RESOLVED, That the American Bar Association urges federal, state, and territorial legislative bodies and governmental agencies, including departments of corrections, and the military that impose or implement capital punishment, to:

(1) promulgate execution protocols in an open and transparent manner and allow public comment prior to final adoption; and,

(2) require disclosure to the public, to condemned prisoners facing execution, and to courts all relevant information regarding execution procedures, including but not limited to:

   a. the steps to be followed in preparation for, during, and after an execution,
   b. the qualifications and background of execution team members, and
   c. details about any drugs to be used, including the names, manufacturers or suppliers, doses, expiration date(s), and testing results concerning use of the drugs.

(3) require that an execution process, including the process of setting IVs, be viewable by media and other witnesses from the moment the condemned prisoner enters the execution chamber until the prisoner is declared dead or the execution is called off;

(4) create and maintain contemporaneous records of what transpires during the execution, including but not limited to the drugs administered, the timing of administration, and any complications, errors or unanticipated events;

(5) disclose the entirety of records and logs on the execution process upon order of the court or as otherwise required in discovery or by law upon request of a death-sentenced prisoner, the prisoner’s counsel, or successors; and,

(6) provide an immediate, thorough, and independent review of any execution where the condemned prisoner struggles or appears to suffer, where the execution is otherwise prolonged, or where the execution deviates from the adopted protocols and regulations concerning the execution process.
REPORT

In the modern era of capital punishment, secrecy has surrounded many aspects of the imposition of a death sentence in the United States. States have sought to shield not just the identities of executioners and other members of the execution team, but the details of those individuals’ basic qualifications, pertinent information about the drug formulas used in lethal injections, and the protocols that instruct how the execution is to be carried out. They have long used blinds and curtains to control which aspects of executions the witnesses can view. Even certain lethal injection drug combinations sometimes contribute to hiding what is happening by paralyzing the condemned prisoners, thereby preventing witnesses from knowing what the prisoners are actually experiencing.1

However, the past few years have been particularly noteworthy, as many states have increased efforts to cloak their execution procedures in secrecy. Many states have passed statutes that broaden the categories of information that will be kept confidential, exempting information about execution practices and procedures from public disclosure requirements and exempting departments of corrections from the public rulemaking requirements of administrative procedures act laws. The result of this troubling trend is that many jurisdictions have made secret information that may have once been readily available concerning their execution procedures, and other states are trying to do so.

The American Bar Association is concerned about this movement toward increased secrecy and regressive policies surrounding the processes by which prisoners are executed by lethal injection, particularly given the gravity of the authority exercised by state and federal governments in the execution of prisoners. This resolution reflects and complements the ABA’s longstanding policy that “death penalty cases [should be] administered fairly and impartially, in accordance with due process.”2

I. Background

A. Declining Drug Availability

The vast majority of U.S. executions since 1976 have been carried out by lethal injection using a three-drug formula, where the first drug is supposed to anesthetize the prisoner; the second drug causes paralysis of all voluntary muscles; and the third drug stops the heart, causing death.3 In 2008, the Supreme Court decided Baze v. Rees, upholding Kentucky’s three-drug execution formula as constitutional.4 Nevertheless, challenges to lethal injection have continued over the

1 Of the 1,215 executions imposed using lethal injection since 1976, 1,135 included administration of a paralyzing agent. Once the paralytic is administered, the condemned prisoner is unable to move, speak or otherwise communicate any distress s/he may experience. See generally, Lethal Injection, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/lethal-injection-moratorium-executions-ends-after-supreme-court-decision?did=1686&scid=64 (last visited Nov. 18, 2014).
2 ABA House of Delegates Resolution 107 (Feb. 1997).
six years since the *Baze* decision, in part due to substantial changes in execution protocols and states’ increasing difficulties securing reliable sources for and obtaining execution drugs.\(^5\)

Sodium pentothal (thiopental) was used as the first drug in the three-drug formula and also as a stand-alone agent in one-drug procedures.\(^6\) When the sole U.S. manufacturer of thiopental, Hospira, temporarily ceased manufacture of the drug in 2010, thiopental became scarce—not only for corrections departments looking for execution drugs, but also for hospitals and other health care providers.\(^7\) In response to the limited availability of thiopental, some corrections departments began to import unregulated thiopental from overseas sources.\(^8\) Hospira permanently ceased manufacture of thiopental for sale in the United States in January 2011, and since then there have been no Food and Drug Administration (FDA) -approved forms of the drug available in this country.

The unavailability of thiopental set off a chain reaction, as states scrambled to identify and stockpile other execution drugs.\(^9\) Many states turned to pentobarbital to replace thiopental in both three-drug and one-drug formulas. However, in July 2011, the Danish manufacturer of pentobarbital instituted distribution controls designed to prevent the sale of its drugs for use in executions.\(^10\) Since then, additional pharmaceutical companies have taken similar steps to prevent departments of corrections from obtaining their drugs for use in executions. As a result, states continue to struggle to identify and obtain drugs for use in executions and have turned to purchasing pentobarbital produced in compounding pharmacies that mix small batches of drugs “made-to-order” from the raw ingredients (called active pharmaceutical ingredients). Other states have developed protocols that use the benzodiazepine drug Midazolam in two-drug and three-drug formulas. The use of compounded drugs and the reliance on novel drug combinations mark a new era of experimentation in execution procedures. When corrections departments turned to these new drugs and new drug formulas, they simultaneously and dramatically increased the secrecy surrounding their execution procedures.

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B. Expanding Secrecy Policies

In response to changes in drug availability, states have taken measures to decrease access to information about their lethal injection practices. Some states have heightened secrecy about lethal injection by passing confidentiality statutes that broaden the scope of information that is deemed secret, while others have simply begun to refuse to disclose information about lethal injection practices without passing statutes to authorize confidentiality.

1. Secrecy Statutes

In order to safeguard their access to execution drugs, some states have added—or are currently seeking to add—categories of confidential information to their previously existing frameworks, which had previously been focused only on protecting the identities of execution team members. These new statutes make confidential the identities of pharmacies, pharmacists, and pharmaceutical distributors who make and/or supply the drugs and other materials intended for use in executions. Some states, like Missouri, have actually defined the drug suppliers as confidential and privileged members of the execution team; others simply state that drug manufacturers and suppliers’ identities shall be confidential.

Georgia’s secrecy statute, for example, defines pertinent information about the drugs and equipment used in an execution as a “confidential state secret,” subject to the highest level of secrecy, such that the public, condemned prisoners, and even the courts are prevented from viewing the information. Other statutes do not apply the designation of state secret, but nonetheless make the pertinent information unavailable through discovery in the course of litigation and unavailable even for in camera review by the courts. This type of secrecy surrounding the sources and production of drugs used in executions causes opacity regarding the quality and effectiveness of the drugs to be used.

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11 MO. ANN. STAT. § 546.720(2-3) (2007) (“The identities of members of the execution team, as defined in the execution protocol of the department of corrections, shall be kept confidential. Notwithstanding any provision of law to the contrary, any portion of a record that could identify a person as being a current or former member of an execution team shall be privileged and shall not be subject to discovery, subpoena, or other means of legal compulsion for disclosure to any person or entity, the remainder of such record shall not be privileged or closed unless protected from disclosure by law.”).

12 See, e.g., ARIZ. REV. STAT. ANN. § 13-757(c) (2011) (“The identity of executioners and other persons who participate or perform ancillary functions in an execution and any information contained in records that would identify those persons is confidential and is not subject to disclosure pursuant to title 3—9, chapter 1, article 2.”); FLA. STAT. § 945.10(1)(g) (2014) (“Information which identifies an executioner, or any person prescribing, preparing, compounding, dispensing, or administering a lethal injection” is confidential.).

13 GA. CODE ANN. § 42-5-36(d)(2) (2013) (“The identifying information of any person or entity who participates in or administers the execution of a death sentence and the identifying information of any person or entity that manufactures, supplies, compounds, or prescribes the drugs, medical supplies, or medical equipment utilized in the execution of a death sentence shall be confidential and shall not be subject to disclosure under Article 4 of Chapter 18 of Title 50 or under judicial process. Such information shall be classified as a confidential state secret.”).

14 See, e.g., 22 OKLA. STAT. ANN. tit. 22 § 1015(B) (2011) (“The identity of all persons who participate in or administer the execution process and persons who supply the drugs, medical supplies or medical equipment for the execution shall be confidential and shall not be subject to discovery in any civil or criminal proceedings.”).
2. Non-Disclosure Statutes

Other states have passed somewhat narrower statutes that exempt information about execution drugs from disclosure under state public records laws. Under these statutory schemes, the information may still be subject to disclosure through discovery in litigation—perhaps subject to a protective order—but the state is not required to make the information publicly available. For example, the Tennessee execution protocol calls for administration of a compounded drug in a one-drug formula; and under Tennessee law, information “identifying an individual or entity” involved in executions “shall be treated as confidential and shall not be open to public inspection.” 15 This information includes prison employees and private contractors who are part of the execution team and individuals or entities that procure or supply drugs and other materials for use in executions. 16 Arizona has a similar statute that exempts from disclosure confidential, identifying information about persons and entities who participate directly or in ancillary ways. 17 In Colorado, it is not statutory but case law that dictates that information about drug inventory in the possession of the Department of Corrections and the source of any drugs is not subject to public disclosure. 18

3. Refusal to Disclose Pertinent Information

Some states have refused to disclose information about execution procedures, despite having little or no legal support for the refusal. For example, Texas has neither a secrecy statute that prevents the disclosure of execution information, nor a non-disclosure statute that specifically exempts execution information from disclosure under the state’s Public Information Act. In fact, historically, the Texas Department of Criminal Justice (TDCJ) had consistently disclosed information about its execution procedures and drug suppliers in response to Public Information Act requests. However, in April 2014, despite previously providing this information, TDCJ sought an opinion from the Texas Attorney General on whether it could withhold identifying information pursuant to a common-law physical safety exception to the disclosures required under the Public Information Act. The Attorney General agreed that publicly disclosing identifying information would subject the execution drug-supplying pharmacy and pharmacist to a “substantial threat of physical harm” and ordered that the information be withheld. 19 In a subsequent opinion, the Attorney General further opined that releasing the name of a laboratory that conducts testing of execution drugs would similarly put it at risk and ordered that TDCJ not release identifying information regarding laboratories that conduct execution drug testing. 20 Mississippi has recently taken a similar position, and has withheld information about execution

16 Id.
17 ARIZ. REV. STAT. § 13-757(C) (2009) (“The identity of executioners and other persons who participate or perform ancillary functions in an execution and any information contained in records that would identify those persons is confidential and is not subject to disclosure pursuant to title 39, chapter 1, article 2.”).
procedures and drug sources without citing any statutory authority for non-disclosure. The State has simply opined that “[f]or security purposes, MDOC cannot release the name of the entity.”

C. Decreasing Transparency During and After Executions

In a majority of states carrying out executions, witnesses are also denied access to significant parts of the lethal injection process. In these states, witnesses are only permitted to see the condemned prisoner after the execution team members have set the IV lines and left the chamber. This means that steps crucial to ensuring that an execution is carried out in a humane manner are hidden from public view, and no independent scrutiny of that part of the process is possible. Witnesses and the public must then rely on departments of corrections to provide information about whether, and to what extent, there were problems during executions.

The April 2014 botched execution of Clayton Lockett in Oklahoma underscores the importance of independent witnesses’ access to the entire execution process. During the execution, witnesses had no idea that Mr. Lockett was punctured at least fifteen times in his arms, legs, feet, and neck before the execution team purportedly set an IV in the femoral vein in his groin. By the time the Oklahoma Department of Corrections (ODOC) opened the curtains to witnesses, Mr. Lockett was already laying on the gurney and his body was covered with a sheet. When the IV line failed and drugs were administered into Mr. Lockett’s surrounding tissue, instead of into his vein, resulting in his prolonged death, witnesses did not know where the IV had been set or that there was visible evidence of its improper placement. This was not revealed until three days later when the ODOC released piecemeal and conflicting information about the execution.

Additionally, when Mr. Lockett was observed writhing and groaning, the ODOC once again closed the curtain to prevent witnesses from observing the actions of the execution team. As a result, there was a significant gap in the public’s knowledge about what happened to Mr. Lockett during the subsequent twenty-four minutes until he was pronounced dead. Because witnesses were prevented from observing the setting of the IV as well as the actions of the execution team after Mr. Lockett regained consciousness, the public only has the information provided by

21 Memorandum from Tara Booth, Office of Communications, Miss. Dep’t of Corr. to Vanessa Carroll, MacArthur Justice Ctr. (Feb. 18, 2014) (on file with the Berkeley Law Death Penalty Clinic).


25 Cf. Baze, 553 U.S. at 56 (“Three of the Commonwealth’s medical experts testified that identifying signs of infiltration would be ‘very obvious,’ even to the average person, because of the swelling that would result.”).


ODOC and subsequent results from an internal investigation into what happened during the execution by the Department of Public Safety, issued four months later.

In a handful of states witnesses are permitted to view the entire execution process. California was the first state required to provide full access after the Ninth Circuit ruled that “the public enjoys a First Amendment right to view executions from the moment the condemned is escorted into the execution chamber, including those ‘initial procedures’ that are inextricably intertwined with the process of putting the condemned inmate to death.” In 2013, the Ninth Circuit’s ruling was extended to Idaho and Arizona, and witnesses in those states now have access to the entire execution procedure. Similarly, in 2012, a federal district court judge in Pennsylvania granted an injunction against the Pennsylvania Department of Corrections barring them from preventing witnesses, including members of the press, from observing the full execution process. The judge held that reporters must be allowed to observe the entire execution because it contributes to the “wide freedom in matters of adult public discourse” guaranteed by the First Amendment. Witnesses in Ohio have been permitted to watch the setting of IVs on a closed-circuit television screen before the execution chamber curtain is opened to witnesses.

The shift in some states to require full witness access is a significant step toward ensuring a level of independent public scrutiny of the actual execution process in those states. However, a majority of executions are still carried out without this independent oversight. In those states, just as during the Lockett execution, department of corrections officials can limit witness access to the aspects of the execution that appear in compliance with standard protocol and have complete control over the information that is ultimately released about whether an execution was carried out in a humane manner, absent a court or executive order for a more independent review of the facts. Media plaintiffs have petitioned the courts in Missouri and Oklahoma to grant witness access to the entire execution procedure.

II. Botched Executions and Internal Investigations

While it is impossible to know how many recent executions were problematic, there were four plainly botched executions in the United States in 2014. The botched executions in Arizona, Ohio, and Oklahoma are stark illustrations of the risks involved in the execution procedures shrouded in secrecy and using novel and experimental drug formulas. When jurisdictions are permitted to operate in secrecy, the courts, legislatures, and the public cannot provide critical oversight to guard against the use of risky and experimental drug protocols and untrained and unqualified execution team members. Botched executions are the predictable result of such practices.

28 Cal. First Amendment Coal. v. Woodford, 299 F.3d 868, 877 (9th Cir. 2002).
29 The Associated Press v. Otter, 682 F.3d 821 (9th Cir. 2012).
31 State of Ohio Department of Rehabilitation and Correction Execution Policy, supra note 22, at 14.
For example, in January 2014, on the eve of Dennis McGuire’s execution in Ohio, the U.S. District Court considered whether Mr. McGuire could show a reasonable likelihood of success on the merits of his claim that the new drug combination to be used in his execution posed a substantial risk of serious harm. The court denied Mr. McGuire’s request for a temporary injunction but acknowledged that the case presented the unknowable:

There is absolutely no question that Ohio’s current protocol presents an experiment in lethal injection processes. The science involved, the new mix of drugs employed at doses based on theory but understandably lacking actual application in studies, and the unpredictable nature of human response make today’s inquiry at best a contest of probabilities.

The court was prescient in describing Ohio’s new protocol as an experiment—one that led to Mr. McGuire’s prolonged execution, as there was widely-reported evidence that he “gasped, choked, clenched his fists and appeared to struggle against his restraints for about 10 minutes after the administration of . . . midazolam and hydromorphone.” Since then, that same drug combination was also used in July 2014, when Joseph Wood was given fifteen times the fifty milligram doses of midazolam and hydromorphone provided for in Arizona’s two-drug execution protocol. Witnesses reported that he gasped for breath for more than an hour and forty minutes before he was pronounced dead.

Additionally, witnesses who observed the April 2014 execution of Clayton Lockett, discussed above, also stated that Mr. Lockett grimaced, writhed, and clenched his jaw well after the sedative should have rendered him unconscious. Mr. Lockett was not declared dead until more than forty minutes after the execution started. These gruesome and prolonged executions have led many to find that these new protocols, which are sometimes developed without expert consultation and using drugs that do not carry the assurances associated with FDA approval, constitute dangerous and failed experiments on human subjects.

34 Id. at 913.
Finally, in furtherance of these secrecy laws and policies, several states have sought to have the same departments of corrections who were involved in administering the executions also conduct the sole investigative review following a botched execution. After the January botched execution of Dennis McGuire in Ohio, the Department of Rehabilitation and Corrections conducted an internal review and released an Executive Summary on April 28, 2014. The summary explains that the department interviewed nearly twenty witnesses and consulted with the same medical expert who had testified for the state prior to the botched execution. The summary ultimately concluded that “[t]here is no evidence that McGuire experienced any pain, distress or anxiety” during the execution. The Ohio Department of Corrections and Rehabilitation did not release any transcripts from the interviews that were conducted, did not provide any primary documents, and no autopsy was performed after the execution. In Oklahoma, following the Lockett execution, the Governor ordered the state’s Department of Public Safety to conduct an “independent review” of the state’s execution procedures. While the report that was released by Oklahoma was much more extensive than what was released by Ohio after the McGuire execution, including the results from an autopsy and toxicology tests, the review was led by the commissioner of the state agency that oversees the department of corrections instead of an independent party.

