules of Civil Procedure recommended by the Advisory Committee on Civil Rules in April 1996 and approved by the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States for publication and public comment:  
1. The Association supports:  
   (a) proposed revision 23 
   (b)(4) that would authorize settlement classes in the circumstances specified in the proposed Rule change, and provided that adequate due process protections are provided for the parties; (b) proposed revision 23(e) that would add a hearing requirement to the Rule;  
   (c) proposed revisions 23(b)(3)(A) and (B) that would focus on the size of the individual claims in determining their viability without certification and the individual interest of class members in maintaining separate actions;  
   (d) proposed revision 23(b)(3)(C) that would add "maturity" as a factor in determining the appropriateness of a class under the Rule; and  
   (e) proposed revision 23(c) that would require a certification decision "when practicable" after the action has been brought.  
2. The Association would oppose the proposed revision to Rule 23(b)(3)(F), which would provide for a balancing of probable relief to individual class members with the costs and burdens associated with class litigation unless the Rule would further provide for the consideration of the deterrent effect of accumulating small recoveries.  
3. The Association supports proposed revision 23(f) that would permit discretionary interlocutory appeals of class certification decisions.  

17. Health Insurance  
Ohio State Bar Association  
February, 1997(Report 8B-97MM8B)  

RESOLVED, That the American Bar Association urges the repeal of Section 217 of the Health Insurance Portability and Accountability Act of 1996, effective January 1, 1997, which criminalizes certain asset transfers made for the purpose of qualifying for Medicaid benefits.
24. Electronic Commerce  
Section of Business Law  
August, 1997 (Report 114-97AM114)  

RESOLVED, That the American Bar Association:  

1. Supports electronic commerce as an important means of commerce among nations;  

2. Supports commerce through electronic networks that are global in nature and require international communication and cooperation among all nations, including developing nations;  

3. Encourages continued discussion in open international forums to remove unnecessary legal and functional obstacles to electronic commerce;  

4. Encourages the private sector, governments, and international organizations to cooperate to establish a legal framework within which global electronic commerce can flourish in an environment that provides appropriate legal protection to all interested parties, while eliminating unnecessary legal and functional barriers to electronic commerce; and  

5. Encourages the private sector to develop self-regulating practices that will protect the rights of individuals and promote the public welfare.

27. Hague Convention  
Section of Family Law  
August, 1997 (Report 117-97AM117)  

RESOLVED, That the American Bar Association urges:  

1) the Senate of the United States to give its advice and consent to the ratification of the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, the final text of which was adopted by the Hague Conference on Private International Law on October 19, 1996; and  

2) the Congress of the United States to enact legislation to permit the United States to fully and uniformly implement this Convention which concerns custody matters and other measures taken for the protection of children and their property.
RESOLVED, That the American Bar Association:

1) condemns the conduct of lawyers making political campaign contributions to, and soliciting political campaign contributions for, public officials in return for being considered eligible by public agencies to perform professional services, including municipal finance engagements;

2) calls upon bar associations, lawyer disciplinary agencies and the judiciary to enforce, when applicable to prohibit this conduct, existing Rules of Professional Conduct, such as Model Rule 7.2(c) prohibiting a lawyer from giving “anything of value to a person for recommending the lawyer’s services”;

3) condemns the conduct of public officials considering as eligible for engagement by public agencies to perform professional services, including municipal finance engagements, only those lawyers who make political campaign contributions to, or solicit political campaign contributions for, public officials; and

4) calls upon legislative bodies, judicial rule-making agencies, bar associations, lawyer disciplinary agencies and public agencies to enact or adopt and enforce laws, rules and regulations that will discourage the conduct condemned in these resolutions.

