Coalition for Justice (Report No. 110)

BE IT RESOLVED, That the American Bar Association support the application of existing Association policy regarding federal benefit programs (identified in Attachment A hereto) to states, territories and localities, where primary control and/or funding for such programs is transferred from the federal government to those jurisdictions.

BE IT FURTHER RESOLVED, That the American Bar Association urges state, local and territorial governments in developing the transferred programs within their jurisdictions to utilize an open process that encourages public participation and that those programs provide clear standards for individual eligibility and a process for determining issues of eligibility which includes notice, an opportunity to be heard and represented, and the right of appeal.

BE IT FURTHER RESOLVED, That the American Bar Association urges state, local and territorial bar associations to work within their jurisdictions in support of these principles and standards.
The American Bar Association has endeavored for many years to improve access to justice for all persons, especially those who are least able to protect their own legal rights — low-income persons, individuals with disabilities, children and older people — and has displayed its commitment to this goal by advocating in support of adequate funding for, timely access to and due process in all levels of the justice system, including the administrative process. Concern for these vital issues led the Board of Governors in 1992 to create the Coalition for Justice, and to charge that entity with being the liaison to ensure that lawyers and the public work together to develop broad-based coalitions on issues that affect the justice system, including civil justice improvements, uneven legal needs of children, underfunding of the justice system and public education. The need for these efforts will continue as primary control and/or funding for welfare and other federal benefit programs for needy persons is transferred to the states and other local jurisdictions, a process known as "devolution." The present recommendation restates our historic and consistent support for protection of legal rights and due process under these programs and urges the states to ensure their observance as they implement these newly-devolved responsibilities.

The most comprehensive devolution effort to date is in the area of aid to low-income families. The recently passed Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (the "welfare bill"), replaces the existing Aid to Families with Dependent Children (AFDC) program with "block grants for temporary assistance for needy families" (which is becoming known as TANF). Rather than funding states to pay benefits to all eligible persons, under the new program the federal government will give block grants to states. Unless they obtain a waiver of the rules, states must comply with certain federal requirements (time limits for benefits, work requirements for beneficiaries, etc.) in order to receive the funds. Individual entitlement to benefits will cease to exist. Federal funding for food stamp programs will be reduced, certain categories of immigrants will be ineligible for public benefits, and the connection between AFDC and Medicaid will be severed. States will have no duty to maintain current benefits levels, or even to operate a cash assistance program at all.1

1 Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193, August 22, 1996. Under this law, states will receive a finite sum from the federal government, but it may not be sufficient to cover everyone who is eligible — states can choose how to handle this possibility, and could simply cut off benefits when the funds are depleted, or could maintain eligibility and slow enrollment throughout the budget year. The law 1) requires states to limit benefits to a maximum of five years and require recipients to work after two years; 2) eliminates the individualized functional assessment for SSI disabled children and 3) eliminates eligibility for SSI and food stamps and restricts receipt of other public benefits for non-citizens. States can opt to deny Medicaid coverage to legal immigrants, to deny assistance to children bom to women while they are receiving welfare, to deny welfare to all married parents under age 18, to require that married parents under age 18 live with an adult and attend school, and to provide assistance to a state only if the benefits it would have received under the old program (unless states choose to use a single application).
This law, in conjunction with programmatic changes at the state level through the use of federal waivers, foretells a massive restructuring of the manner in which our nation will meet the needs of our most vulnerable residents. On the one hand, states will have the opportunity to develop thoughtful programs that best serve the needs of their residents; on the other hand, fiscal constraints and political ideology could lead states to limit or even to eliminate fundamental legal rights of needy persons.

The American Bar Association has urged consistently that public participation, clear standards of eligibility and fundamental principles of fairness and due process -- including notice, an opportunity to be heard and represented, and the right of appeal -- must be integral parts of government benefit programs. An overview of existing Association policies on these fundamental legal issues makes clear that they address broad principles that are as applicable to social welfare programs that devolve to states, territories and localities, as they are to those on the federal level.

The House of Delegates has considered many of these issues within the context of programs administered by the Social Security Administration. The House is on record in support of clarity in communications with and due process protections for claimants, and the application of appropriate, consistent legal standards at all stages of the disability adjudication process. In 1985 the ABA joined with the Administrative Conference of the United States (ACUS) to sponsor a symposium on the Social Security Administrative Appeals process. The symposium produced a set of recommendations that resulted in the development of an extensive policy statement adopted by the House of Delegates in 1986. Also in 1986, in an amicus curiae brief in the landmark U.S. Supreme Court case, Bowen v. City of New York, the Association argued successfully that the Social Security Administration should reopen the cases of thousands of mentally disabled claimants who were denied disability benefits because they failed to meet sub rosa requirements and appeal deadlines.