III. The Importance of Transparent Execution Laws and Protocols

The ABA has long been a champion of due process and a leader in the call for fair administration of the death penalty in accordance with the Constitution. The trend of decreasing transparency in execution processes implicates numerous constitutional and public policy issues that should be of great concern to members of the ABA. Such concerns are the subject of active litigation in the courts and make a strong case in favor of transparency. Included among these constitutional issues are lack of due process and violations of the First, Eighth, and Fourteenth Amendments.

A. Constitutional Concerns

1. Due Process

When condemned prisoners, their lawyers, the public, and even the courts are prevented from knowing about the protocols, drugs, and personnel involved the execution, any meaningful exploration of these issues in civil discourse, the media, or in the courts is completely foreclosed. State secrecy laws greatly impede the ability of prisoners to access the courts in order to raise

41 Id. at 1.
44 Although the U.S. Supreme Court has not yet considered a case regarding the new and increasing secrecy policies surrounding lethal injection drugs and other execution protocols, these issues are likely ripe for further judicial review.
meritorious challenges to the protocols, drugs, and qualifications and training of personnel involved the execution. The promise of due process and access to the courts is hollow if the evidence required to raise such claims may be withheld by the state.

These secrecy laws and policies also fundamentally deny condemned prisoners real and true notice of how they will be put to death. Although they may be provided with general information about the names of the drugs to be used, they often do not know the type of IV that will be set in their body or the provenance of the drugs and, therefore, whether they will be effective generally (or in their bodies specifically), or the competence of the execution personnel to establish IV access and administer the drugs. When condemned prisoners are denied access to this critical information about the drugs and the execution team members’ qualifications, they are denied due process and are prevented from presenting legal claims to the courts that are charged with determining whether execution procedures are constitutional under the Eighth Amendment.

2. The Eighth Amendment

The Eighth Amendment’s prohibition on cruel and unusual punishment is the traditional vehicle by which prisoners have challenged the constitutionality of methods of execution. The U.S. Supreme Court has recognized that this prohibition extends to “subjecting individuals to a risk of future harm—not simply actually inflicting pain . . . .” As discussed above, this risk of harm is not merely theoretical; several prisoners have suffered actual physical harm as the result of ineffective and experimental combinations and untrained corrections staff. Proving such harm prospectively, however, requires access to the very information that states seek to hide behind their secrecy laws.

In order to prevail on an Eighth Amendment challenge to an execution method, the prisoner must show that there is a “substantial risk of serious harm” that is “objectively intolerable.” To conduct this analysis, courts look to the details of the execution protocol and drugs being used—precisely the information that many states seek to withhold. For example, in Baze v. Rees, the U.S. Supreme Court analyzed the Eighth Amendment challenge to an execution method by considering evidence about the training of corrections officers who administer the lethal drugs, evaluating how many other states use the exact same drugs, and reviewing expert testimony about the efficacy of the specific drug combination. Under many of today’s active and proposed secrecy laws, such an analysis would not be possible.

For example, many different types of professionals participate in executions across the country, from prison guards, to paramedics, nurses, doctors, and pharmacists. In a situation where corrections departments maintain secrecy beyond just the identities of execution team members who are performing crucial tasks and also shroud the qualifications and training required of those individuals, such secrecy has the ability to unjustifiably protect individuals who are unqualified to perform the required steps and/or who already have performed them incorrectly in the past. When a department knows that it will be required to disclose information about the members and

45 See Baze, 553 U.S. at 48 (2008) (citing Wilkerson v. Utah, 99 U.S. 130 (1879)).
46 Id. at 49.
47 Id. at 50.
training of its execution team, it is also more motivated to set rigorous standards for and select qualified, competent personnel.

Likewise, in order for the court to assess whether a lethal injection is humane and constitutional, governments must provide advance information about the drugs they possess and plan to use both in preparation for the execution and in the execution itself, including: the source of the drugs and whether they are manufactured or compounded; whether the drugs are FDA-approved; dealers and brokers involved in the purchase; the doses to be used; and any testing that was conducted on the drugs. All of this information should be known by the corrections department and is easy to disclose well in advance of a planned execution, even when the jurisdictions have found certain drugs newly unavailable and have had to identify and procure new drug sources and plan for new combinations and new doses. This transparency is particularly important when these new drug combinations and procedures have never been utilized for an execution before and/or have been developed without expert medical or pharmacological consultation.

As bedrock principles of civil litigation, there must be meaningful ability for parties to obtain information about their claims and present relevant information as evidence. So when lethal injection procedures are challenged, the court must have the relevant facts before it to determine whether the procedures present a substantial risk of harm, whether past executions have in fact risen to the level of an Eighth Amendment violation, and/or whether the corrections department has acted with deliberate indifference to the known risks of harm. Simply put: without the facts, a court is prevented from making these determinations. Consequently, secrecy laws and practice render it virtually impossible for prisoners to carry their burden, no matter how great a state’s violation of constitutional principles may be, and the Eighth Amendment becomes effectively meaningless. If executions are to be conducted in accordance with the principles of the U.S. Constitution, rather than operating outside the rule of law, prisoners and courts must have access to the basic information required for the legal analysis of such claims.

3. The First and Fourteenth Amendments

Public right of access to executions and execution protocols is also safeguarded by the First Amendment and the Fourteenth Amendment. State secrecy laws and limits on access to media and witness viewing of executions violate this public right. Traditionally, executions—and information about how executions are conducted—have been accessible to the public. In fact, executions were popular public events well into the twentieth century, when technological changes in execution methods required that executions take place behind prison walls, rather


50 Cal. First Amendment Coal., 299 F.3d at 875.
Throughout U.S. history, the open availability of information about execution procedures has served to ensure the fair functioning of our criminal justice system and promote confidence in the integrity of our government. The free flow of information about executions has enabled the public to evaluate state actions to decide if they comport with our country’s evolving values, and to check state powers by calling for reforms when appropriate. Though execution methods have changed over time, the importance of protecting the public’s right to access information about the death penalty has not. By allowing states to shroud irreversible and momentous state actions, like executions, in secrecy, we violate core values found in the First Amendment and risk eroding the public’s faith in the judicial system as a whole.

Society, the courts, and condemned prisoners should have assurances that execution procedures are humane and constitutional before the procedures are implemented. For this surety to happen, there must be transparency. Core constitutional values including due process, free speech and press, and freedom from cruel and unusual punishment require that states that wish to conduct executions do so in a transparent manner.

**B. Public Policy Concerns**

As a fundamental matter, the ABA has consistently and frequently taken the position that a good and democratic government requires transparency, and carrying out death sentences—which is one of the government’s greatest and most extraordinary powers—is no exception. Governmental secrecy can undermine public confidence in the justice system, leaving citizens to view that these governmental acts are being done in violation of one of our system’s principles that “access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person.” Compliance with state administrative rulemaking requirements would allow for public knowledge of the proposed protocol, including the evidence and reasoning behind it. Exemption from the law prevents such fundamental public oversight. Likewise, exemption from public records act requests (or refusal to comply with them) prevents the media from obtaining relevant information and presenting it to the public.

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52 See, e.g., 1974 Reps. of the A.B.A. 99, at 583. See also, ABA House of Delegates Resolution 107D (Feb. 2006) (calling for “a system for administering our immigration laws that is transparent, user-friendly, accessible, fair, and efficient…”); ABA House of Delegates Resolution 304 (Aug. 1995) (encouraging the Food and Agriculture Organization of the United Nations to “restructure itself, streamline its operations, and strengthen its transparency and accountability”); and ABA House of Delegates Resolution 109B (Feb. 1993) (supporting the “governments of Canada, Mexico and the United States to establish, through the North American Free Trade Agreement (NAFTA) principles, rules, procedures, and institutions for the conduct of trade and other economic relations among the participating countries which are designed to provide transparency, predictability, fairness and due process.”).
53 See, e.g., Cal. Gov’t Code § 6250 (West 2014).
Moreover, procedures that are created in secrecy and maintained without transparency are far more likely to be ill-conceived and poorly or inconsistently administered. When execution protocols are promulgated without public notice, opportunity for comment, or a public hearing, there is no mechanism for citizen and expert engagement in the creation of the policies, foreclosing the possibility of valuable perspectives and information from external, non-governmental sources. Finally, without meaningful public process in formulating these execution protocols, no record is created that would allow a court to evaluate the diligence and deliberation that went into creation of the execution protocol.

C. Balancing States’ Justifications for Secrecy

Some states have indicated that their increasing secrecy is necessary in order to prevent lethal injection drug suppliers from becoming the targets of public backlash. However, fear of criticism and outcry does not justify hiding critical information about executions from the public. The public’s view of drugmakers’ participation in executions—whether it be a detriment or even a boon to a business’s reputation and bottom line—is part and parcel of the American economic system. It is difficult to imagine other scenarios in which a business’s concerns about the public’s response to their activities would lead U.S. elected officials to conceal that business’s identity from the public.

Proponents of secrecy have also argued that manufacturers need to be protected from harassment and threats to their personal safety, presumably by opponents of the death penalty. However, such claims have not been verified in any state seeking to shield information concerning execution drug suppliers from the public, either through prosecution, litigation, or other publicly available evidence. If credible evidence of such threats does come to light, there are civil and criminal remedies available. Furthermore, courts are well-suited to craft narrowly-tailored remedies that protect names and identifying information from entering the public record while still allowing prisoners to bring meaningful challenges to execution protocols.

IV. Conclusion

For the reasons discussed in this Report and because of the ABA’s commitment to meaningful due process and fair administration of the death penalty, this Recommendation calls upon each jurisdiction that imposes capital punishment to ensure that it has execution protocols that are subject to public review and commentary, and include all major details regarding the procedures to be followed, the qualifications of the execution team members, and the drugs to be used. Without this information, the analysis called for by the U.S. Supreme Court in Baze to determine whether an execution protocol poses a substantial risk that inmates will face severe and needless suffering, cannot be done.

Additionally, these principles require the ABA to support access by media representatives and other citizen witnesses to view the entirety of an execution process while it is in progress and

have access to the contemporaneous records created to document an execution. Only when executions in every state provide witnesses full access to the entire procedure will the public have independent information about the manner in which states are actually carrying out executions. Finally, to ensure our ability to study and prevent other sentinel events, there should be an immediate, thorough, and independent review anytime there is prolonged, botched, or otherwise flawed execution.

These important indicia of transparency will bolster our collective confidence in our justice system’s fairness, accuracy, and impartiality and will better ensure that there is meaningful due process available to individuals facing the death penalty in this country. Society’s interest in the fair administration of the death penalty is significant—and far outweighs any jurisdiction’s asserted governmental interest in secrecy regarding their execution drugs and procedures.

Respectfully submitted,
Virginia E. Sloan, Chair
Death Penalty Due Process Review Project
February 2015

Robert L. Rothman, Chair
Death Penalty Representation Project
February 2015

Mark I. Schickman, Chair
Section of Individual Rights and Responsibilities
February 2015
GENERAL INFORMATION FORM

Submitting Entity: Death Penalty Due Process Review Project, with Co-sponsors: Death Penalty Representation Project, Section of Individual Rights and Responsibilities

Submitted By: Virginia Sloan, Chair, Steering Committee, Death Penalty Due Process Review Project; Robert L. Rothman, Chair, Steering Committee, Death Penalty Representation Project; Mark I. Schickman, Chair, Section of Individual Rights and Responsibilities

1. Summary of Resolution(s).

This resolution seeks to ensure that all death penalty jurisdictions’ lethal injection procedures fully comport with the ABA’s longstanding position that the death penalty be administered only when performed in accordance with constitutional principles. Because proper evaluations of the death penalty can only occur when execution processes are transparent, this resolution calls on jurisdictions to make detailed information available to the public about lethal injection drug protocols and execution procedures, to protect media and witness rights to view the entirety of the execution process, to conduct and make publicly available contemporaneous records of the minute-to-minute events of executions, and to provide for independent investigations of all flawed or troubled executions.

2. Approval by Submitting Entity.

Yes, the Steering Committee of the Death Penalty Due Process Review Project and the Steering Committee of the Death Penalty Representation Project have each approved the Recommendation, on November 18, 2014 and November 19, 2014, respectively. The Council of the Section of Individual Rights and Responsibilities approved the Recommendation on November 8, 2014 at the Section’s Fall Meeting in Snowbird, Utah.

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 no existing policies that pertain to execution policies and procedures. However, this resolution complements current ABA policy that seeks to protect the constitutional rights of persons facing possible death sentences, including the 1997 ABA Policy Supporting a Temporary Halt on Executions in the United States and the 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.
5. If this is a late report, what urgency exists which requires action at this meeting of the House?

N/A. The report is not late filed, but the Recommendation should be considered at the 2015 Mid-Year meeting so that the ABA is able to engage in the ongoing policy discussions on these issues, respond to legislation to be introduced in 2015, and participate as amicus curiae, if a case reaches the U.S. Supreme Court this year with relevant claims.


There is no relevant legislation pending in Congress. However, several states have passed laws limiting access to information about lethal injection protocols in the past few years, including Arizona, Georgia, Missouri, Oklahoma, South Dakota, and Tennessee. Additionally, legislatures in other death penalty states like Ohio and Alabama will likely be considering new lethal injection secrecy laws in their 2015 sessions.

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

If this recommendation and resolution are approved by the House of Delegates, the sponsors will use that approval to provide information to policymakers and other stakeholders about the need for transparency in lethal injection protocols. The policy will support the filing of amicus briefs in cases that present issues of transparency in execution procedures. The sponsors will also use the policy to consult on issues related to lethal injection transparency when called upon to do so by judges, lawyers, government entities, and bar associations.

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

None.

9. Disclosure of Interest. (If applicable)

N/A.

10. Referrals.

By copy of this form, the Resolution will be referred to the following ABA entities that may have an interest in the subject matter:

   Criminal Justice Section
   Government and Public Sector Lawyers Division
   Section of International Law
   Section of Litigation
   Section of State and Local Government Law
   Tort Trial and Insurance Practice Section
Judicial Division
Law Student Division
Solo, Small Firm and General Practice Division
Senior Lawyers Division
Young Lawyers Division
Center for Racial & Ethnic Diversity
Standing Committee on Legal Aid and Indigent Defense
Committee on Bioethics and the Law

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

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E-mail: misty.thomas@americanbar.org

12. Contact Name and Address Information. (Who will present the report to the House?)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution seeks to ensure that states’ lethal injection procedures fully comport with the ABA’s longstanding position that the death penalty be administered only when performed in accordance with constitutional principles. The resolution aims to accomplish this goal by calling on jurisdictions to make detailed information available to the public about lethal injection drug protocols and execution procedures, to protect media and witness rights to view the entirety of the execution process, to conduct and make publicly available contemporaneous records of the minute-to-minute events of executions, and to provide for independent investigations of all flawed or troubled executions.

2. Summary of the Issue that the Resolution Addresses

In 2011, the sole U.S.-based manufacturer of sodium thiopental, a key component in lethal injection protocols across the country, ceased producing the drug. Since that time, death penalty states have been experimenting with new and untested lethal injection drug combinations and dosages. The results of this experimentation have been troubling. In recent years there has been a marked increase in the number of botched executions, and states’ lethal injection procedures have been questioned by death row prisoners, experts, advocates, and the public. Death penalty states responded to this scrutiny by implementing measures that undermine important constitutional protections. Many states have enacted secrecy laws that prohibit disclosure of information about the drugs used in lethal injection protocols, including the identity of the drug manufacturers, and the types, dosages, and expiration dates of the drugs. These secrecy laws prevent prisoners from obtaining the information necessary to determine if the drugs will cause death in a humane manner that comports with Eighth Amendment standards. Secrecy laws also violate prisoners’ due process rights and First Amendment rights by withholding information essential to a constitutional claim. In addition to enacting secrecy laws, states are moving toward only allowing witnesses and the media to view certain parts of the execution process, rather than the whole procedure. Like the secrecy laws, these measures pose a significant threat to fundamental First Amendment freedoms.