FURTHER RESOLVED That the House of Delegates requests the President of the American Bar Association to appoint a task force:

a) to review issues related to political campaign contributions made or solicited by lawyers and effective solutions thereto, including the “pay-to-play” rule proposed by The Association of the Bar of the City of New York in its Recommendation 10D dated August 1997;

b) to determine whether additional professional standards, laws or procedures relating to political campaign contributions are necessary and desirable, including the conduct of lawyers making significant political campaign contributions to judicial candidates before whom the lawyers appear; and

c) to submit for consideration by the House of Delegates at its meeting in August 1998 recommendations as to any additional professional standards, laws or procedures found to be necessary and desirable in the form of amendments to the Model Rules of Professional Conduct, aspirational ethical standards of other appropriate measures.
Pursuant to Report 400, adopted by the House of Delegates in 1996, the Association is annually required to review policies adopted by the House of Delegates that have been in existence ten years or more. See Report 400 attached as Appendix A. Those policies that are outdated, duplicative, inconsistent with current policy or no longer relevant are to be archived. The review process operates from the premise that any policy on the list will be archived unless there is a request to remove it from the archival list and retain it as current policy. Once archived, it may no longer be cited as current policy. An archived policy is not considered to be rescinded, but rather is retained by the Association for historical purposes only.

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

This year, the policies adopted in 1997 which were previously considered for archiving but retained were reviewed. The process of reviewing previously retained policies began in spring of 2012 and will continue annually. To accomplish this objective, the Division for Policy and Planning compiled an index of such policies set forth in the ABA Policy and Procedures Handbook. Some 38 policies were thus identified. Each entity, which had been the original sponsor, was sent a list of the policies it had sponsored. In cases where the original sponsoring entity was no longer in existence, the policies were sent to an appropriate successor entity. The 24 entities to which the policies were sent are listed in Appendix B.

Each entity was asked to identify which of the policies should be archived and which should be retained as current policy. In addition, each was requested to identify and include a recommended disposition for any other policies that had been generated which were not in the materials they received. Those retained as current policy through this process will be reviewed again in 10 years. Retained policies are listed in Appendix C.

Respectfully submitted,

Mary T. Torres, Secretary
American Bar Association
August 2017
APPENDIX A
Approved by the House of Delegates, August, 1996

Report No. 400
The resolution was approved as amended as follows:

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

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

1. All policies adopted by the House of Delegates shall be reviewed, with the exception of uniform state laws, model codes, guidelines, standards, ABA Constitution and Bylaws, and House Rules of Procedures.

2. To phase in this process, the periodic mandated review will in the first year, 1997, address policies 20 years old or older; in the second year policies 15 years old or older; and in the third year and each year thereafter, policies 10 years old or older.

3. Prior to each Annual meeting, a list of affected policies will be complied and circulated to the original sponsoring entities and to each member of the House identifying those policies which will be placed on the archival list.

4. At each Annual Meeting, a recommendation will be submitted to archive certain policies and the House will vote on the recommendations.

5. Those policies which are not archived will be subject to review every ten years thereafter.

6. Any policy 10 years old or older that is not contained within the ABA Policy and Procedures Handbook (The Green Book) or any Legislative Issues list published by the ABA and that has not been subject to the review set forth in these principles is considered to be archived.

7. This archival process is not intended to affect the rights of any member of the House to propose amendments or rescission of any policies as presently permitted under House rules.

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

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

Section and Divisions

- Administrative Law and Regulatory Practice
- Business Law
- Civil Rights and Social Justice
- Criminal Justice
- Dispute Resolution
- Family Law
- Intellectual Property Law
- International Law
- Judicial Division
- (JD) National Conference of Administrative Law Judiciary
- Labor and Employment Law
- Litigation
- Taxation
- Tort Trial and Insurance Practice Section
- Young Lawyers Division

Standing Committees

- Lawyer Referral and Information Service

Commissions

- Domestic Violence
- Immigration
- Law and Aging
- Youth at Risk

State, Local and Territorial Bar Associations

- Bar Association of the District of Columbia
- New Jersey State Bar Association
- New York City Bar Association
- Ohio State Bar Association
APPENDIX C
Retained Policies

1. Federal Benefits Program
   Judicial Division
   February, 1997

2. Government Programs addressing Domestic Violence
   Commission on Domestic Violence
   February, 1997

3. Amendments to the Bankruptcy Code
   Standing Committee on Lawyer Referral and Information Service
   February, 1997

4. Incarceration Alternatives
   Criminal Justice Section
   February, 1997

5. Alternative Dispute Resolution
   Section of Dispute Resolution
   February, 1997

6. Capital Punishment
   Section of Civil Rights and Social Justice
   February, 1997

7. Digital Electronic Environment
   Section of Intellectual Property Law
   February, 1997

8. Employment Qualification
   Section of International Law and Practice
   February, 1997

9. Trade Agreements
   Section of International Law and Practice
   February, 1997

10. State Central Hearing Agency
    National Conference of Administrative Law Judiciary
    February, 1997

11. Due Process Protocol
    Section of Labor and Employment Law
    February, 1997
13. Alternative Work Schedule  
   Young Lawyers Division  
   February, 1997  