The 1986 policy was augmented in 1991, when the House of Delegates adopted a resolution aimed at further improving the disability claims process and protecting the rights of persons who are already receiving or who may be entitled to benefits. These policies formed the basis for the Association's efforts to improve the quality of medical and vocational evidence at the initial stages of the disability review process, by recommending that the Social Security Administration make vigorous efforts to compile necessary documentation and to supplement reports that are not sufficiently detailed or comprehensive, and increase its efforts to educate the medical community regarding eligibility criteria used in the disability program, and the kind of

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2 ABA Resolution No. 126A (August 1986).
evidence required to establish eligibility for benefits.

The Association has argued that, to make the disability review process efficient and fair, the Social Security Administration must afford claimants the opportunity to review their files, and must provide them with notice of any information not in the file, which normally should have been included, and an opportunity to submit further evidence in support of their claim. Our policies support face-to-face interviews between claimants and decision-makers at the early stages of the process, elimination of the reconsideration level of appeal, and protection of the Administrative law judge’s role as fact finder. The Association also has urged Congress to enact the Homeless Outreach Act, requiring SSA to undertake affirmative efforts in locations where homeless people congregate, to ensure that eligible individuals receive the benefits to which they are entitled. At the 1995 Annual Meeting, the Association voiced support for establishing a single standard for decision making at all levels of the Social Security disability claims process, encouraging disability claims managers to consult with legal and medical resources, and guaranteeing each claimant a due process hearing, on the record, before an administrative law judge who has been appointed pursuant to the Administrative Procedure Act. Most recently, in February 1996 the House articulated firm support for the system of authorizing and paying attorney fees in successful Social Security Administration disability insurance appeals, which has produced a situation in which persons with meritorious claims can find lawyers willing to represent them, not only working very well in preserving access to representation, but protecting claimants from being overcharged.

The Association has advocated for increased clarity in official agency communications, improvements in beneficiary notice provisions and overpayment appeal procedures in the Supplemental Security Income (SSI) program, which pays cash benefits to low-income persons who meet the qualifications of age, blindness or disability. In 1994 the House of Delegates supported in principle the Final Report of the Supplemental Security Income Modernization Project recommendations to raise the awareness of eligible persons about SSI benefits, reduce unwarranted delays in the processing of applications and appeal of claims, increase the level of benefits, and eliminate rules and procedures that are unreasonable, demeaning and harsh.

The Association also has promoted fairness and due process in matters of health security and long term care. In 1987, the House expressed support for federal and state legislative and

8 ABA Resolution No. 315 (August 1993).
9 ABA Resolution No. 115 (February 1996).
10 ABA Resolution No. 514 (August 1984).
11 ABA Resolution No. 110 (February 1990).
regulatory standards to improve the quality of home care, including provisions to involve consumers directly in the evaluation and monitoring of home care, provide them with clear and consistent information about services, consumer rights, and simple and effective means of redress should problems arise. One year later, the Association advocated for improvements in Medicare coverage and procedures, with a focus on public participation in the development of policies, clarity in and timely processing of coverage determinations, and the right to due process protections in the appeal of adverse decisions.

In the long term care arena, the Association has recommended that federal and state legislation provide a coordinated and comprehensive system of care for Americans of all ages with long-term care needs, consistent with principles of equitable access and procedural fairness. We have also supported principles of equitable access, procedural fairness, autonomy, quality of care and responsible financing in government initiatives to promote private long term care insurance. Most recently, the House of Delegates in 1995 appealed to Congress to repeal federal Medicaid estate recovery laws, authorizing the federal government, states, and territories in the event that those laws were not repealed, to amend their rules to protect the poorest and most vulnerable persons. That resolution also proposed that the federal government require states to develop and apply clear standards for notice, appeals and other due process protections consistent with Medicaid due process guidelines, and to meet certain reporting requirements to ensure that estate recovery programs are being fairly implemented.

In recent years, the Association has monitored state efforts to revamp their welfare systems through application to the federal government for a waiver from federal rules and requirements, and has not hesitated to advocate on issues raised by state proposals. For example, the Association has advocated that welfare programs be funded at a level required to meet basic essentials of life, consistent with state and federal constitutions, and has opposed any federal, state or territorial legislation, regulation or rule that denies public benefits to which a family would otherwise be entitled based on receipt of public assistance at the time of the child's conception or birth, or the mother's age or marital status at the time of the child's birth, or the fact that the child's paternity has not been established. Concerned about restrictions on the education

10 ABA Resolution No. 106A (August 1987).
11 ABA Resolution No. 110 (August 1988).
12 ABA Resolution No. 105 (February 1989).
13 ABA Resolution No. 105 (February 1992).
14 ABA Resolution No. 105 (February 1995).
15 ABA Resolution No. 105 (February 1995).
16 ABA Resolution No. 122 (August 1992).
17 ABA Resolution No. 103 (February 1995).
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of children, the House of Delegates in 1995 spoke out against federal and state government efforts to restrict or deny access to public education to a child based on the child's or the child's parent's citizenship or immigration status, and urged all jurisdictions to respect Constitutional rights to due process and civil liberties.\(^7\)