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

States’ secrecy laws and limitations on information about execution protocols and access to viewing execution procedures create a grave risk that executions will be carried out in a manner that fails to comport with important U.S. constitutional and public policy principles. Condemned prisoners need access to the types of information detailed in the resolution in order to challenge the constitutionality of the procedures in state and federal court. The public needs this information so that it can properly evaluate death penalty procedures and decide whether or not they comport with current standards of decency. This resolution will encourage all death penalty jurisdictions to provide the type of information about execution protocols and drugs that is essential for our society and legal system to be able to evaluate death penalty cases and ensure that they are administered fairly and impartially, in accordance with due process, and not in violation of the Eighth Amendment’s prohibition against cruel and unusual punishment.
4. **Summary of Minority Views**

There has been no opposition raised or minority views expressed within the American Bar Association to this Recommendation. However, externally, proponents of lethal injection drug secrecy laws have asserted the contentions that state officials want to provide confidentiality for drug suppliers in order to protect those suppliers from purported threats or harassment and to prevent anti-death penalty advocates from pressuring them to stop selling the drugs.
RESOLVED, That the American Bar Association urges all federal, state, local, territorial and tribal governments to adopt a presumption against the use of restraints on juveniles in court and to permit a court to allow such use only after providing the juvenile with an in-person opportunity to be heard and finding that the restraints are the least restrictive means necessary to prevent flight or harm to the juvenile or others.
REPORT

Children in juvenile court should be restrained in only the rarest of circumstances. Yet youth who are in custody, whether for an initial appearance, adjudication of guilt, or post-conviction hearing, are routinely brought before the court in leg irons, handcuffs, and belly chains. Indeed, the indiscriminate shackling of youth in the nation’s juvenile courts has become widespread in recent years. Shackling interferes with the attorney-client relationship, chills notions of fairness and due process, undermines the presumption of innocence, and is contrary to the rehabilitative ideals of the juvenile court.1

The overwhelming majority of juveniles are in court for non-violent offenses.2 In 2011, the juvenile violent crime arrest index rate was the lowest in three decades.3 Yet in many courts across the country, all youth, regardless of their alleged offense, are shackled in juvenile proceedings. Some jurisdictions extend this to children charged with status offenses – non-criminal misbehavior.4

In response to the phenomenon of blanket policies shackling children and youth in court, a number of jurisdictions have sharply limited the practice, whether by judicial decision, legislation, or court rule-making.

North Carolina, Pennsylvania, and South Carolina have restricted the practice by statute.5 Florida, New Mexico, and Washington State have curtailed the practice through the rule-making authority of those states’ highest courts, and Massachusetts has done so through a statewide official court policy.6 In terms of court decisions, Illinois ended the

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1 The practice has been roundly criticized. See, Perlmutter, Unchain the Children: Gault, Therapeutic Jurisprudence and Shackling, 9 Barry Law Rev. 1 (2007) (arguing that blanket shackling policies stigmatize and harm children, violate due process norms and vitiate the aims of the juvenile justice system); Zeno, Shackling Children During Court Appearances: Fairness and Security in Juvenile Courtrooms, 12 J. Gender Race & Just. 257 (2009) (asserting that shackling juveniles is antithetical to the twin goals of rehabilitation and treatment in the juvenile court and harmful to children); Kim McLaurin, Children in Chains: Indiscriminate Shackling of Juveniles, 38 WASH. U. J. L. & Pol’y 213 (2012) (noting that U.S. Supreme Court jurisprudence distinguishes youthful offenders from their adult counterparts, intensifying the need for scrutiny of the practice and arguing the absence of individualized determinations of necessity is unconstitutional).


4 For example, in considering its rule prohibiting a blanket policy of shackling youth in the state’s juvenile courts, the administrative office of the courts there noted that juvenile offenders and status offenders were “routinely shackled” in juvenile court in a majority of the counties. Cover sheet, Proposed Rule JuCR 1.6, available at www.courts.wa.gov/ under “Rules.”


practice in 1977. Courts in Oregon, North Dakota and California have followed suit. Many localities are beginning to institute their own rules to curtail the practice.

These measures all employ a presumption against the use of restraints on young people in their courts. Generally, they provide that restraints should be employed as the least restrictive alternative means available to the court, and imposed only to prevent harm to the juvenile or others, or to prevent flight. The juvenile, through counsel, must be given an opportunity to challenge the imposition of restraints.

There are compelling reasons to end the automatic shackling of juveniles, and the American Bar Association should exercise leadership in bringing about needed reforms to halt this practice.

The automatic shackling of children and adolescents is contrary to law.

The automatic shackling of youth violates notions of fairness and due process. Under the United States Constitution, the use of visible restraints imposed on adult criminal defendants at trial and sentencing may only be employed “in the presence of a special need.” This requires the state to demonstrate a safety interest specific to a particular trial, such as potential security problems or a risk of flight from the courtroom. This principle dates at least as far back as British common law. The United States Supreme Court in Deck v. Missouri concluded that the common law history on shackling reflected “a basic element of ‘due process of law’ protected by the Federal Constitution.” Blackstone’s 1769 Commentaries on the Laws of England noted that “it is laid down in our ancient books” that a defendant “must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape.” Indeed, the main rationale against shackling at common law holds constant today: “If felons come in judgment to answer,…they shall be out of irons, and all manner of bonds, so that their pain shall not take away any manner of reason, nor them constrain to answer, but at their free will.”

7 In re Staley, 364 N.E.2d 72 (Ill. 1977).
9 Localities include Boulder, Colorado; Maricopa and Pima Counties in Arizona; and Anchorage, Alaska.
10 For example, Florida requires that restraints be removed in the courtroom, unless they are necessary to prevent physical harm to the child or another person; the child has a recent history of disruptive behavior which is potentially harmful; or there is a founded belief of a substantial risk of flight. Fl. R. Proc. 8.100. Pennsylvania and South Carolina statutes are to the same effect. 42 Pa. Cons. Stat. § 6336.2; S.C. Code Ann. § 63-19-1435 (2014 Supp.).
12 Id. at 629. See also Holbrook v. Flynn, 475 U.S. 560, 568-569 (1986).
13 Deck, 544 U.S. at 626.
14 Id. Another contemporaneous source held similarly that “a defendant ‘ought not be brought to the Bar in a contumelious Manner; as with his Hands tied together, or any other Mark of Ignominy and Reproach ... unless there be some Danger of a Rescous [rescue] or Escape.’” Id. at 630-31, quoting 2 W. Hawkins, Pleas of the Crown, ch. 28, § 1, p. 308 (1716–1721) (section on arraignments)).
15 Id. at 626, quoting 3 E. Coke, Institutes of the Laws of England *34.
It is clear that adults at trial should be shackled only “as a last resort.”\textsuperscript{16} The same can be said for children in delinquency court. As the Supreme Court observed in \textit{In re Gault}, “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.”\textsuperscript{17} The Gault Court highlighted the importance of “the appearance as well as the actuality of fairness, impartiality and orderliness—in short, the essentials of due process” of juvenile court procedure.\textsuperscript{18} The anti-shackling principles espoused in \textit{Deck} apply with equal—if not greater—force for juveniles.

Fairness at trial starts with the most fundamental tenet of American criminal jurisprudence—the presumption of innocence.\textsuperscript{19} Shackling undermines the presumption of innocence and denigrates the factfinding process.\textsuperscript{20} As the Supreme Court held in \textit{Deck}, “[i]t jeopardizes the presumption’s value and protection and demeans our justice for an accused without clear cause to be required to stand in a courtroom in manacles or other restraints while he is being judged.”\textsuperscript{21} An accused juvenile also has “the right to stand trial ‘with the appearance, dignity and self-respect of a free and innocent man.’”\textsuperscript{22} While \textit{Deck} applies to jury trials, its underlying principles are fundamental across all proceedings, including those with judicial factfinders. “[J]udges are human, and the sight of a defendant in restraints may unconsciously influence even a judicial factfinder.”\textsuperscript{23} Judges themselves have rejected the argument that they are insulated from prejudice: “To make this assumption is to degrade a defendant’s right to be presumed innocent. Visible shackles give the impression to any trier of fact that a person is violent, a miscreant, and cannot be trusted,” wrote New York’s highest jurist.\textsuperscript{24} Moreover, other parties in court and members of the public are prejudiced by the sight of a defendant in shackles. Although the public does not determine a person’s guilt or innocence, courts cannot “ignore the way the image of a handcuffed or shackled defendant affects the public perception of that person.”\textsuperscript{25}

A youth who must defend himself in court should not also have to struggle with “a disheartening suspicion that he is presumed guilty.”\textsuperscript{26} One clinical law professor recounts the experience of a youth client whose request to be unchained was denied—“Our client has a difficult time believing that the presumption of innocence still cloaks him when all he can feel are chains.”\textsuperscript{27} Simply put, youth in juvenile court are entitled to a presumption of innocence, and indiscriminate shackling undermines this presumption.

\textsuperscript{17} 387 U.S. 1, 13 (1967).
\textsuperscript{18} \textit{Id.} at 26.
\textsuperscript{20} \textit{Id.} at 630.
\textsuperscript{21} \textit{Id.}
\textsuperscript{24} \textit{Id.} at 1190 (Lippman, J., dissenting) (agreeing with the majority’s rule but rejecting the majority’s finding of harmless error).
\textsuperscript{25} \textit{Id.} at 1189 (majority opinion).
\textsuperscript{27} Mary Berkheiser, \textit{Unchain the Children}, NEV. LAW. MAG. 30 (June 2012), available at http://nvbar.org/articles/content/deans-column-unchain-children.
The clear implication of the practice is that the child is being punished through the use of shackles and other restraints prior to an adjudication of guilt. Almost universally, the decision to employ shackles or other restraints is made by court security staff—a law enforcement function. Using shackles as punishment prior to trial is a deprivation of due process of law.28 “Liberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action.”29

**Shackling interferes with juveniles’ ability to participate in their own defense.**

Shackling greatly impedes one’s ability to consult or confer with counsel, take notes, or even take the stand in one’s own defense. Deck recognizes this.30 Shackled children find it physically difficult—and oftentimes impossible—to hold papers they are asked to review in court, or provide counsel with notes. The inability to effectively communicate with counsel is a problem of constitutional significance. Gault guarantees juveniles the right to counsel. The Supreme Court recently acknowledged that communication between juveniles and counsel is often strained, even where shackles are not an issue.31

Difficulty interacting with counsel puts juveniles at a considerable disadvantage in adjudicatory proceedings. These relations are particularly strained because “[j]uveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it.”32 Furthermore, “[d]ifficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel…all can lead to poor decisions by one charged with a juvenile offense.”33 Restraints can only exacerbate this already fragile relationship. As one shackled youngster has said:

> It just made my attorney not like me. I felt like he wasn’t even trying to work with me or reduce my time. I felt like everybody was looking at me like I was a monster. I was so worried about how everyone was seeing me in shackles that I couldn’t concentrate because it made me feel like a monster. I felt unfairly treated. I was unable to focus.34

Discussing the impact of the psychological weight of the shackles, an Illinois appellate judge observed, “[a]nyone who can sit in chains with no diminution of courage and

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33 Id.
34 Letter from C.O. to Washington State Supreme Court, Re: Proposed JuCR 1.6 – Physical Restraints in the Courtroom (on file with the Campaign Against Indiscriminate Juvenile Shackling (hereinafter CAIJS)).
confidence has a thicker hide than the common run of humanity.”

The practice of automatically shackling children and adolescents is contrary to the purpose of the juvenile justice system.

Our nation’s courts must communicate deliberation, decorum and dignity. Discussing the practice of shackling the accused, and limiting its use, at least as applied to adult offenders, the United States Supreme Court observed:

The courtroom’s formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence and the gravity with which Americans consider any deprivation of an individual’s liberty through criminal punishment. And it reflects a seriousness of purpose that helps to explain the judicial system’s power to inspire the confidence and to affect the behavior of a general public whose demands for justice our courts seek to serve.

These considerations are even more important in the state’s juvenile courts. Their purpose includes the goal of rehabilitation, recognized in Gault. Limiting the imposition of restraints on children only to those who truly present a risk of harm or flight will further ensure the dignity of the juvenile courts. Indeed, as one court recognized, “allowing a young person who poses no security hazard to appear before the court unshackled, with the dignity of a free and innocent person, may foster respect for the judicial process.”

In contrast, indiscriminate shackling disserves this purpose. After extensive hearings before the Florida Supreme Court conducting an inquiry into the practice as a part of its rule-making authority, the court said:

[W]e find the indiscriminate shackling of children in Florida courtrooms… repugnant, degrading, humiliating, and contrary to the stated primary purposes of the juvenile justice system and to the principles of therapeutic justice, a concept which this Court has previously acknowledged.

In the wake of the Kids for Cash scandal revealing the abhorrent treatment of court-involved children in Luzerne County, Pennsylvania, the Pennsylvania Supreme Court acted on recommendations for reform to enact a rule limiting the use of shackles. The court found shackling practices to be contrary to the philosophy of balanced and

37 In re Gault, 387 U.S. 1, 14 (1967).
39 In re Amendments to Fla. Rules of Juvenile Procedure, 26 So.2d 552, 556 (Fl. 2009).
40 The rule was reinforced by statute. See supra note 3.
restorative justice. The practices further undermined “the goals of providing treatment, supervision, and rehabilitation to juveniles.” The Chief Justice of the Massachusetts Juvenile Court similarly found juvenile shackling to be antithetical to these goals. The routine use of restraints in juvenile proceedings undermines the goals and objectives of family courts across the country.

The automatic shackling of children and adolescents is contrary to their interests.

Indiscriminate and routine shackling of youth in the juvenile court contradicts the central tenets of Gault, which reflect a modern understanding of therapeutic justice. It should be clear to even a casual observer in a courtroom that the use of shackles on children as young as nine or ten, or even those age fourteen to sixteen, is degrading. A psychologist with substantial experience working with children involved in the juvenile justice system warns that treating children in this way leads to shame and humiliation. Indeed, experts and medical professionals agree that “[p]ublic shackling is an inherently humiliating experience for children to endure.” Compounding this is the fact that “children and adolescents are more vulnerable to lasting harm from feeling humiliation and shame than adults.” The nature of shackling necessarily signals that child is dangerous, thereby increasing the likelihood that the child will be treated as dangerous by others.

A decade ago, the Supreme Court recognized in Roper v. Simmons that childhood is a thing apart from adulthood, informed not only by common sense but science. As well, science should inform the decision whether to shackle children in court.

The latest research indicates that the teenage years are crucial to identity development and self-esteem. A stable sense of self is critical to the development of moral and ethical values and the achievement of long-term goals. “Shackling is inherently shame producing.” Feelings of shame and humiliation may inhibit positive

41 Adoption of New Rule 139 of the Rules of Juvenile Court Procedure, Pennsylvania Supreme Court, No. 527, April 26, 2011.
42 Id.
43 Id. at 3.
45 Affidavit of Dr. Donald L. Rosenblitt, In the Matter of Rebecca C., No. 04-JB-000370, Motion to Prohibit Shackling of Minor Child, Ex. 1 (2007).
48 See, e.g., Laurence Steinberg & Robert G. Schwartz, Developmental Psychology Goes to Court, in YOUTH ON TRIAL 9, 27 (Thomas Grisso & Robert G. Schwartz eds., 2000); ELISABETH SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 52 (2008); Affidavit of Dr. Laura Vanderbeck, Jan. 8, 2007 (on file with CAIJS).
49 See Adolescent Development, Module 1 of TOWARD DEVELOPMENTALLY APPROPRIATE PRACTICE: A JUVENILE COURT TRAINING CURRICULUM 11-17 (National Juvenile Defender Center & Juvenile Law Center eds., 2009).
50 Email from Dr. Rosenblitt to David A. Shapiro, (Sept. 12, 2014, 13:06 EDT) (on file with CAIJS).
self-development and productive community participation. Shackling doesn’t protect communities. It harms them.

At Midyear 2014, in resolution 109B, the American Bar Association passed a resolution calling for “the development and adoption of trauma-informed, evidence-based approaches and practices on behalf of justice system-involved children.” Ending the indiscriminate imposition of restraints on children alleviates the impact of trauma and its legal ramifications on children and their families.

The automatic shackling of children and adolescents is unnecessary.

The most common argument in favor of indiscriminate shackling focuses on courtroom safety and order. Shackles are not necessary, however, to maintain either safety or order—both of which can be achieved with less restrictive means. These include, for instance, the presence of court personnel, law enforcement officers, and bailiffs, or locking the courtroom door to deter flight.

Florida courts have successfully relied on shackling alternatives to ensure courtroom safety and order. In the two years after Florida’s rule took effect, only one instance of disorderly behavior was reported in the entire state: a boy struck his stepfather, a registered sex offender who had been convicted three times for lewd and lascivious acts on the boy.54 Before the Florida Supreme Court eliminated indiscriminate shackling statewide in 2009, Miami-Dade County halted the practice in 2006.55 Five years later, a study revealed that “[s]ince then, more than 20,000 detained children have appeared before the court unbound….In that time, no child has harmed anyone or escaped from court.”56 This success has been replicated in many other jurisdictions across the country.

Nor is the requirement of an opportunity of the juvenile to be heard on the decision to impose restraints burdensome or impractical. To begin with, the opportunity for the juvenile to be heard is satisfied in practice by giving counsel for the youngster to object whether or not the child is present in court. In Massachusetts, where the imposition of restraints is regulated by administrative rule, court security staff is required to notify the presiding judge of any “security concerns,” and counsel for the juvenile is given an

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51 Affidavit of Dr. Laura Vanderbeck, Jan. 8, 2007 (on file with CAIJS).
56 Martinez, supra note 54, at 1.
57 Advocates in Arizona, Colorado, Massachusetts, Nevada, Utah, and numerous other locales report a lack of escape attempts and physical violence perpetuated by unshackled youth in courtrooms.
opportunity to challenge the decision at a sidebar prior to the call of the case. In Florida, if the trial court is considering the imposition of restraints, counsel for the juvenile may be heard before the youngster is brought to the courtroom, or the juvenile may enter the courtroom in restraints when the motion to remove them is taken up.