14. Legal Services  
   Young Lawyers Division  
   February, 1997  

15. Child Abuse and Neglect  
   Young Lawyers Division  
   February, 1997  

16. Pension Plans  
   New Jersey State Bar Association  
   February, 1997  

18. Naturalization Process  
   Commission on Immigration  
   August, 1997  

19. Physician Assisted Suicide  
   Commission on Law and Aging  
   August, 1997  

20. Immigration Rights  
   Commission on Law and Aging  
   August, 1997  

21. Health Care for Children  
   Commission on Youth at Risk  
   August, 1997  

22. Congressional Review  
   Section of Administrative Law and Regulatory Practice  
   August, 1997  

23. Remand Proceedings  
   Section of Administrative Law and Regulatory Practice  
   August, 1997  

25. Victims’ Rights  
   Criminal Justice Section  
   August, 1997  

26. Criminal Justice Standards
28. Improving Communications
   Section of Civil Rights and Social Justice
   August, 1997

29. Needle Exchange Programs
    Section of Civil Rights and Social Justice
    August, 1997

30. Inter-American Convention
    Section of International Law
    August, 1997

31. Interpreters
    Judicial Division
    August, 1997

32. Attorney Client Privilege
    Section of Litigation
    August, 1997

33. Awards
    Section of Taxation
    August, 1997

34. Termination of Partnerships
    Section of Taxation
    August, 1997

35. Interest in a Partnership
    Section of Taxation
    August, 1997

36. Revisions to the Code of Federal Regulations
    Tort Trial and Insurance Practice Section
    August, 1997

37. Military Administration Personnel
    Bar Association of the District of Columbia
    August, 1997
GENERAL INFORMATION FORM

Submitting Entity: Secretary of the Association

Submitted By: Mary T. Torres

1. Summary of Resolution:

In an ongoing effort to bring the Association’s policies up to date, this resolution consists of the review of policies adopted in 1997 which were previously considered for archiving but retained. A policy that is archived is not rescinded. It is retained for historical purposes, but cannot be expressed as a current position of the ABA. The Secretary recommends that the policies set forth in Attachment 1 of the resolution be archived.

2. Approval by Submitting Entity:

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

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

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

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

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

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

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

6. Status of Legislation (If applicable)

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

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

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

Costs of Printing.

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

N/A

10. **Referrals.**

The policies identified in the Resolution with Report have been circulated to 28 entities as noted in Appendix B, and also will be sent to the Government Affairs Office.

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

Mary T. Torres  
Law Offices of Mary T. Torres  
201 Third Street NW Suite #500  
Albuquerque, NM 87102  
(505) 944-9030  
mtt@marytorreslaw.com

Richard Collins  
American Bar Association  
321 North Clark Street  
Chicago, Illinois 60610  
312/988-5162  
Richard.Collins@americanbar.org

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

Mary T. Torres  
Law Offices of Mary T. Torres  
201 Third Street NW Suite #500  
Albuquerque, NM 87102  
(505) 944-9030  
mtt@marytorreslaw.com
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   This resolution archives Association Policies adopted in 1997 which were previously considered for archiving but retained. A policy that is archived is not rescinded. It is retained for historical purposes, but cannot be expressed as a current position of the ABA.