Nor has our advocacy on issues of fairness and due process been limited to particular programs. In 1977 the House of Delegates urged states to adopt administrative procedure acts that "secure people fair procedural treatment and a clear, reliable guide to their rights in dealing with the many different state administrative agencies." States were encouraged to provide agency rulemaking by notice and an opportunity for interested persons to submit views or information; to publish agency rules and make available for inspection agency policies affecting the rights of the public; and in agency adjudicatory proceedings, to establish rules for notice, evidence, content of the record, grounds for decision making, and impartiality of the decision maker, and the opportunity for judicial review of an agency decision.\(^8\) The Association stopped short of advocating that states impose similar rules on local government agencies, acknowledging the existence of tensions in some jurisdictions over state control of local government decision making.\(^9\)

Most importantly for the purposes of this Recommendation, while not all of these resolutions are directed specifically to states, territories and localities -- until recently there was no cause for them to be so directed, since the major benefit programs were created and administered by the federal government -- none indicate any intent of the Association to exclude their application to the states.

This Recommendation will make clear that existing Association policy on issues of fairness and due process continues to apply as federal benefit programs are transferred to the states and restructured, and will support Association efforts to work with states as they prepare to meet the challenges ahead. It will continue this Association's strong tradition of advocacy in support of fairness and due process in federal government benefit programs, by applying the principles set forth in existing policy to those programs as they are transferred to states, territories and localities. Specifically, it will allow the Association to advocate in support of an open process that encourages public participation in the design of these programs; and the development of a system that embraces principles of fairness and due process, including the equitable application of clear standards for eligibility, and a rational and fair decision making process that includes notice, rights of appeal and other due process protections.

\(^7\) ABA Resolution No. 110 (February 1995).

\(^8\) ABA Resolution No. 1 (August 1977).

\(^9\) Id. Report at 875.
February, 1997

Respectfully Submitted,

Philip S. Anderson
Chair, Coalition for Justice
Attachment A
List of ABA adopted policy positions
with respect to federal benefit programs

ABA Resolution No. 1, August 1977
ABA Resolution No. 114, August 1984
ABA Resolution No. 126A, August 1986
ABA Brief Amicus Curiae, Bowen v. City of New York,
47 U.S. 467 (1986)
ABA Resolution No. 106A, August 1987
ABA Resolution No. 110, August 1988
ABA Resolution No. 105, February 1989
ABA Resolution No. 109A, August 1991
ABA Resolution No. 112, February 1992
ABA Resolution No. 122, August 1992
ABA Resolution No. 110, February 1994
ABA Resolution No. 110, February 1995
ABA Resolution No. 120, February 1995
ABA Resolution No. 105, February 1995
ABA Resolution No. 115, August 1995
ABA Resolution No. 115, February 1996
1. Summary of Recommendation(s).
Urges state, local and territorial governments in implementing federal benefit programs transferred to them, to provide clear standards for eligibility and a process for determining issues of eligibility that includes notice, an opportunity to be heard and represented, and the right of appeal.

2. Approval by Submitting Entity.
Approved by Coalition at its 11/08/96 Meeting.
Approved by Commission on Legal Problems of the Elderly at its 09/28/96 Meeting.
Approved by Section of Administrative Law Council at its 10/19/96 Meeting.
Approved by Senior Lawyers Division Council at its 11/01/96 Meeting.
Approved by Commission on Homelessness and Poverty at its 09/28/96 Meeting.

3. Has this or a similar recommendation been submitted to the House or Board previously?
As detailed in the report, a wide range of policies in this area have previously been approved by the House. They are reaffirmed in this recommendation and, in some cases, explicitly extended to state, local and territorial governments.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?
As noted above, a wide range of resolutions are reaffirmed and extended by this recommendation.
5. What urgency exists which requires action at this meeting of the House?
Congress has acted, and continues to act, to devolve programs to the states, which are now trying to implement them.

6. Status of Legislation. (If applicable.)
None currently pending. Congress having adjourned.

7. Cost to the Association. (Both direct and indirect costs.)
Only modest costs associated with producing and sending this recommendation to the states.

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

9. Referrals.
All ABA Sections and Divisions
StC on Delivery of Legal Services
StC on Group and Prepaid Legal Services
StC on Lawyer Referral and Information Service
StC on Lawyers’ Public Service Responsibility
StC on Lawyers’ Responsibility for Client Protection
StC on Legal Aid and Indigent Defendants
StC on Legal Assistance for Military Personnel
Commission on Domestic Violence
Coordinating Committee on Immigration Law
Commission on Interest on Lawyer Trust Accounts
Consortium on Legal Services and the Public
Commission on Mental and Physical Disability Law
Steering Committee on the Unmet Legal Needs of Children

10. Contact Person. (Prior to the meeting.)
Philip S. Anderson
Williams & Anderson
2200 Stephens Bldg
222 Center Street
Little Rock, AR 72201-4402
501/372-0800

11. Contact Person. (Who will present the report to the House.)
Philip S. Anderson

12. Contact Person Regarding Amendments to This Recommendation.
(Are there any known proposed amendments at this time? If so, please provide the name, address, telephone, fax and ABA/net number of the person to contact below.)