Nothing in this resolution is meant to prohibit the reasonable use of restraints or other security measures in the transport of children to and from the courtroom by security personnel. Moreover, the resolution does not mean that a juvenile may never be restrained with the use of hardware. Instead, the resolution intends that such instances in the nation’s courts be rare. The trend in courts around the country facing this question insists on the exercise of fact-specific discretion in determining when to require restraints on juveniles, taking into account:

[T]he accused’s record, temperament, and the desperateness of his situation; the security situation at the courtroom and the courthouse; the accused’s physical condition; and whether there was an adequate means of providing security that was less prejudicial.

Thus, this resolution adequately and accurately reflects this trend, and leaves intact effective measures to ensure the security of our nation’s courts. Shackling of youth need and should not play a major role in this pursuit.

CONCLUSION

This resolution promotes fairness and the rule of law in juvenile proceedings, provides for the imposition of restraints when needed for safety, protects the due process rights and well-being of youth, and upholds the rehabilitative principles of juvenile courts. Shackling of children in the courtroom without compelling justification is an inherently stigmatizing and traumatic practice that compromises the presumption of innocence. Wholesale reliance on shackles in the juvenile court without an individualized determination that they are actually necessary is contrary to law, undermines the purpose of the juvenile court, and is inimical to the interests of children and youth in conflict with the law.

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58 See note 5, supra.
60 In re R.W.S., 728 N.W.2d 326, 331 (N.D. 2007).
Responsible for improving the administration of justice in across the country, the American Bar Association is uniquely positioned to advocate the reform of this egregious practice, in favor of a rule which promotes the integrity of the courts and the dignity of citizens before them—including the youngest.

Respectfully submitted,

Jim Felman and Cynthia Orr, Chairs
Criminal Justice Section
February 2015
GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: Jim Felman and Cynthia Orr, Chairs

1. **Summary of Resolution**

The resolution urges federal, state and local governments and agencies to restrict the use of restraints on juveniles in court to those juveniles who present a risk of harm or flight, to employ a presumption against the use of restraints in court, and to give the juvenile an opportunity to be heard on whether restraints are the least restrictive alternative. The resolution does not seek to impose limitations on security measures for transporting juveniles to and from the courtroom.

2. **Approval by Submitting Entity.**

This resolution was approved by the Criminal Justice Section Council at its Fall Meeting on October 25, 2014.

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

No similar resolution has been submitted previously to the House of Delegates or Board of Governors.

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

ABA Criminal Justice Standard 6-3.2 relating to Special Functions of the Trial Judge requires the court maintain security in the courtroom with due deference to dignity and decorum, accomplished in the least obtrusive and disruptive manner, minimizing any adverse impact. ABA Criminal Justice Section Standard 23-5.9 relating to Treatment of Prisoners allows for the use of restraints as a security precaution during transfer or transport, using the least restrictive form of restraint appropriate and only as long as the need exists. These standards would be unaffected. There is no relevant ABA Juvenile Justice Standard. One principle of those standards, however, is that the least restrictive alternative should be the choice of decision makers for intervention in the lives of juveniles. Flicker, *IJA/ABA Juvenile Justice Standards: A Summary and Analysis*, (Ballinger Publishing Co. 1982) p. 23.

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

Many jurisdictions are now considering limitations on the use of restraints in court proceedings involving juveniles, and the ABA is uniquely positioned to provide guidance to federal, state and local jurisdictions on the use of such restraints.
6. **Status of Legislation**

This resolution does not support a specific piece of legislation.

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 legislation or rule making at the federal, state and local levels to impose restrictions on the use of restraints on juveniles in court, and members will work with national and local groups seeking to reform the practice of the indiscriminate use of restraints on juveniles in the courts.

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

Adoption of the resolution will not result in expenditures by the Association.

9. **Disclosure of Interest**

We are not aware of potential conflicts of interest related to this resolution.

10. **Referrals.**

At the same time this policy resolution is submitted to the ABA Policy Office for inclusion in the 2015 Midyear Agenda Book for the House of Delegates, it is being circulated to the chairs and staff directors of the following ABA entities:

   **Standing Committees**
   - American Judicial System Standing Committee
   - Ethics and Professional Responsibility
   - Federal Judiciary
   - Legal Aid and Indigent Defendants
   - Professionalism

   **Special Committees and Commissions**
   - Children and the Law
   - Coalition on Racial and Ethnic Justice
   - Commission on Domestic and Sexual Violence
   - Commission on Youth at Risk
   - Death Penalty Representation Project
   - Hispanic Legal Rights and Responsibilities
   - Sexual Orientation and Gender Identity
Sections, Divisions
Government and Public Sector Lawyers Division
Individual Rights and Responsibilities
Family Law
Judicial Division
Litigation
State and Local Government Law
Young Lawyers Division

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

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EXECUTIVE SUMMARY

1. **Summary of the Resolution**

The resolution urges federal, state and local governments and agencies to restrict the use of restraints on juveniles in court to those juveniles who present a risk of harm or flight, employing a presumption against the use of restraints in court, and giving the juvenile an opportunity to be heard on whether restraints are the least restrictive alternative. The resolution does not seek to impose limitations on security measures for transporting juveniles to and from the courtroom.

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

The overwhelming majority of juveniles are in court for non-violent offenses. In 2011, the juvenile violent crime arrest index rate was the lowest in three decades. Yet in many courts across the country, all youth, regardless of their alleged offense, are shackled in juvenile proceedings. Some jurisdictions extend this to children charged with status offenses – non-criminal misbehavior.

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

This resolution promotes fairness and the rule of law in juvenile proceedings, provides for the imposition of restraints when needed for safety, protects the due process rights and well-being of youth, and upholds the rehabilitative principles of juvenile courts. Shackling of children in the courtroom without compelling justification is an inherently stigmatizing and traumatic practice that compromises the presumption of innocence. Wholesale reliance on shackles in the juvenile court without an individualized determination that they are actually necessary is contrary to law, undermines the purpose of the juvenile court, and is inimical to the interests of children and youth in conflict with the law.

4. **Summary of Minority Views**

None are known.
AMERICAN BAR ASSOCIATION
YOUNG LAWYERS DIVISION

RECOMMENDATION AND REPORT TO THE
ASSEMBLY OF THE YOUNG LAWYERS DIVISION

RECOMMENDATION

RESOLVED, that the American Bar Association urges law schools to include practicing lawyers and judges in the work of their hiring and tenure committees, so that law schools will benefit from the insight of experienced practitioners when identifying the teachers who will educate the next generation of lawyers.
In 1992, the ABA’s Section of Legal Education and Admissions to the Bar issued the influential MacCrate Report, which sought to abolish the “gap” between law schools and practicing lawyers. Over twenty years later, the need to integrate the academy and the profession persists. This resolution seeks to advance that goal in a practical manner by urging law schools to make use of the insight of practicing lawyers and judges from their communities on law school hiring and tenure committees.

I. The Continued Need to Integrate the Academy and the Profession.

At its best, legal education is a harmonious blend of the academic and the practical. Legal scholarship trains young lawyers to analyze case law and synthesize difficult concepts, while exposure to legal practice teaches both technical skills and trains young lawyers in the intangible virtue of practical judgment. As the MacCrate Report explained, neither academic study nor practical training is alone sufficient, for “[t]he skills and values of the competent lawyer are developed along a continuum that starts before law school, reaches its most formative and intensive stage during the law school experience, and continues throughout a lawyer’s professional career.” The academic and the practical are the two lungs of legal education; without both, the whole enterprise founders.

But in recent years, commentators from law professors to practitioners have decried the imbalance that has arisen as the academic aspects of legal education predominate over the practical. According to the influential 2007 Carnegie Report on legal education, for example, law schools are hybrid institutions. One parent is the historic community of practitioners, deeply immersed in the common law and carrying on traditions of craft, judgment, and public responsibility. The other heritage is that of the modern research university. These two strands of inheritance were blended by the inventors of the modern American law school.

Over the course of the twentieth century, legal scholarship would move further away from the concerns of judges and practitioners and closer to those of other academic fields. In the process, the cultural resources available to any who wished to defend the earlier practitioners’ traditions within the legal academy seemed correspondingly thinner and fewer. In its quest for academic respectability, legal education would come to emphasize legal knowledge and reasoning at the expense of attention to practice skills, while the relations of legal

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2 Id. at 3.
activity to morality and public responsibility received even less direct attention in the curriculum.\(^3\)

Professor Brian Tamanaha, the author of *Failing Law Schools*, has similarly observed a shift toward academic concerns, with great detriment to the ability of law schools to prepare students for practice: “By the closing decades of the twentieth century the academic side was decisively dominant . . . Among contemporary legal academics, anyone who maintains that law schools should focus on training lawyers for practice risks being branded an anti-intellectual.”\(^4\)

Recent reports by bar associations have sounded a similar note. According to a report by the Illinois State Bar Association,

> [T]he focus on academic scholarship prevents law schools from focusing on the time-intensive instruction techniques that are necessary to educate new lawyers. . . .

Any reform must therefore focus on reorienting law schools toward the education of lawyers for practice and away from the production of academic scholarship.\(^5\)

Finally, the ABA’s Task Force on the Future of Legal Education sounded a similar theme, noting that although law schools had made some strides in developing effective curricular reforms to transmit practical skills to their students, “[t]he balance between doctrinal instruction and focused preparation for the delivery of legal services needs to shift still further toward developing the competencies and professionalism required of people who will deliver services to clients.”\(^6\)

This resolution seeks to restore the balance. To be sure, the integration of theory and practice in the education of lawyers is not a simple matter, and there are no silver-bullet solutions.\(^7\) A variety of thoughtful commentators have developed practical suggestions for pedagogical and curricular reform that have provided legal educators the tools they need to

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3 WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 4, 7 (2007) [hereinafter CARNEGIE REPORT].

4 BRIAN Z. TAMANAH, FAILING LAW SCHOOLS 54-61 (2012).


6 AM. BAR ASS’N, TASK FORCE ON THE FUTURE OF LEGAL EDUCATION, REPORT AND RECOMMENDATIONS 3 (2014).

7 See generally Byron D. Cooper, The Integration of Theory, Doctrine, and Practice in Legal Education, 1 J. ASS’N LEGAL WRITING DIRS. 50 (2001).
integrate practical training into the traditional law school setting. Moreover, a variety of schools have succeeded in providing more educational opportunities to their students that provide practical training.

The problem remains, however, that many law schools maintain an academic bent, with the majority of faculty (and often the most powerful and prestigious faculty) focusing on traditional doctrinal courses and academic scholarship. Increasingly, such faculty lack the exposure to the practicing bar that would allow them to integrate fully the practical and theoretical aspects of law practice. Over the last decade, for example, tenure-track professors hired at ABA-accredited law schools have had a median of only three years of practice experience. For tenure-track hires at top schools, this already negligible median figure drops yet further, to a single year. To be clear, that means that at top schools fully one-half of new faculty hires have less than one year of experience in practice.

To address this problem, this resolution recommends a modest reform to the law school hiring and tenure process to ensure that law schools regain a focus on hiring those professors who are best able to teach the next generation of practitioners.

II. The Law School Professor Hiring and Tenure Process.

The majority of law school hiring occurs through a standardized process, which begins with the three-day AALS Faculty Recruitment Conference. Each fall, candidates submit resumes and engage in screening interviews with representatives of law schools. A small subset of those interviewed will be invited to full interviews on campus, including a “job talk” in which the candidate explains the research program that she expects to pursue. Following the on-campus interview, the school may extend a small number of job offers.

Each stage of the process typically is managed by a faculty committee. This committee generally has complete discretion in deciding which candidates to interview at the AALS

8 See, e.g., CARNEGIE REPORT, supra note 2; ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007).

9 ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, A SURVEY OF LAW SCHOOL CURRICULA: 2002-2010, at 15-16 (Catherine L. Carpenter ed., 2012) (reporting that “[l]aw schools have increased all aspects of skills instruction, including clinical simulation, and externships,” and that 85% of respondent law schools offered in-house live-client clinics, 30% offered off-site, live-client clinics, nearly all provided externship opportunities, and externship placement opportunities have increased without exception since 2002).

10 See TAMANAHA, supra note 4, at 54-61.

11 TAMANAHA, supra note 4, at 58.

12 Id.

Conference, and which candidates to invite to campus for a “job talk.” Following on-campus interviews the committee generally makes a recommendation about which candidates should receive offers. The full tenure-track faculty usually makes the final decision by majority or supermajority vote.

Most law schools have a similar process for granting tenure, with a smaller committee engaging in early rounds of review and making a recommendation to tenure-track faculty. Sometimes the law school dean and, in law schools connected to universities, the university president, also play a role in the process. Again, however, the key decisionmaking is usually completed through a vote of the existing tenure-track faculty.

III. A Proposal for Reform.

This resolution does not propose removing from faculty the exclusive right to choose the colleagues who will be teaching law alongside of them. That is, at the final stage of both the hiring and tenure review process, the key decision will still be made in the same manner as it is now. Nonetheless, law schools’ hiring and tenure review processes would benefit substantially from allowing input from outside the tenure-track faculty during the first two stages of review. By allowing practicing lawyers and judges to contribute their insight about which individuals are likely to be the best law professors, law schools can regain a focus on hiring and promoting only those teachers who are best able to educate students for practice.

These lawyers and judges are on the front lines of legal practice and have unique insight into the skills and competencies that are required to excel there. As a result, they will inject a new perspective into law school hiring and tenure decisions that may be lacking among academics alone. For example, practitioners can draw on the experience of their own legal education, sharing insight about the teachers and educational techniques that have been most beneficial for their own practice.

The ISBA Debt Report has recently highlighted the need to tap the resources and insight of the practicing bar to help improve legal education. Specifically, achieving the goal of integrating theory and practice in legal education presents great challenges to law schools accustomed to the habits of the academy, rather than of law practice. To address that barrier, the practicing bar can and must play a prominent role in reform by engaging with law schools and legal education. In previous generations, most lawyers were trained through the apprenticeship model, in which new lawyers developed the skills, practical wisdom, and judgment necessary to legal practice by working in close proximity with experienced lawyers. On both an individual and institutional level, the practicing bar can again create and support opportunities for experiential learning.14

Accordingly, the Report recommended that:

14 ISBA Debt Report, supra note 3, at 38.
Law faculty should be accomplished practitioners to ensure that they are able to educate the next generation of practicing lawyers. One way law schools can evaluate the lawyering skills of faculty candidates is to include respected lawyers and judges from the community on hiring and tenure committees. Practicing judges and lawyers can provide unique insight into the candidate’s skills as a practitioner and will ensure that the law school hires faculty who are best able to educate law students for practice.\textsuperscript{15}

If this proposal were adopted, law schools would be more likely to hire more accomplished practitioners, rather than continuing their current bias toward candidates with substantial academic credentials but minimal practice experience.

As an added benefit, over time practitioners and academics would have regular opportunities to interact, fostering greater mutual understanding among both groups and potentially opening up further opportunities for collaboration. For example, lawyer participants in the hiring and tenure process could serve as a ready source of adjunct professors.

IV. Conclusion

The MacCrate report concluded that “[l]egal educators and practicing lawyers should stop viewing themselves as separated by a ‘gap’ and recognize that they are engaged in a common enterprise—the education and professional development of the members of a great profession.”\textsuperscript{16} To make legal education truly a “common enterprise,” practitioners and academics must work together to choose the best teachers for the next generation of lawyers. Only then will legal education truly represent the integration of theory and practice.

\textsuperscript{15} Id. at 47.

\textsuperscript{16} MACCRATE REPORT, supra note 1, at 3.
ABA/YLD RECOMMENDATION
GENERAL INFORMATION FORM

Submitting Entity: ABA/YLD Resolutions Team
Submitted By: Daniel Thies, ABA/YLD Liaison to the Section of Legal Education and Admissions to the Bar

1. Summary of Recommendations:

The ABA should encourage law schools to involve practicing lawyers and judges in the work of their hiring and tenure committees, so that law schools will benefit from the insight of experienced practitioners when identifying the teachers who will educate the next generation of lawyers for practice.

2. Date of Approval by Submitting Entity:

Approved December XX, 2014 by the ABA/YLD Resolutions Team.

3. Has this or a similar recommendation been submitted to the Assembly or ABA previously?

None of which I am aware.

4. Are there any Division or ABA policies that are relevant to this recommendation and, if so, would they be affected by its adoption?

None of which I am aware.

5. Does this recommendation require immediate action at the next Assembly? If so, why?

No.

6. Status of Legislation (if applicable):

N/A

7. Cost to the Association:

None.

8. Disclosure of Conflict of Interest (if applicable):

None.

9. Referrals:

None

10. Contact Person (Prior to the meeting):

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11. **Contact Person** (Who will present the report to the Executive Council and/or Assembly)

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AMERICAN BAR ASSOCIATION
YOUNG LAWYERS DIVISION

RECOMMENDATION AND REPORT TO THE
ASSEMBLY OF THE YOUNG LAWYERS DIVISION

RECOMMENDATION

RESOLVED, that the American Bar Association encourages all stakeholders, including lawyers’ professional liability insurance providers (“LPL Providers”), bar associations, pro bono legal services providers, and business entities, to closely examine the availability and scope of malpractice insurance coverage for attorneys providing pro bono legal services in all practice settings.

FURTHER RESOLVED, that the American Bar Association encourages all stakeholders, including LPL Providers, bar associations, pro bono legal service providers, and business entities to examine any rules, regulations, or policies restricting the availability of malpractice coverage to attorneys providing pro bono legal services and determine whether amendments to those rules, regulations, or policies may expand coverage.