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

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

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

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

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

   None at this time
<table>
<thead>
<tr>
<th>Resolution Title</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amendments to the Constitution and Bylaws</td>
<td>11-1 through 11-4</td>
</tr>
<tr>
<td>American Judicial System, Standing Committee on</td>
<td>104</td>
</tr>
<tr>
<td>Archiving, Resolutions with Reports on</td>
<td>400A-B</td>
</tr>
<tr>
<td>Beverly Hills Bar Association</td>
<td>104</td>
</tr>
<tr>
<td>Children and the Law, Center on</td>
<td>117A-C</td>
</tr>
<tr>
<td>Civil Rights and Social Justice, Section of</td>
<td>113, 115, 117A-C, 118A-B, 119A-B</td>
</tr>
<tr>
<td>Client Protection, Standing Committee on</td>
<td>110</td>
</tr>
<tr>
<td>Constitution and Bylaws, Report of the Standing Committee on</td>
<td>11A</td>
</tr>
<tr>
<td>Criminal Justice Section</td>
<td>104, 106, 112A-G, 115, 118B</td>
</tr>
<tr>
<td>Disability Rights, Commission on</td>
<td>113</td>
</tr>
<tr>
<td>Dispute Resolution, Section of</td>
<td>103</td>
</tr>
<tr>
<td>Domestic and Sexual Violence, Commission on</td>
<td>115</td>
</tr>
<tr>
<td>Election Law, Standing Committee on</td>
<td>117B</td>
</tr>
<tr>
<td>Executive Director, Report of the</td>
<td>3</td>
</tr>
<tr>
<td>Gun Violence, Standing Committee on</td>
<td>118A-B</td>
</tr>
<tr>
<td>Hawaii State Bar Association</td>
<td>104</td>
</tr>
<tr>
<td>Hispanic Legal Rights and Responsibilities, Commission on</td>
<td>115</td>
</tr>
<tr>
<td>Homelessness and Poverty, Commission on</td>
<td>119A</td>
</tr>
<tr>
<td>Immigration, Commission on</td>
<td>115</td>
</tr>
<tr>
<td>Intellectual Property Law, Section of</td>
<td>114A-C</td>
</tr>
<tr>
<td>Interest on Lawyers Trust Accounts, Commission on</td>
<td>110</td>
</tr>
<tr>
<td>International Law, Section of</td>
<td>109A-B, 115</td>
</tr>
<tr>
<td>Judicial Division</td>
<td>116, 121</td>
</tr>
<tr>
<td>King County Bar Association</td>
<td>104</td>
</tr>
<tr>
<td>Law and Aging, Commission on</td>
<td>105, 113</td>
</tr>
<tr>
<td>Law Student Division</td>
<td>108</td>
</tr>
<tr>
<td>Lawyer's Role in Assuring Every Child's Right to a High-Quality Education</td>
<td>117A-C</td>
</tr>
<tr>
<td>Legal Aid and Indigent Defendants, Standing Committee on</td>
<td>106, 115</td>
</tr>
<tr>
<td>Legal Assistance for Military Personnel, Standing Committee on</td>
<td>120</td>
</tr>
<tr>
<td>Litigation, Section of</td>
<td>104, 115, 116, 118A-B, 121</td>
</tr>
<tr>
<td>Massachusetts Bar Association</td>
<td>115</td>
</tr>
<tr>
<td>New York City Bar Association</td>
<td>115</td>
</tr>
<tr>
<td>New York County Lawyers Association</td>
<td>115</td>
</tr>
<tr>
<td>Paralegals, Standing Committee on</td>
<td>100</td>
</tr>
<tr>
<td>President, Report of the</td>
<td>1</td>
</tr>
<tr>
<td>Professional Discipline, Standing Committee on</td>
<td>110</td>
</tr>
<tr>
<td>Public Education, Standing Committee on</td>
<td>117A-B, 119B</td>
</tr>
<tr>
<td>Real Property, Trust and Estate Law, Section of</td>
<td>113</td>
</tr>
<tr>
<td>Scope and Correlation of Work, Report of the Committee on</td>
<td>4</td>
</tr>
<tr>
<td>Scope Nominating Committee, Report of the</td>
<td>8</td>
</tr>
<tr>
<td>Senior Lawyers Division</td>
<td>107</td>
</tr>
<tr>
<td>Specialization, Standing Committee on</td>
<td>111</td>
</tr>
<tr>
<td>Stanley, Timothy, ABA Member</td>
<td>101</td>
</tr>
<tr>
<td>State and Local Government Law, Section of</td>
<td>118A-B, 119A-B</td>
</tr>
<tr>
<td>Tort Trial and Insurance Practice Section</td>
<td>102A-C, 104</td>
</tr>
<tr>
<td>Treasurer, Report of the</td>
<td>2</td>
</tr>
<tr>
<td>Veterans Legal Services, Commission on</td>
<td>119A, 120</td>
</tr>
</tbody>
</table>