FURTHER RESOLVED, that the American Bar Association encourages all LPL Providers, in collaboration with all relevant stakeholders, to narrow or close any gaps in LPL insurance coverage (“LPL Coverage”) available to attorneys while providing pro bono legal services, including when an indigent client has a conflict with the primary provider of pro bono legal services in that client’s geographic region and an attorney seeks to represent that client on a pro bono basis.

FURTHER RESOLVED, that the American Bar Association encourages all stakeholders, including LPL Providers, bar associations, pro bono legal service providers, and business entities to publicize the availability or existence of LPL Coverage for attorneys providing pro bono legal services and to place particular emphasis on publicity directed towards lawyers in their first five years of practice.

FURTHER RESOLVED, that the American Bar Association encourages all employers to ensure that their LPL Coverage extends to all “Employed Attorneys” (generally, in-house counsel) who wish to provide pro bono services.
I. A Barrier to Access to Justice?

There can no longer be a question that increasing pro bono legal services and closing the access to justice gap are two major goals of the American Bar Association. Both objectives provide attorneys the opportunity to lend their training and experience to those in need of legal services despite an inability, or restricted ability, to pay. Although the number of attorneys active in pro bono services is increasing,\(^1\) it remains below an optimal level.

Evidence suggests that a contributing reason attorneys are reluctant to participate in pro bono services is their lack of professional liability (LPL) insurance coverage. Because pro bono services often extend into substantive legal areas outside their realm of expertise, attorneys fear a legal malpractice suit when the case is not resolved favorably to the client. This is particularly true for young lawyers, who are not familiar with the traditional bounds of LPL Coverage, and for lawyers who have not provided pro bono services in the previous twelve months.

II. The Availability of LPL Coverage.

Despite these concerns, stakeholders agree that part of the problem is a misunderstanding about the availability of LPL coverage, particularly among young lawyers. Indeed, in many circumstances, the facts reveal that obtaining LPL insurance coverage for pro bono legal services is straightforward and cannot be considered a barrier to pro bono practice.

When the ABA Standing Committee on Pro Bono and Public Service examined the motivating factors behind attorneys who provide pro bono services, it found that providing free malpractice insurance is a factor that would encourage pro bono services, particularly among non-providers of pro bono services, who ranked it the second highest encouraging factor.\(^2\) In other words, for attorneys who did not provide pro bono services in the last year, free malpractice insurance would likely encourage greater pro bono work. The availability of LPL insurance was also a significant concern for solo practitioners, as compared to those who work in mid-sized or larger firms.\(^3\) Overall, attorneys largely agree that the availability of free malpractice insurance for pro bono services would encourage more pro bono work.\(^4\)

While the Standing Committee on Pro Bono and Public Service examined attorneys’ attitudes toward pro bono service, the Standing Committee on Lawyers’ Professional Liability examined the structure of malpractice coverage generally available to attorneys, leading to important findings that were documented in the LPL Standing Committee’s White Paper on pro

\(^1\) AM. BAR ASS’N STANDING COMM. ON PRO BONO & PUB. SERV., SUPPORTING JUSTICE II: A REPORT ON THE PRO BONO WORK OF AMERICA’S LAWYERS 27 (ABA Feb. 2009) [hereinafter SUPPORTING JUSTICE II].
\(^2\) Id. at 20-21.
\(^3\) Id. at 20.
\(^4\) Id. at 21.
bono work and malpractice coverage. First, the Standing Committee concluded that pro bono services are generally covered by any standard legal malpractice policy form. “An examination of 18 different commercial LPL policy forms generally available to firms of 10+ attorneys revealed that pro bono services . . . are likely covered on each, even though they do not specifically mention pro bono representation.” Small firm attorneys are also likely covered under their policies, although they may need to be more diligent about ensuring that pro bono services are covered under the terms of the policy.

The LPL Standing Committee found that while attorneys in private practice are generally covered under existing policies, government attorneys and in-house counsel (or “employed attorneys,” in insurance parlance) must be more cautious about providing services if they require coverage. Most governmental agencies do not cover their attorneys’ participation in pro bono services. But there are solutions for governmental lawyers. Most pro bono agencies, such as non-profit legal services organizations, provide coverage for participating attorneys. And some insurance providers offer programs through which an attorney may purchase a low-limit policy at a minimal cost.

Employed Attorneys likewise have substantial resources for acquiring malpractice coverage if they wish to participate in pro bono activities. Many of these resources are available through the Corporate Pro Bono project, a joint venture of the Association of Corporate Counsel and the Pro Bono Institute. An Employed Attorney should first ensure that an “employed lawyer malpractice policy” or an “employed lawyer rider” on a current policy is in place. If one is not, the Employed Attorney can often obtain coverage through the pro bono services provider or obtain a personal policy directly from an insurer. Other options include obtaining coverage from an outside resource such as the National Legal Aid & Defender Association, or asking the in-house department to self-insure for malpractice risk.

No matter the type of attorney seeking to provide pro bono services, LPL Coverage is usually available. Nevertheless, there are a few instances in which gaps in coverage may occur. The most common (although still relatively rare) involves a geographic area serviced by only one pro bono agency in a particular subject area. If an individual qualifies for pro bono legal services, but the agency cannot retain the case due to a conflict of interest, a volunteering attorney will not

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6 Id. at 2.
7 Id.
8 Id. at 3.
9 “Employed Attorneys” are often also referred to as “in-house counsel.” The term “Employed Attorneys” is used by the LPL industry, so is used here for consistency and to reflect the broad spectrum of attorneys practicing in private enterprise but outside of a traditional law firm setting.
12 Id. at 1-2.
14 IN-HOUSE PRO BONO at 2-3.
have LPL Coverage through the agency. If that volunteering attorney is a solo practitioner, Employed Attorney, or government attorney, it may be the case that the attorney does not have her own malpractice coverage, so a gap in coverage exists. Another gap in coverage can occur when a new solo practitioner in a rural area seeks to provide pro bono legal services and does not partner with a pro bono legal services provider.

Still, stakeholders working together should be able to fill this gap and defeat any misconceptions about the availability of malpractice coverage as a barrier to pro bono service.

### III. The Importance of Informing Attorneys About the Available of Malpractice Insurance.

An analysis of the available malpractice coverage for pro bono services reveals that coverage is generally available for attorneys seeking to provide pro bono legal services. It is not the unavailability of malpractice coverage that often discourages attorneys from providing pro bono legal services, but a misconception that such coverage does not exist. There are several ways to remedy this problem. The first is for state and local bar associations to take an active role in educating attorneys about the availability of malpractice coverage for each pro bono service it endorses. Several already do.  

Secondly, LPL Providers should make explicit in their policies the availability of coverage for pro bono activities that fall within the regular scope of legal services. Or, LPL Providers could provide notices to the insured attorneys of the availability of coverage, or if coverage is not available, the best manner in which to go about obtaining it. Finally, pro bono agencies should continue to publicize the availability of coverage and educate pro bono legal services participants about their LPL Coverage, as well as explain any instances in which it may not be.

By calling on all involved stakeholders to reduce the misconceptions surrounding the availability of malpractice coverage for pro bono legal services, the American Bar Association can continue the already positive trend of more and more attorneys spending more and more of their time on closing the access to justice gap and providing services to those who need them the most.

1. **Summary of Recommendations:** The resolution encourages all stakeholders in legal malpractice and lawyers’ professional liability insurance to examine the current scope of insurance coverage offered to attorneys participating in *pro bono* or access-to-justice representation to ensure that those attorneys are entitled to the greatest degree and scope of coverage possible.

2. **Date of Approval by Submitting Entity:** N/A

3. **Has this or a similar recommendation been submitted to the Assembly or ABA previously?** No.

4. **Are there any Division or ABA policies that are relevant to this recommendation and, if so, would they be affected by its adoption?** No.

5. **Does this recommendation require immediate action at the next Assembly?** If so, why? No.

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

7. **Cost to the Association:** N/A

8. **Disclosure of Conflict of Interest (if applicable):** N/A

9. **Referrals:** N/A

10. **Contact Persons (Prior to the meeting):** Logan Murphy and Morgan Macdonald.

11. **Contact Person (Who will present the report to the Executive Council and/or Assembly):** TBD.
RESOLVED, That the American Bar Association urges federal, state, territorial and tribal
governments, courts, and agencies to establish laws, rules, regulations, and policies to implement
the following principles:

(1) Counsel should be appointed for unaccompanied children at government expense at
all stages of the immigration process including initial interviews before United States
Citizenship and Immigration Services Asylum Offices and at all proceedings
necessary to obtain Special Immigrant Juvenile Status, asylum and other remedies;

(2) Immigration courts should not conduct any hearings, including final hearings,
involving the taking of pleadings or presentation of evidence before an
unaccompanied child has had a meaningful opportunity to consult with counsel about
the child’s specific legal options;

(3) State court judges and staff should receive training to learn to effectively and timely
hear and adjudicate petitions or motions on behalf of immigrant children, including
for the purpose of making the predicate findings that are required for a child to obtain
Special Immigrant Juvenile Status; and

(4) Due to firm deadlines in federal immigration laws which limit certain immigration
remedies by age, state, territorial and tribal courts with jurisdiction should consider
implementing specialized calendars to timely hear and adjudicate petitions on behalf
of immigrant children to determine predicate matters that are required for the children
to apply for Special Immigrant Juvenile Status, including creating expedited processes
for children aged 16 and older.
Thousands of foreign-born children arrive in the United States each year unaccompanied by their parents or other legal guardians. Some are escaping political persecution, while others are fleeing poverty, gang violence, abusive families, or other dangerous conditions in their home countries. Some children have lost contact with or been abandoned by their families abroad, while others are sent here for safety by parents who remain behind. Here is just one representative example:

J.E., J.F., and D.G. are ten, thirteen, and fifteen years old, respectively. They were scheduled to appear in immigration court on September 4, 2014, in Seattle, Washington. They were born in El Salvador, where their parents ran a ministry and rehabilitation center for former gang members. These activities drew retaliation from local gangs, who killed the children’s cousin and then their father: the children watched as gang members murdered him in the street. Several years later, the children themselves became the targets of gangs that threatened them with harm if they refused to join, and they fled to the United States.

When unaccompanied children arrive in the United States, they generally have no predetermined U.S. legal status and no immediate support system. What many of these children face when they arrive in the United States is immediate detention in a foreign culture, a mire of immigration proceedings and the challenge of finding legal assistance involving high standards of proof and complex legal issues. In an area of law compared in complexity to the IRS tax code, a lawyer is critical to prepare a child’s claim for immigration relief, gather the required evidence largely located abroad, complete and file the necessary forms pursuant to the regulations, present the case in a court setting and rebut evidence and legal arguments presented by the government, which is represented by an experienced trial attorney. Indeed, “[s]tudies have found that asylum seekers in deportation proceedings are four times more likely to be granted asylum if represented.”1 Though similar statistics are not available for children seeking Special Immigrant Juvenile Status, immigration practitioners have anecdotally stated that the effect of representation is just as great.

ABA COMMITMENT AND POLICY UNDERLYING THE RESOLUTION

The American Bar Association is committed to ensuring fair treatment and access to justice under the nation’s immigration laws in accordance with the Constitution. ABA policy has consistently recognized the importance of representation in immigration cases where a lawyer can help a noncitizen understand and effectively navigate the complexities of the U.S. immigration system, a process that can be especially daunting and difficult where language and

Cultural barriers are present. These problems are multiplied when the applicants for immigration relief are children under the age of 18 who are alone with no adult responsible to care for them. This policy resolution seeks to increase representation and enhance fairness by suggesting changes in the practice of immigration courts as well as the state, territorial and tribal courts that issue orders required for Special Immigrant Juvenile Status. These changes will help strengthen the system of assuring due process for each child and engage counsel for them—both pro bono and government-funded—to help address the crisis of the surge of children facing our immigration courts alone.

This policy resolution seeks to ensure that the most vulnerable children who flee their native lands and seek refuge here have access to counsel at government expense to ensure that no child deserving of protected refugee or Special Immigrant status is relegated, due to incapacity to voice the merits of their cause, to likely removal and danger upon return. Women and children are fleeing to the U.S., in part, because of the sexual discrimination and exploitation that they have suffered. According to a report by the United Nations High Commissioner for Refugees, 70% of 404 children interviewed cited domestic abuse or some other form of violence among their primary reasons for fleeing their homes in Mexico and Central America. The International Labor Organization estimates that women and girls represent the largest share (55%) of the nearly 21 million victims of forced labor. The rising rate of gender violence and child exploitation in Mexico and Central America has certainly impacted this child crisis, but our broken immigration system exacerbates it.

This resolution will affirm the ABA’s support for government appointed counsel for unaccompanied children and that immigration proceedings should not proceed where a child is unrepresented because today’s urgent crisis compels a reminder of the fundamental importance of appointment of counsel for the unaccompanied immigrant children that lawyers across America are called on to serve. When children will be seeking Special Immigrant Juvenile Status (SIJS) as a form of immigration relief, counsel should also be appointed at government expense for them to protect the child’s legal rights in the state, territorial and tribal courts from which the predicate orders incorporating the necessary SIJ factual findings will be requested. The resolution further seeks to assure that no child who seeks to remain in the United States has a substantive hearing scheduled without the opportunity for consultation with counsel.

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Because Special Immigrant Juvenile Status is one key immigration remedy available to many of these children, the resolution seeks to secure training for state, territorial and tribal courts to help them promptly provide the prerequisite orders for this status that fall within their jurisdiction. Finally, the resolution urges state, territorial and tribal courts to consider whether it is necessary to create specialized dockets to ensure the quick and timely adjudication of these matters which are under firm immigration law deadlines. Recognizing that state court jurisdiction over abused, neglected or abandoned youth can range from age 21 down to age 18 in most states, the resolution suggests an expedited proceeding for those children in danger of losing their claims because they "age out" of the Special Immigrant Juvenile Status age range when state court jurisdiction ends. This weighs in favor of considering a special expedited docket for any child within two years of the end of his or her state court jurisdiction. In many states, that is age 16.

In recognition of these problems, ABA leadership has created the Working Group on Unaccompanied Minor Immigrants to assist in mobilizing and engaging pro bono lawyers to represent the thousands of immigrant youth appearing in American courts alone and in need of representation to secure due process for each of their claims.4

THE NEED AND WHY REPRESENTATION MATTERS5

An “unaccompanied alien child” (unaccompanied child) is a minor who has no lawful immigration status in the United States, and has no parent or legal guardian in the country present or available to provide care.6 The Department of Homeland Security (DHS) reports that 68,541 unaccompanied children were processed by Customs and Border Protection (CBP) in the United States between October 1, 2013 and September 30, 2014, as compared to 38,759 in Fiscal Year (FY) 2013, a 77% increase.7 While the numbers of unaccompanied children entering the United States at the Southwest border have decreased significantly over the past three months, the numbers will likely rise again in a typical cyclical fashion. This is an unprecedented “surge” that caps a growing trend: 13,625 unaccompanied children entered U.S. custody in Fiscal Year 2012 and 24,668 in Fiscal Year 2013.8 Unaccompanied children are turned over to the custody of the Department of Health and Human Services’ Office of Refugee Resettlement (ORR) and placed in removal proceedings in which they face deportation. Most are released by ORR if they have family or an adult in the United States able to care for them, after which they continue to defend against removal in immigration court, often without an attorney.9

These children face significant challenges in the immigration system, causing an urgent need for access to counsel in light of the complexity of U.S. immigration laws. Many unaccompanied children have legitimate claims that would grant them legal status under U.S. immigration law but, without representation, they cannot enjoy the due process to which they are entitled or have a fair basis to estimate whether they have a provable claim or not. For example, approximately 40% of unaccompanied children in ORR custody in 2010 were potentially eligible for some kind of relief from deportation.\textsuperscript{10} Depending on where an unaccompanied child is released, local legal services organizations and private law firms may be available to provide representation to some children. But these meager resources are already stretched beyond capacity—the current surge in numbers will stretch them even further, meaning that more and more unaccompanied children will lack legal representation. This limited capacity will be further taxed in short order by the tsunami of need if for legal assistance arising from the recently announced executive order regarding deferred action for several million persons.

While the Executive Office for Immigration Review (EOIR) has put in place some measures to provide noncitizens with assistance in obtaining representation which include procedures for recognizing or accrediting organizations that can represent individuals in immigration matters and providing a list of pro bono service providers, less than half of the noncitizens whose proceedings were completed in the last several years were represented. In 2010, almost 60% of noncitizens were unrepresented.\textsuperscript{11} The figure is substantially higher for those who are detained, with around 84% unrepresented.\textsuperscript{12} Rates of representation for proceedings before the Board of Immigration Appeals (BIA) are somewhat better than for those before the immigration courts, but a substantial number of noncitizens are unrepresented there as well.\textsuperscript{13}

There is strong evidence that representation affects the \textit{outcome} of immigration proceedings. In fact, the recently released preliminary findings from The New York Immigrant Representation Study, a two-year project of the Judge Robert A. Katzmann Immigrant Representation Study Group, show that “[t]he two most important variables in obtaining a successful outcome in a case (defined as relief or termination) are having representation and being free from detention.”\textsuperscript{14} The study analyzed representation in the New York immigration courts, and found that 74% of individuals who were represented and released or never detained had a successful outcome; 18% of individuals who were represented but detained were successful; but only 3% of individuals who were unrepresented and detained were successful.\textsuperscript{15} Another study has shown that whether...

\textsuperscript{10} Id.  
\textsuperscript{13} Id. The CLINIC BIA Pro Bono Project was developed in 2001 to alleviate some of the need at the appellate level, using a network of committed volunteers, trainers, and mentors to safeguard the rights of vulnerable asylum-seekers and long time lawful permanent residents. Since the Project’s inception in 2001, it has secured representation for more than 550 individuals. See BIA Pro Bono Project, CATHOLIC LEGAL IMMIGRATION NETWORK, INC., http://cliniclegal.org/programs/center-immigrant-rights/bia-pro-bono-project/0811/bia-pro-bono-project.  
\textsuperscript{15} Id.
a noncitizen is represented is the “single most important factor affecting the outcome of [an asylum] case.”

For example, from January 2000 through August 2004, asylum seekers before the immigration courts were granted asylum 45.6% of the time when represented, compared to a 16.3% success rate when the asylee proceeded pro se. Between 1995 and 2007, in affirmative asylum cases, which are processed administratively by asylum officers, the grant rate for applicants was 39% for those with representation and only 12% for those without it. In defensive asylum cases, which are heard in immigration court, 27% of applicants who had representation were granted asylum, while only 8% of those without representation were successful. Between 2000 and 2004, in expedited removal cases, 25% of represented asylum seekers were granted relief, compared to only 2% of those who were unrepresented.

As noted above, representation also has the potential to increase the efficiency, and thereby reduce the costs, of at least some adversarial immigration proceedings. In short, enhancing access to quality representation promises greater institutional legitimacy, smoother proceedings for courts, reduced costs to government associated with pro se litigants, and more just outcomes for noncitizens.

Unlike other court systems, immigration courts do not accord a special right to counsel for children. Without counsel, children, even infants, must defend themselves against trained government attorneys who bring evidence against the child in court. Children face a myriad of challenges just like those adults face: they must testify under oath, secure the testimony of witnesses, obtain evidence from abroad, plead to government charges, tell the judge what forms of relief they wish to pursue, file applications for relief and supporting documents in English, testify, and call witnesses, all with no knowledge of the legal norms and customs. In addition, they seldom speak English and must communicate through an interpreter. Faced with these challenges, the existing protections and remedies offered by the laws of the United States are rendered meaningless if these children do not have access to an attorney.

It is a fiction that most of these children lack viable claims to protective immigration relief – a significant number are eligible because they are fleeing oppressive forces or because they have been abused, neglected or abandoned. In a recent report, the United Nations High Commissioner for Refugees found that 58% of 404 unaccompanied children interviewed had potential claims for international protection. Among the most common forms of relief that unaccompanied children are eligible for are (1) Special Immigrant Juvenile Status (SIJS) for children who have

16 GOV’T ACCOUNTABILITY OFFICE, SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES 30 (2008) (“GOV’T ACCOUNTABILITY OFFICE”). An affirmative asylum case is where the noncitizen files a Form I-589 Application for Asylum, which is reviewed by USCIS in a non-adversarial process.

17 Id. A defensive case is where an individual requests asylum before an immigration judge in response to an expedited removal or other removal action by DHS.


20 See U.N. High Comm’r for Refugees, Children on the Run, supra note 2.
been abused, abandoned, or neglected by at least one parent; and (2) asylum for children fleeing persecution in their home countries. Approximately 23% of unaccompanied children are potentially eligible for SIJS and 17% for asylum and related protections. Other potential forms of relief include the U visa for individuals who have been a victim of certain serious crimes in the United States, and the T visa for victims of severe forms of human trafficking including for any child under the age of 18 engaged in commercial sex acts.

Aside from the complexities of navigating Immigration Court, there are separate challenges in seeking to obtain Special Immigrant Juvenile Status. This status is a unique hybrid of family and immigration law that requires three separate steps. First, it requires obtaining an order with specific predicate findings from a state court before filing the SIJS visa petition with USCIS. Only after the state court order and the approved visa petition are obtained may the child apply for lawful permanent residence (green card) from and immigration judge or, if the judge agrees to terminate removal proceedings, from USCIS. The predicate state court order must include certain factual findings, including that a child is unable to reunify with one or both parents because of abuse, neglect, abandonment, or some similar basis under state law, and that it is not in the child’s best interest to return to the home country. An increasing number of state courts are familiar with this form of relief, but even with growing awareness, some state court judges are confused by the federal immigration laws related to SIJS and others are unaware that they have the authority to make the special findings.

Many other barriers make obtaining Special Immigrant Juvenile Status a challenge:

(1) A state juvenile, probate, or family court must issue the special findings order; however they typically neither provide free legal counsel to children nor even pay for interpreters. These deficiencies, coupled with the fact that these courts and the lawyers who practice in them often are unfamiliar with SIJS, make it difficult to initiate and advance the claim, let alone obtain the predicate order with appropriate language acceptable for USCIS adjudication of the visa petition. The appropriate jurisdictional grounds for filing in state court are varied and depend on the individual state. Examples include a petition for legal guardianship, child custody, juvenile delinquency proceedings, or child dependency proceedings. The complexity of navigating these pro se is virtually impossible for an immigrant child. Even if a child knows that he is eligible for SIJS, questions abound—which court should he file in, and what kind of proceeding is most appropriate to bring? Should the child start the claim, or the adult caring for the child?

21 VERA INSTITUTE OF JUSTICE, supra note 9.
22 For a detailed treatment of these forms of relief and the associated challenges, see the February 2014 report by Kids in Need of Defense and the Center for Gender and Refugee Studies (CGRS), A Treacherous Journey: Child Migrants Navigating the U.S. Immigration System at http://cgrs.uchastings.edu/our-work/treacherous-journey. This article focuses on SIJS and asylum and describes the challenges that children who are eligible face in obtaining these forms of relief. Without adequate assistance of counsel, the complexity of these forms of relief can doom an otherwise viable claim. See also USCIS, www.uscis.gov/green-card/special-immigrant-juveniles/history-sijs-status; NCSB, www.ncsc.org/sitecore/conotent/microsites/trends-2014/home/monthly-trends-articles/unaccompanied-minors-in-state-courts.aspx.
23 Throughout this report, reference is made to Special Immigrant Juvenile Status requiring orders from different divisions for state courts. Of course, this resolution language recognizes that the requisite orders for Special Immigrant Juvenile Status may also come from territorial and tribal courts. Therefore all the provisions about state courts in this report equally apply to territorial and tribal courts that are responsible for adjudicating these same requisite orders for children subject to their jurisdictions.
(2) After the state court has issued its special findings order, the child must submit an application for SIJS to the immigration adjudication office at USCIS. An adjudications officer at USCIS may conduct an interview of the child to determine whether to approve or deny the child’s SIJS petition. This process can be very stressful and intimidating for a child proceeding pro se. An attorney would ensure that the child files the correct application and documents and that he is prepared to answer questions about his application.

(3) To obtain permanent status, the child must submit an application for lawful permanent residency (“LPR”) that is separate and distinct from the SIJS petition. The LPR application may be decided by an adjudications officer at USCIS after an interview or by an immigration judge after a hearing, if the child’s removal proceeding has not been terminated. Provision of an attorney would ensure that the child is prepared to present the appropriate claim, include the correct supporting documentation including fees, identity documents and a medical exam, and testify and be cross-examined by the government attorney in immigration court or answer any questions about his application before USCIS.

During all the steps of the SIJS process, the unaccompanied child must continue to appear in immigration court, explain the progress of the SIJS application, and request continuances from the judge to complete the state court process. The complexity of multiple areas of law coupled with multiple legal venues makes SIJS particularly difficult to obtain on a pro se basis. Could anyone imagine their own children navigating this puzzle alone and without the benefit of professionals trained to understand and proceed through it?

Perhaps the most significant obstacle is the pressure of time. Deadlines in federal law require adjudication of all three steps - immigration filing, state court orders, and return to USCIS or immigration court - before the child turns 18 in most instances. The risk of loss of rights due to a child’s “aging out” of the system while proceedings are delayed is discussed in detail below.

A CHILD’S RIGHT TO IMMIGRATION COUNSEL AT GOVERNMENT EXPENSE

A hallmark of the U.S. legal system is the right to counsel, particularly in complex proceedings that have significant consequences. 25 Immigration proceedings for unaccompanied children can separate children from families they are trying to join to avoid the horrific conditions they fled, can impoverish them, can return them to countries in which they have no functional ties, and can lead to their persecution and personal, physical danger. Despite the dangers of a journey that threatens their lives and safety, parents and caregivers in other nations abandon their children to this fate. Children themselves run away from homes abroad that fail to protect them. As Justice Brandeis wrote more than 80 years ago, removal can result “in loss of both property and life; or of all that makes life worth living.” N. G. Fung Ho v. White, 259 U.S. 276, 284 (1922). This is particularly true for persons who may qualify for relief from removal under strict U.S. immigration standards.

25 The right to legal representation is a bedrock principle of the ABA as reflected in its stated goals. ABA Goal II “speaks directly to this priority: “‘to promote meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social condition.” Expanding legal representation to unaccompanied children also improves the U.S. system of justice (Goal I), promotes standards of professionalism (Goal V) and enhances public service (Goal X).” American Bar Association, Commission on Immigration, Report to the House of Delegates (February 2006), p.4.
Consistent with its commitment to legal representation, the ABA has adopted several “right to counsel” policies in the immigration field. These policies seek to expand access to retained and pro bono legal representation for persons in removal proceedings, to protect existing attorney-client relationships, and to extend representation to certain vulnerable populations. Of particular concern are persons in removal proceedings (formerly called “exclusion” and “deportation” proceedings), political asylum seekers, unaccompanied minors, individuals with diminished mental capacity, non-citizens whose removal cannot be effected, detained parents with children, and those held in incommunicado detention. The recent border crisis has created a situation of such magnitude that vast numbers of children who should be eligible for protected status either under political asylum laws or SIJS are threatened with being deprived of any meaningful access to legal assistance, putting them in danger of being returned to life-threatening conditions.26

A necessary corollary to a right to counsel for the child herself is that when an adult files a custody, guardianship or other action seeking SIJS findings on behalf of a child, and that adult qualifies for in forma pauperis status, counsel should be appointed at government expense for that adult as well. The purpose of providing counsel to the child is to protect her rights. In SIJS proceedings in non-immigration courts, the child’s rights can often only be vindicated when a responsible adult caring for the child files to obtain a predicate order from the state court in order to later obtain SIJS status from USCIS. In those cases, counsel should be provided to the responsible adult, subject to financial eligibility requirements. This is the only effective way to protect the legal rights of children in these proceedings.

Principles of economy and efficiency also militate in favor of this resolution as representation advances both in this context, with the potential of reducing costs sharply. Pro se litigants cause delays in immigration court proceedings and, as a result, impose a substantial financial strain on the government. Countless immigration educators, judges, practitioners, and government officials have observed that the presence of competent, well-prepared counsel on behalf of both parties helps to clarify the legal issues and allows courts to make more principled and better informed decisions. In addition, representation can speed the process of adjudication, reducing detention costs. The Executive Office for Immigration Review confirmed that the involvement of counsel allows the immigration process to run more smoothly and efficiently, and certainly more humanely.27 This is certainly true for the immigration process as it irreversibly affects the destinies of the most vulnerable populations of children.

This resolution is also justified because of the disproportionate number of children arriving at our border who are eligible for some type of protected status. For example, the United Nations High Commissioner for Refugees recently noted that 58% of the children interviewed in a 2013 study “raised potential international protection [needs].”28 Given that more than half of these children self-identify with information indicating a likelihood that they qualify for legal status it seems only just and proper to invest in their protection through representation.

26 See In re Gault, 387 U.S. 1, 40 (1967) (noting that counsel is often “indispensable” to any meaningful realization of due process); see also Haley v. Ohio, 332 U.S. 596, 599-600 (1948) (noting that “a lad of tender years . . . needs counsel and support if he is not to become the victim first of fear, then of panic.”).
28 See U.N. High Comm’r for Refugees, Children on the Run, supra note 2 at pg. 9.
DUE PROCESS CONSIDERATIONS

The courts have long recognized that children as well as adults in deportation proceedings are entitled to due process protections.29 One of the most important elements of due process is the right to be represented by counsel. This right has also long been recognized in the field of immigration law.30 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."31 Federal regulations recognize an individual's right to counsel in diverse matters and circumstances.32 The courts have long recognized the importance of counsel in deportation proceedings – as one federal appeals panel noted, "[a] lawyer is often the only person who could thread the labyrinth".33

Two U.S. Courts of Appeals have suggested that where a noncitizen adult's rights would be substantially impaired in the absence of counsel, the government may be required constitutionally to pay for an attorney in immigration proceedings. The U.S. Court of Appeals for the Sixth Circuit dismissed previous case law on this point as relying on an "outmoded distinction between criminal cases and civil proceedings."34 The court then found that "[w]here an unrepresented indigent alien would require counsel to present his position adequately to an immigration judge, he must be provided a lawyer at the Government's expense. Otherwise 'fundamental fairness' would be violated."35 The Ninth Circuit has observed that due process rights may include providing an indigent alien, in that case an adult, with government appointed counsel.36 This argument is only strengthened when considering the needs of children who generally lack the capacity to represent themselves.

The U.S. Supreme Court has recognized that children need special protections. "[C]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty toward children."37 The Court went on to point out that "although children generally are protected by the same guarantees against government deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability."38

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30 See Orantes-Hernandez v. Thornburgh, 919 F.2d 549 (9th Cir. 1990); Castaneda-Delgado v. INS, 525 F.2d 1295 (7th Cir. 1975).
32 See 8 C.F.R. §§ 3.15(bX5), 240.10(a)(1), 240.48(a), 292.5(b) (2000).
33 Castro-O Ryan v. INS, 847 F.2d 1307, 1312 (9th Cir. 1988).
34 Aguilera-Enriquez v. INS, 516 F.2d 565, 568 n.3 (6th Cir. 1975) (holding that the absence of counsel in the case at hand was not a denial of due process because the petitioner had no arguable defense against being deported so counsel would not have served any meaningful role).
35 Id.
36 See Escobar-Ruiz v. INS, 787 F.2d 1294, n.3 (9th Cir. 1986), aff'd en banc, 838 F.2d 1020 (1988).
NO HEARINGS INVOLVING THE TAKING OF PLEADINGS OR PRESENTATION OF EVIDENCE BEFORE MEANINGFUL OPPORTUNITY TO CONSULT WITH COUNSEL

Immigration courts, in the face of the crisis, will make efforts to allow children to find counsel. Immigration courts will often allow non-profit organizations to help children by providing legal information and screening services in the court prior to master calendar hearings, appearing as “Friend of the Court,” or finding counsel by recruiting, training and mentoring private attorneys to represent children pro bono. In the face of a crisis of so many children at once, the private bar has heroically stepped up to meet the call, but the numbers are overwhelming and countless children will end up without representation.

In the case of a minor who evidences an intent to stay in the US but no counsel has been found, a case should be continued until counsel can be found. From the very first master calendar appearance, the child respondent is required to make representations and statements which carry serious consequences related to the finding or removability or relating to eligibility for relief which the child should therefore never make unrepresented. To secure due process, no proceeding should take place where a court takes pleadings or evidence is presented before an unaccompanied child has had a meaningful opportunity to consult with counsel about his or her specific legal options. Given the very real inequity of legal proceedings taking place with the able counsel of attorneys from DHS on the other side of the aisle from the lone child, no other remedy but counsel could secure due process. Courts should continue any proceeding until the child is there with the able advice of trained counsel on her side.

Communication with these children can be challenged by language, resources, and the fact that so many of these children are trauma victims from the torture, abuse, neglect or trafficking they experienced in their countries or during their journey to the United States.\(^{39}\) As a result, the ABA already has extensive policy concerning the extra care and effort that must be taken in communicating with a child client and established best practices for how to accomplish this in any legal setting including immigration.

The ABA has long championed the notion that every lawyer has a professional responsibility to provide legal services to those unable to pay.\(^{40}\) “Every lawyer, regardless of professional prominence or professional workload, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer.”\(^{41}\) Nowhere is this need and expectation of the best of our profession more apparent than in the immigration context where the stakes are so high and the role that private bar members can play so vital – for their expertise can transform a child’s destiny from terror to hope and normalcy.

But pro bono isn’t free. In fact, it can be exceedingly costly. Volunteer attorneys who apply their best talents to indigent immigration representation often require significant assistance and guidance from public interest law experts to ensure they deliver first class legal services to pro bono clients, especially when their regular practice does not include immigration law. They thus

\(^{39}\) See Walker, Kenniston, Inada, Handbook on Questioning Children: A Linguistic Perspective (American Bar Association Center on Children and the Law, 3rd Ed.)
\(^{40}\) ABA Model Rule 6.1.
\(^{41}\) ABA Model Rule 6.1 Commentary.
require training, mentorship, case review, and guidance from a dedicated and experienced public interest lawyer or other appropriate mentor. These experts are housed in outstanding organizations around the nation committed to the direct representation of immigrant adults and children, as well as the training and recruitment of volunteer attorneys to assist in that effort.42

Of course pro bono is only part of the solution to this legal crisis. As the Association of Pro Bono Counsel (APBCo)43 has argued to the government and to the public, law firms must dedicate their lawyers to assist in this effort but volunteers alone will not meet the extreme demand of the surge of unaccompanied minors.44 This resolution emphasizes the need to find counsel - pro bono or government funded - in order to ensure access to justice for every child before the court who has expressed an interest in staying in the United States.

**TRAINING JUDGES**

This resolution is also in furtherance of the ABA’s mandate to defend liberty and pursue justice. Our profession must promote professional excellence and respect for the law and its administration. Improving our system of justice translates to providing heightened access to legal representation and to the American system of justice for all persons; increasing respect for the law and legal process; advancing the rule of law in the world; and preserving the independence of the legal profession and the judiciary. The ABA has long-standing policies exhorting our profession to stay abreast of our professional obligations and legal reforms through regular and appropriate training.

Training for judges is critical to avert injustices that arise from lack of awareness of legal developments. This resolution is necessary because the judiciary itself is expressing a need for training in this uniquely challenging and evolving area of law. For example, ABA members who represent unaccompanied minors in SIJS proceedings are receiving increasing queries from some state judges asking why they are being brought into federal immigration proceedings and who clearly lack an informed appreciation of the vital role that the SIJS statute demands of them.

The ABA is spearheading efforts to humanize our collective response to the border crisis that is affecting countless vulnerable children – many if not most of whom should qualify for protected status under either political asylum laws or those governing SIJS. Their prospects for achieving protected status in accordance with federal law is jeopardized if state judicial officers and their staff are not properly trained and informed on emerging policies and procedures that are critical to protect this vulnerable class. State court judges need to understand the United States’ legal

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42 For an extensive list of organizations and bar associations that serve the community in this way see Immigrant Child Advocacy Network, AMERICAN BAR ASSOCIATION, www.ambar.org/ican.

43 The Association of Pro Bono Counsel (APBCo) was established in 2006 as a professional organization for attorneys and practice group managers who run a law firm pro bono practice on a full-time basis. See ASSOCIATION OF PRO BONO COUNSEL, www.apbco.org. Today, APBCo has over 135 members representing 85 of the country’s largest law firms. APBCo’s mission is to maximize access to justice through the delivery of pro bono legal services by advancing the model of the full-time law firm pro bono counsel, supporting and enhancing the professional development of pro bono counsel, and serving as the voice of the law firm pro bono community.

obligations to protect immigrant children, the specifics of eligibility for SIJS under current law, the specific role Congress gave state courts in the fact finding process, and the interplay between state court predicate orders and the ultimate resolution of a child’s immigration status by USCIS or an immigration court. There are jurisdictions where training of the judiciary has been proven to improve the adjudication of these critical cases for children. For example, the Los Angeles Juvenile Court has long recognized how critical training on SIJS is to bench officers overseeing SIJS implementation to ensure eligible minors receive the benefit of the highest quality judicial consideration. That and other courts are leading examples for the nation.

CONSIDERATION OF DESIGNATED DOCKETS

The dependency, family law, probate and other state, tribal and territorial court dockets across the United States are in crisis themselves. Many are reeling from sharp budget cuts and have had to lay off judicial officers and court support staff. Despite this chaotic situation, the SIJS process calls upon these state courts to provide a critical component of the findings required for a child to obtain a visa and remain safe in the United States if they qualify. Children who should qualify for SIJ status may still be removed from the United States by immigration authorities if unable to obtain the orders from the state court ruling that they have been abused, neglected or abandoned and that it is in their best interest to remain in the U.S.

In effect, this means that state court judges are making decisions critical and potentially dispositive as to whether children will access immigration remedies and have the right to stay in the United States. It is an unusual responsibility that requires specialized training to understand the context, the consequences and the nuances of this area of law and practice. In order to meet the unyielding deadlines established by federal law, it may make sense in certain jurisdictions to establish special dockets to hear these cases outside of the regular, and frequently clogged, calendars for dependency, family and probate courts. It may decrease disruption to the regular cases before these local courts for the SIJS matters to be heard separately. It also will likely lend more thoughtful and appropriate adjudication of these matters considering the myriad contexts and unique paths these children have journeyed. It will certainly make it easier for any child who does come to the state court for assistance. As always, each state, territorial or tribal court must decide whether the ABA recommendations, if implemented, would further the purposes of this resolution.

Federal immigration law imposes intense pressure upon on applicants to obtain timely adjudication of these matters. The federal law allows for adjudications before the age of 21. But at the time of the immigration decision, the state court order must still be "in effect." Some states have expanded state court jurisdiction to declare a minor dependent and adjudicate their best interests so an order may be in effect as late as age 19 or 21. The age varies among this group of states. But many states still provide that dependency jurisdiction ends at age 18. For these states, the immigration proceeding must be resolved before the child leaves the state court's jurisdiction. The result is that children nearing the age of 16 are in danger of not being able to take advantage of immigration remedies for which they should otherwise qualify, simply due to the lack of coordinated processes between the two different court systems, state and federal. The issue is amplified by the fact that the federal government’s recent funding program allow the

hiring of a number of lawyers to represent immigrant children who arrived in the surge but even these new attorneys will be restricted to representation of children under the age of 16 who are not in the custody of the ORR or HHS. This resolution seeks thoughtful consideration of resources for expediting processes only where it is needed. Where a child is 16 but there is no chance of the state court jurisdiction ending before age 21, expedited proceeding resources should be saved for other more urgent cases. But because these proceedings may take well over a year to complete, a 16 year old facing an age 18 expiration of jurisdiction in state court should have access to a proceeding that recognizes the need for an expedited process for hearing and adjudicating his or her claim.

The ABA recognizes and respects that courts must decide how to effectively administer all matters coming before them while carefully allocating the limited financial resources available to them for doing so. Because the 2014 surge in arrivals of unaccompanied children will continue to impact state courts for some time to come, the ABA also urges state legislatures to appropriate adequate funds to allow the courts to implement those procedures they may develop for the timely processing of SIJS cases.

**INVIGORATING ABA’S LONG STANDING SUPPORT FOR IMMIGRATION RELIEF**

The ABA is deeply committed to ensuring fair treatment and access to justice under the nation’s immigration laws. ABA policy has consistently recognized the importance of representation in immigration cases where a lawyer can help a noncitizen understand and effectively navigate the complexities of the U.S. immigration system. Promoting the goals of fairness and efficiency through improvements to our overburdened immigration adjudication system will serve to advance the rule of law (Goal IV) by providing for a fair legal process.

This resolution supports the provision of legal representation to unaccompanied minors who have come to the U.S. with no resources for counsel but with claims for immigration relief. The resolution would advance the interests of the government, protect the principle of due process for these children by protecting the rights of non-citizens facing removal, and help vindicate their bona fide claims.

Consistent with its commitment to legal representation, the ABA has adopted several “right to counsel” policies in the immigration field. These policies seek to expand access to retained and pro bono legal representation for persons in removal proceedings, to protect existing attorney-client relationships, and to extend representation to certain vulnerable populations. Populations of particular concern include persons in removal proceedings, political asylum seekers, unaccompanied minors, non-citizens whose removal cannot be effected, detainees, and those held in incommunicado detention. A brief summary of its policies follows.

- In 1983, the ABA opposed legislative initiatives to limit the right to retain counsel in removal proceedings and in political asylum proceedings. (83M120A)

- In 1990, the ABA supported “effective” access to legal representation by asylum seekers in removal proceedings. In particular, it supported improved telephonic access between detained

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46 See Justice of AmeriCorps Legal Services for Unaccompanied Children, NATIONAL & COMMUNITY SERVICE, http://www.nationalservice.gov/build-your-capacity/grants/funding-opportunities/2014/justice-americorps-legal-services (describing these new grants for lawyers for these children restricted only to the children under age 16).
asylum seekers and legal representatives; dissemination of accurate lists of legal service providers; and legal orientation programs and materials for detainees. (90M131)

- In 2001, the ABA supported government-appointed counsel for unaccompanied minors in all immigration processes and proceedings. Likewise in 2001, the ABA opposed the involuntary transfer of detained immigrants and asylum seekers to detention facilities when this would undermine an existing attorney-client relationship. It also opposed the construction and use by the Immigration and Naturalization Service of detention facilities in areas that do not have sufficient qualified attorneys to represent detainees. (01M106A)

- In 2002, in response to the post-September 11 arrest and detention of several hundred non-citizens, the ABA opposed the incommunicado detention of foreign nationals in undisclosed facilities. It also supported the promulgation in the form of federal regulations of federal detention standards (originally developed by the ABA) related to access to counsel, provision of legal information and independent monitoring for compliance with these standards. (02A115B)

- 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 call for timely legal rights presentations for all unaccompanied children, the opportunity to consult with an attorney, the right to have an attorney present in all proceedings affecting a child’s immigration status, and (if necessary) the right to government-appointed counsel. (04A117)

- 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; and the establishment of a system to provide legal representation, including appointed counsel and guardians ad litem, to mentally ill and disabled persons in all immigration processes and procedures, whether or not potential relief may be available to them. (06M107A)

- In 2011, the ABA urged legislation for the protection of unaccompanied minors that would assure prompt screening of their eligibility for immigration relief as well as safe and stable family reunification if they are to be repatriated. That resolution also called for federal support to train state and local judges, and attorneys, regarding the intersection of state child welfare laws, immigration laws, applicable international conventions and standards, and Intercountry protocols that affect children who are detained, separated from, or removed from their adult caretakers. (11A103D)
These policies recognize the crucial importance of legal representation in immigration proceedings right now. This resolution particularizes these policies given the immense unmet need for legal representation in immigration proceedings for unaccompanied children facing the "rocket dockets" now found in immigration courts across the nation. These "rocket dockets" were created in response to a directive in July 2014 from the administration to fast-track the cases and has meant the children receive initial hearings within 21 days and in some cases are given a matter of weeks, instead of months, to find an attorney. Non-profit agencies are doing their best to meet the need but it has exploded in the face of the higher numbers of children in need. Specific reforms are needed in the face of this recent crisis. Significant changes in immigration practice and procedure will profoundly challenge the capacity of state juvenile, probate and family courts properly to adjudicate matters inextricably intertwined with immigration proceedings. This resolution is tailored to redress these matters and help alleviate the impact that they are having on state, territorial and tribal courts in their handling of unaccompanied children’s’ claims for immigration protection.

Respectfully Submitted,

Christina Fiflis, Co-chair
Mary Ryan, Co-chair
Working Group on Unaccompanied Minor Immigrants

February 2015

GENERAL INFORMATION FORM

Submitting Entity: Working Group on Unaccompanied Minor Immigrants

Submitted By: Christina Fiflis, Mary Ryan – Co-chairs

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

   This resolution urges that counsel be appointed for unaccompanied children at government expense at all stages of the immigration process including initial interviews before United States Citizenship and Immigration Services Asylum Offices and at all proceedings necessary to obtain Special Immigrant Juvenile Status, asylum and other remedies and urges that immigration courts should not conduct any hearings, including final hearings, involving the taking of pleadings or presentation of evidence before an unaccompanied child has had a meaningful opportunity to consult with counsel about his or her specific legal options. Because Special Immigrant Juvenile Status is one key immigration remedy available to many of these children, the resolution seeks to secure training for state, territorial and tribal courts to help them promptly provide the prerequisites for these visas that fall within their jurisdiction. Finally, the resolution urges state, territorial and tribal courts to consider creating specialized dockets to adjudicate SIJ cases and establishing expedited processes for children age 16 and over.

2. **Approval by Submitting Entity.**

   The Working Group on Unaccompanied Minor Immigrants approved the resolution on November 6, 2014.

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

   No

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

   The ABA has in the past adopted several policies supporting access to counsel in the immigration context. The two policies most relevant to this resolution are: 1) a 2001 policy supporting government appointed counsel for unaccompanied alien children, among other recommendations, and 2) a 2004 policy adopting the Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States. This resolution would restate the ABA’s support for government appointed counsel for unaccompanied children and that immigration court proceedings should not proceed where a child is unrepresented. The resolution seeks to reaffirm these core principles more than 10 years after they were originally adopted because of the timeliness and importance of the issues.

   The ABA has several existing policies urging training and education of judges in specific contexts. This resolution is consistent with and would complement those policies.
5. **If this is a late report, what urgency exists which requires action at this meeting of the House?**

N/A

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

S. 744, the Border Security, Economic Opportunity, and Immigration Modernization Act, passed by the Senate on June 27, 2013, contained a provision that required the Attorney General to appoint counsel, at the expense of the government if necessary, to represent an alien in a removal proceeding who has been determined by the Secretary to be an unaccompanied alien child, is incompetent to represent himself or herself due to a serious mental disability, or is considered particularly vulnerable when compared to other aliens in removal proceedings, such that the appointment of counsel is necessary to help ensure fair resolution and efficient adjudication of the proceedings. There were several bills introduced in the House that had provisions relating to access to counsel for unaccompanied children. No action was taken on any of these bills.

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

The Working Group and other ABA entities will work with the Governmental Affairs Office to engage in advocacy efforts related to supporting government-appointed counsel for unaccompanied children and ensuring that courts do not set hearings involving the taking of pleadings or presentation of evidence before an unaccompanied child has had a meaningful opportunity to consult with counsel about his or her specific legal options. The recommendations on training for state court judges and encouraging state, territorial and tribal courts to consider dedicated calendars for Special Immigrant Juvenile Status cases will be transmitted to relevant state judges, courts and other stakeholders.

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

None

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

N/A

10. **Referrals.**

    Commission on Immigration  
    Section of Litigation  
    Section of Individual Rights and Responsibilities  
    Section of Family Law  
    Section of International Law
11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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Baker & McKenzie LLP            Public Counsel
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Miami, FL 33131                  pfreese@publiccounsel.org
Tel: 305.789.8904
angela.vigil@bakermckenzie.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.)

Christina A. Fiflis              Mary K. Ryan
Fiflis Law LLC                   Nutter McClennen & Fish LLP
1129 Cherokee Street            Seaport West
Denver, CO 80204                 155 Seaport Blvd.
Tel: 303.381.3405                Boston, MA 02210-2604
Cell: 720-346-3690              Cell: 617-947-1869
christinafiflis@me.com          Tel: 617.439.2212
                                  mryan@nutter.com
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   This resolution supports government appointed counsel for unaccompanied children in immigration proceedings and urges that immigration courts should not conduct any hearings, including final hearings, involving the taking of pleadings or presentation of evidence before an unaccompanied child has had a meaningful opportunity to consult with counsel about his or her specific legal options. Because obtaining Special Immigrant Juvenile Status is one key immigration remedy available to many of these children, the resolution seeks to secure training for state, territorial and tribal courts to help them promptly provide the prerequisites for these visas that fall within their jurisdiction. Finally, the resolution urges state, territorial and tribal courts to consider creating specialized dockets to adjudicate SIJ cases and establishing expedited processes for children age 16 and over.

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

   Each year thousands of unaccompanied children enter the U.S. and are placed in immigration removal proceedings. A significant number of these children do not have legal representation because they cannot find and/or afford a lawyer.

   One of the few avenues of potential relief for unaccompanied children under the immigration laws is obtaining Special Immigrant Juvenile Status (SIJS). But there are challenges to obtaining SIJS, including that a state court must first make certain factual findings. Some state court judges are confused by the federal immigration laws related to SIJS and others are unaware that they have the authority to grant the special findings. In addition, deadlines in federal law require adjudication of all three steps - immigration filing, state court orders, and return to USCIS - before the child turns 18 in many instances.

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

   The policy would ensure that all children are afforded legal representation by supporting government appointed counsel where necessary and would help ensure the children’s due process rights are protected by urging immigration courts not to set hearings where an unaccompanied child has not had a meaningful opportunity to consult with counsel about his or her specific legal options.

   For SIJS cases, additional training can help ensure that state, territorial and tribal court judges are aware of and understand their role in these cases. In addition, creating dedicated calendars for SIJ cases and providing expedited processes for children who are 16 years and older will help to ensure that no child is deprived of the opportunity to obtain SIJ status simply because they aged out of eligibility before their court proceedings were finished.

4. **Summary of Minority Views**

   We are not aware of any minority views to date.
WHEREAS, the market for new lawyers has been increasingly competitive in recent years, resulting in significant unemployment of law school graduates in the state in which they sit for the bar; and

WHEREAS, the restriction of recent law graduates to the state in which they sit for the bar contradicts the American Bar Association’s aim to address the access to justice gap; and

WHEREAS, the increased demand for lawyer mobility has resulted in greater multijurisdictional practice and has increased utilization of admission on motion by experienced lawyers; and

WHEREAS, admission by motion rarely applies to recently admitted lawyers; and

WHEREAS, the increasing use of uniform, high quality testing instruments has rendered most jurisdictions’ bar examinations substantially similar; and

WHEREAS, a uniform licensing examination for lawyers would benefit the changing landscape of legal education; and

WHEREAS, after adoption of the Uniform Bar Exam, state bar admission authorities and state supreme courts would remain responsible for making admission decisions, including establishing character and fitness qualifications, setting passing standards, and enforcing their own rules for admission; and

WHEREAS, the Conference of Chief Justices and the American Bar Association Council of the Section of Legal Education and Admissions to the Bar adopted resolutions urging “the bar admission authorities in each state and territory to consider participating in the development and implementation of a uniform bar examination”;

WHEREAS the American Bar Association Task Force on the Future of Legal Education’s final report issued January 24, 2014, recommends that state Supreme Courts, state Bar Associations and other regulators of lawyers and law practice “establish uniform national standards for admission to practice as a lawyer, including adoption of the Uniform Bar Examination”;

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1 https://www.ncbex.org/assets/media_files/UBE/CCJ-Resolution-4-Uniform-Bar-Exam-2010-AM-Adopted.pdf
3 http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf page 33
NOW, THEREFORE, BE IT RESOLVED that the American Bar Association Young Lawyers Division, by and through its Assembly, hereby supports the positions taken in 2010 by the Conference of Chief Justices and by the Section of Legal Education and Admissions to the Bar;

FURTHER RESOLVED that the American Bar Association Young Lawyers Division urges the bar admission authorities in each state, territory and the District of Columbia to consider participating in the development and implementation of the Uniform Bar Examination;

FURTHER RESOLVED, that the American Bar Association Young Lawyers Division encourages these and other entities to renew consideration of the Uniform Bar Exam now that four years have passed since previous relevant resolutions and now that fourteen states have adopted the Uniform Bar Exam, and that the American Bar Association Law Student Division is committed to working with these groups in such a re-examination; and

FURTHER RESOLVED, the American Bar Association Young Lawyers Division urges States and Territories to expeditiously adopt the Uniform Bar Exam.
REPORT

Introduction

The Uniform Bar Exam (“UBE”) is entering its fourth year, with fourteen jurisdictions having administered the exam in July 2014, and New York considering adoption through a public comment period ending March 1, 2015. Iowa is also considering implementing the UBE. Such momentum is right on schedule, if not a little late. Administering significantly duplicative exams throughout the United States is inefficient. The UBE serves to decrease the expense of an exam taken mostly by recent law school graduates saddled with considerable student loan debt. The UBE more adequately tests legal proficiency and still allows each jurisdiction to ensure that bar admission candidates have adequate knowledge of local law. Non-UBE administered exams already test mostly the same general issues of law, with some jurisdictions testing little to no emphasis on local variations. Year after year, more jurisdictions are adopting the UBE.

Bar Exam History

The history of the written bar exam tells the tale of a steady progression toward the UBE. The bar exam in most states is not an immutable thing, as it has been in flux for most of its existence. Prior to written examinations, bar admissions were conducted orally, either before a judge of the court or by one or more other lawyers. An oral component to the exam was kept well into the 20th Century. Early bar exams focused on rote learning and basic literary skills and therefore “failed to function as effective tests of competence.”

In 1972, the National Conference of Bar Examiners (“NCBE”) first offered the Multistate Bar Examination (“MBE”). The MBE is now offered in 48 states. The MBE has not only improved the scope and quality of bar exams, but it has solved immense logistical problems in administering bar exams throughout the country. Later, the NCBE developed supplemental exams, including: the Multistate Professional Responsibility Examination (“MPRE”), first offered in 1980, and now used in all jurisdictions, except Maryland, Washington, Wisconsin and Puerto Rico; the Multistate Essay Examination (“MEE”), first offered in 1988 and now used in 31 jurisdictions; and the Multistate Performance Test (“MPT”), first used in 1997 and now used in 41 states and territories.

6 Id.
7 Id. at 378.
8 Comprehensive Guide to Bar Admission Requirements 2010 at 17 (Erica Moeser & Claire Huisman, eds. 2010). Louisiana, Washington and Puerto Rico have not adopted the MBE.
9 Jarvis, supra note 1, at 380 (citing Eckler, supra note 9).
10 Jarvis at 384.
11 http://www.ncbex.org/about-ncbe-exams/mpre/
Given that nearly all states and territories use the MBE and the MPRE, and most utilize some portion of other NCBE uniform examinations, we are essentially already using the UBE in many jurisdictions.\textsuperscript{16}

**UBE Composition and Administration**

The UBE is composed of the MEE, MPT, and the MBE.\textsuperscript{17} It is uniformly graded, offering test-takers a portable score, something that would prove beneficial to law students and recent graduates. UBE jurisdictions agree to follow one scoring rubric for the MEE, which expresses general principles of law unless specified otherwise in the question, as when the law is provided within the question. The MPT uses the law of the mythical state of Franklin, which is given to the candidate as part of the exam.

The NCBE pays considerable attention to quality control and offers extensive opportunities for graders to participate in training that is specific to each question once administered and before grading begins. Tests are graded locally, and the problem of forum shopping is alleviated by the UBE grading model. Without going into the minutia of grading, graders of the MEE and MPT rank candidates from best to worst, and through scaling, differences are eliminated. The written scores are set on the MBE scale, and in this way, the effect of having a jurisdiction employ hard or easy grading is eliminated. In short, there is no advantage to forum shopping. A full explanation of scaling can be found in the December 2014 issue of The Bar Examiner.\textsuperscript{18}

Jurisdictions that use the UBE still set their own guidelines for issues such as: setting their own passing scores; determining how long incoming UBE scores will be accepted; and deciding who may sit for the bar exam and who will be admitted into practice.\textsuperscript{19} Jurisdictions that desire to ensure that candidates have knowledge of local law can meet this need in various ways. Most jurisdictions are not testing local law to any considerable degree on current bar examinations, and candidates can pass most bar examinations by studying a core set of subjects, paying little to no attention to local variation in the law.

At this point, an estimated 5,476 examinees have taken the UBE from February 2011 to July 2014. (See Appendix A). In February 2011 there were only two jurisdictions that offered the exam, and in July 2014 there were fourteen jurisdictions that offered the exam.\textsuperscript{20} The amount of scores transferred has increased year to year, with 45 in 2011, 329 in 2012, and 617 in 2013. As of September 2014, at least 1,155 scores have been transferred. (See Appendix B, C).

\textsuperscript{17} http://www.ncbex.org/about-ncbe-exams/ube/
\textsuperscript{18} http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2014/830414-abridged.pdf at 50.
UBE Benefits

The benefits of the UBE are numerous. The UBE better reflects the reality that firms and practices have become multi-jurisdictional and global. Tests of legal competency should therefore emphasize cross-jurisdictional topics.

Furthermore, lawyers, like all professionals, are increasingly mobile, changing firms and locations more than ever. The UBE would make it easier for lawyers to gain admission in multiple jurisdictions by being able to transfer scores from one to the other. Given the state of the legal job market, this need is particularly acute today. Law school graduates without jobs cannot know where their practices will ultimately land. This can force them to take multiple exams, adding thousands of dollars to their already-considerable debt load. The UBE would offer some relief to this problem.

Moving toward the UBE would also align the legal field with other professions, including medicine, which utilize a uniform exam for board licensure. The common reaction to this statement is that medicine should be uniform. After all, a pancreas is a pancreas, whether it is in Missouri or New York. In reality, though, state medical board license examinations varied considerably to reflect the different diseases and medical conditions that afflict different regions and ethnic populations. Lyme Disease, for instance, may be common in Connecticut, but it is virtually nonexistent in Montana. Nevertheless, in the late 1980s, the National Board of Medical Examiners went through the same process that the NCBE is going through now and worked to establish a uniform exam. This exam ensured competency of medical professionals while at the same time easing the expense for state and territorial medical boards of administering separate exams across the country.

The ultimate goal of bar exams is to protect the public by ensuring minimum levels of competency in the legal profession. The UBE would provide some level of transparency and consistency across the legal profession. The UBE would relieve state boards of bar examiners of the burden of creating a test twice a year. States lack the resources to retain professional test writers. This can result in exam questions that are frequently unreliable tests of legal competency. The NCBE has the resources to prescreen and heavily review and edit its tests, using a staff of law professors and professional test writers.

Rationale for Adoption

Only the fourteen states that currently administer the UBE have a vested interest in the quality and form of the exam. Therefore, only those states care to provide input towards shaping the

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21 White, supra note 25, at 6.
23 There are expenses not only in registering for exams, but also in preparing for them. Popular courses such as BARBRI can run in the thousands of dollars.
The globalization of law practice is readily apparent. In August 2002, the American Bar Association’s Commission on Multijurisdictional Practice “recognized that geography no longer dictated the substantive law a lawyer would practice, nor the location in which that practice would take place.” Global licensing is sure to follow, as more jurisdictions join in adopting the UBE. If all of the jurisdictions provide input into the UBE, then the exam will become greater. A single exam will be easier to change and adapt with time, while still having an impact on the profession.

Local law is not tested in most jurisdictions because the current purpose of a bar exam is to test legal reasoning skills to ensure that candidates for admission can “think like lawyers.” Accordingly, law schools purport to teach law students to “think like lawyers” because law schools claim to teach towards the bar exam. While such a reality is questionable, due to the existence and need of bar review courses such as BARBRI, law schools nevertheless develop part of their curriculum based on the bar. Over time, the UBE could become more of a test that could actually measure whether or not an examinee is prepared to practice law. Reasonably, law schools would be hard pressed to not adapt their own curriculums to be more practical towards the actual practice and business of law. Such an exam is more likely to come about if we only have to adapt one exam, instead of leaving it to every separate jurisdiction. The UBE is not just an opportunity to allow multijurisdictional practice of law. This exam is an opportunity to reform legal education as we know it.

The vast majority of law school graduates have to choose a single jurisdiction where they will apply for admission to the bar. That decision usually must be made prior to obtaining employment in that jurisdiction. Some of those graduates may want or need to move to another jurisdiction, and in such situations they must often retake the bar exam at additional cost to practice law in that new jurisdiction. Reciprocity agreements are usually only available to seasoned lawyers with five or more years of experience. Today, if a young lawyer sat for a bar exam in a jurisdiction where there are no longer job opportunities, then he or she must wait for up to six months and pay fees to take another jurisdiction’s exam. The UBE would alleviate this circumstance, as that newly minted young lawyer could more easily transfer to another jurisdiction. While there is a legitimate concern for lose of local control, that concern is readily alleviated.

The UBE would still permit state bar examiners from either testing or otherwise ensuring competency with respect to local law. Bar examiners could design tests of local law as an adjunct to the UBE. New York is considering implementing an additional one-hour of fifty state-specific questions to the UBE. New York’s state-specific portion would be administered four times a year, if the UBE were adopted. A test-taker who would want to take the UBE and practice in New York could study specific aspects of the state’s law instead of studying general variations in dozens of areas. State bars could also ensure competency through bridge-the-gap CLE programs required for candidates for admission to the bar. These are already mandated in many states.

For the jurisdictions that rely on all three of the multistate components of the bar exam,

<http://www.americanbar.org/content/dam/aba/publishing/young_lawyer/yl dol dec10jan11_career.authcheckdam.pdf>.
adoption the UBE is merely a formality, such as with Iowa. Certain jurisdictions have their boards of
bar examiners still drafting essay questions, while the topics are largely the same as those that appear
on the MEE. They involve the same general areas of law with little to no local nuances. The UBE
would reduce substantial duplication efforts that are occurring throughout the country, thus freeing
state resources to focus on other areas of importance in bar admissions, such as character and
fitness examinations, setting passing standards, enforcing their own rules for admission, and
mandatory CLE programs.

The problem of the subjectivity of exam graders would be significantly reduced with the
UBE. Exam graders would have uniform model answers and grading materials. Reduced subjectivity
in grading exams alleviates the concern that students will opt to take the UBE in one jurisdiction
over another, with the hope that the test taker can pass in an easier jurisdiction and then transfer to
any jurisdiction in which he or she wants to find work. The UBE exam makes grading more uniform
from jurisdiction to jurisdiction. Additionally, each jurisdiction will still have control to decide how
long it will accept a transferred score, thus further alleviating any bait-and-switch concerns.

Critics often point to certain areas that vary considerably from one jurisdiction to the next,
such as probate, trusts and estates and family law. Although these areas of law vary more than most
from one jurisdiction to the next, there are commonalities, such as through the Uniform Probate
Code. Since the law has become specialized, a test of minimum competency should not be testing
special areas of the law that vary from jurisdiction to jurisdiction. Additionally, any lawyer would
face both sanctions and malpractice suits if he or she attempted to represent a client in such practice
areas without having fully educated him or herself.

The law is increasingly uniform throughout the states and territories. Whether through
uniform laws or through the adoption of principles in the Restatements, laws do not vary
considerably from one jurisdiction to the next. Most jurisdictions (Louisiana being the most notable
exception) derive their general legal principles from the same English Common Law source. Where
laws do vary, it is typically in specialized areas or through minor nuances, none of which are
rigorously tested in an exam of basic competency.

Finally, federal attorneys only need to be licensed in one state, and then they can practice law
in whatever jurisdiction their job requires. Additionally, there is trend where certain states are willing
to offer reciprocity to another state so long as the other state is also willing to offer reciprocity.
These two realities lend themselves to a simple conclusion – that knowledge of specific local law is
on its way out for state licensure. Nevertheless, jurisdictions will still be able to set the passing score
on the exam.

Furthering ABA Policy

The UBE would be consistent with several ABA policies. Most recently, in August 2014, the
ABA House of Delegates adopted Resolution 108 of the Legal Access Job Corps Task Force
regarding the access to justice gap. Resolution 108 outlines that “most states have substantial rural
areas and some of them have an aging lawyer population. As a result, many communities are now
without lawyers. For example, in one South Dakota community, the nearest lawyer is 120 miles
away. State bars faced with this challenge are creating rural placement projects designed to

31 White, supra note 25, at 6-7.
encourage and give incentives for recently admitted lawyers to set up or assume practices in these communities.”

Wider adoption of the UBE could address both the problems of recent graduate unemployment and lack of access to legal services in certain locals. This resolution urges all jurisdictions to remedy this deficit by adopting the UBE, providing portability to law students and a step in the right direction towards the reformation of legal education.

Summary

The recommended resolution will enable the ABA to continue to serve the interests of law students, young lawyers and the bar in new and innovative ways. The UBE is an idea whose time has come. Such an exam would better reflect the multijurisdictional practice of law today while at the same time ensuring a level of competency for all lawyers throughout the United States. Such an exam would greatly assist law school graduates facing tremendous challenges finding employment while at the same time reducing inefficiency and expense by eliminating the duplication of efforts among state bar examiners. Finally, because most states are already, in essence, administering the UBE, formally doing so is the next logical step.

Respectfully submitted,

ABA YLD Truth in Law School Education Task Force
December 2014
### APPENDIX A

**UBE Exams Taken & Scores Transferred**

#### Number of UBE Examinees by Exam Date

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<th>Exam Date</th>
<th>Jurisdictions</th>
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#### Total UBE Score Transfers by Year

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9/22/14
### APPENDIX B

#### Breakdown of multi-state NCBE test adoption

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<th>State</th>
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## APPENDIX C

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### # of UBE Jurisdictions

- Feb-11: 2
- Jul-11: 3
- Feb-12: 6
- Jul-12: 7
- Feb-13: 8
- Jul-13: 11
- Feb-14: 13
- Jul-14: 14
ABA YLD RECOMMENDATION
GENERAL INFORMATION FORM

Submitting Entity: ABA YLD Truth In Law School Education Task Force

Submitted By: Mathew Kerbis
ABA YLD Emerging Leader

1. Summary of Recommendations:

The ABA support governing bodies of state and territorial bar examinations adopting the UBE.

2. Date of Approval by Submitting Entity:

October 2014.

3. Has this or a similar recommendation been submitted to the Assembly or ABA previously?

Yes. 4YL from 2011 Midyear Assembly, which this resolutions draws from.

4. Are there any Division or ABA policies that are relevant to this recommendation and, if so, would they be affected by its adoption?

The UBE would be consistent with several ABA policies. For instance, the ABA, along with the NCBE and the Association of American Law Schools, has adopted a Code of Recommended Standards for Bar Examiners. The House of Delegates adopted the latest version of this code in August 1987. This code includes several provisions that tend to support the UBE. These standards are consistent with, if not supportive of, the UBE to test general subject matter taught in law school primarily for the purpose of testing legal reasoning and communication skills, not for the purpose of testing knowledge of specific local laws.32

In 1994, the ABA adopted as policy the recommendations from a report of the Task Force on Law Schools and the Profession. Among other recommendations, the task force urged “licensing authorities to consider modifying bar examinations which do not give appropriate weight to the acquisition of lawyering skills and professional values.”

In 2006, the ABA House of Delegates adopted a resolution concerning minorities in the pipeline to the profession. Among other policies within the resolution, it urged state and territorial bar examiners to address significant problems facing minorities within the pipeline to the profession. Certainly, erecting a barrier in the form of duplicative and expensive tests for each state and territory is just the type of significant problem that should be addressed.

Finally, in August 2014, the ABA House of Delegates adopted Resolution 108 of the Legal Access Job Corps Task Force regarding the access to justice gap. Resolution 108 outlines that “most states have substantial rural areas and some of them have an aging lawyer population. As a result,

many communities are now without lawyers. For example, in one South Dakota community, the nearest lawyer is 120 miles away. State bars faced with this challenge are creating rural placement projects designed to encourage and give incentives for recently admitted lawyers to set up or assume practices in these communities.”

None of the above policies, however, would be directly affected by this resolution.

5. Does this recommendation require immediate action at the next Assembly? If so, why?

Yes. With New York and other state bars considering adoption of the UBE, it is crucial for the ABA YLD to be able to weigh in on those discussions.

6. Status of Legislation (if applicable):

N/A.

7. Cost to the Association:

None.

8. Disclosure of Conflict of Interest (if applicable):

None.

9. Referrals:

None.

10. Contact Person (Prior to the meeting):

Mathew Kerbis
ABA YLD Emerging Leader
mathew.kerbis@gmail.com