RESOLVED, That the American Bar Association urges the President, Congress, and the Equal Employment Opportunity Commission (“EEOC”) to adopt measures to provide that employment discrimination hearings conducted by the EEOC be subject to the formal adjudication requirements of the Administrative Procedure Act (5 U.S.C. sections 554, 556, and 557).
The ABA provides that invocation of the APA provides the public with an assurance that fair hearings will be held before an impartial adjudicator. The ABA has characterized APA adjudication as a fair process affording all parties ample opportunity to be heard; guided by an expert and professional corps of adjudicators who seek to ensure justice is done. Over time, the APA has become a “mini Constitution” that provides fundamental fairness for litigants before administrative agencies. The ABA has long supported uniformity in adjudication through the APA. For example, in Resolution 113, July, 2000, the ABA asked Congress to amend the APA so that prospectively, absent a statutory requirement to the contrary, in any future legislation that creates the opportunity for an adjudicatory hearing, “such a hearing shall be subject to the APA.” Further, in Resolution 114, adopted February 14, 2005, the ABA recognized “Federal Administrative Adjudication in the 21st Century,” when it acknowledged that administrative law judge adjudication should be the preferred type of adjudication for evidentiary proceedings conducted under the Administrative Procedure Act.

The EEOC is responsible for conducting hearings to determine the rights of federal employees, applicants for employment and former employees under the various non-discrimination statutes which EEOC also enforces in the private sector, including inter alia, Title VII of the 1964 Civil Rights Act, as amended, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.; the Equal Pay Act of 1963, as amended, 29 U.S.C. § 206(d) et seq.; and the Americans with Disabilities Amendment Act, 42 U.S.C. 12101 et seq. Although the hearings bear similar characteristics to APA hearings, EEOC federal sector administrative hearings are not conducted pursuant to the APA, 5 U.S.C. §§ 554, 556 and 557 [APA]. The Resolution calls for extension of the APA to these EEOC administrative hearings to significantly increase public trust and confidence in the integrity and independence of EEOC decisions.

1 The American Bar Association has adopted policy supporting the independence and integrity of the administrative judiciary in 1983, 1989, 1998, 2000, 2001 and 2005. Federal administrative law judges (“ALJ”) have been members of the American Bar Association, Judicial Division, National Conference of the Administrative Law Judiciary, since 1971. In Resolution 106A, August, 2005, the ABA proposed the Administrative Law Judge Conference of the United States as an independent agency to assume the responsibility of the United States Office of Personnel Management with respect to Administrative Law Judges including their testing, selection, and appointment. In Resolution 112, February, 2009 the ABA requested the Office of Personnel Management, as part of its mandate to select the best qualified candidates for federal administrative law judge positions, to consider judicial status in good standing as a satisfactory alternative to any requirement that candidates be active licensed attorneys in good standing.

2 See Report to Resolution # 114, August 9-10, 2004

3 See, A Guide to Federal Agency Adjudication, Michael Asimow, ed., 164 (American Bar Association Administrative Law Section, 2003). Under the APA, subject to published rules of the agency, administrative law judges are empowered to administer oaths, issue subpoenas, receive relevant evidence, take depositions, and regulate the course of the hearing. These fundamental powers arise from the Administrative Procedures Act “without the necessity of express agency delegation” and “an agency is without the power to withhold such powers” from its administrative law judges. Id. The Administrative Procedure Act seeks to affirm and protect the role of the administrative law judge, whose “impartiality,” in the words of the Supreme Court in Marshall v. Jerrico, 446 U.S. 238, 250 (1980), “serves as the ultimate guarantee of fair and meaningful proceedings in our constitutional regime.”
In the Report to Resolution 114, February 14, 2005, the ABA determined that when evaluating whether a hearing should fall within the APA process, Congress should consider the following factors:

a. Whether the adjudication is likely to involve a substantial impact on personal liberties or freedom, whether the orders carry with them a finding of criminal-like culpability or would have substantial economic effect, or whether the orders involve determinations of discrimination under civil rights or analogous laws.
b. Whether the adjudication would be similar to, or the functional equivalent of, current APA adjudication.
c. Whether the adjudication would be one in which adjudicators ought to be lawyers.

Procedures in Equal Employment Opportunity Commission (EEOC) hearings should be the same as current APA hearings. EEOC adjudication is likely to involve a substantial impact on personal liberties or freedom, and involve determinations of discrimination under civil rights or analogous laws. EEOC hearing should be the functional equivalent of, current APA adjudication. Moreover, they are legal proceedings involving parties that that should be represented by competent counsel.

This Resolution is intended to encourage reform of the EEOC administrative hearings program in order to protect the public interest in independent, impartial, and responsible decision-making in the administrative adjudication process. The public and parties to cases before any federal agency expect that the agency employees who decide their cases, who are held out by the agency as “judges,” to be independent and to decide a case based solely on the facts and the law. Other factors should not be considered by a judge or the agency official responsible for managing the judge. The integrity of the administrative law system is itself at stake in such cases.

Currently the administrative process at the EEOC is not governed by the APA. Its Administrative Judges are not guaranteed independence, but instead report through the District Director in their geographical area, who is not a judge and often not a lawyer. The parties have no right to obtain information from third parties through issuance of administrative subpoenas. The selection criteria for EEOC Administrative Judges are not the same uniform criteria used across the government for selection of administrative law judges, including a minimum of seven (7) years of litigation or administrative law experience. The ABA has long supported the establishment of a government-wide corps of administrative law judges to enhance the judicial independence and efficiency of all federal administrative law judges. Although the EEOC has been statutorily empowered for over 30 years to hire administrative law judges, it has not done so and upon information and belief has not entered into factfinding or rulemaking on this issue.

The duties of EEOC administrative judges are include not only cases under the statutes then in effect, but also the 1991 Civil Rights Act, authorizing awards of up to $300,000 in compensatory damages in certain cases of intentional discrimination, as well as attorneys’ fees to certain prevailing parties; the Americans with Disabilities Amendments Act; the Lilly Ledbetter Fair Pay Act; and the Genetic Information Nondisclosure Act. The parties are now entitled to discovery modeled on the Federal Rules of Discovery, including electronic discovery. Finally, EEOC administrative judges are responsible for “developing an adequate record” in a process
when unrepresented claimants are opposed by agency respondents, who virtually always have counsel.

Resolution 101 B, August, 2001, provides that the administrative judiciary should be held accountable under appropriate ethical standards adapted from the *ABA Model Code of Judicial Conduct* (1990) in light of the unique characteristics of particular positions in the administrative judiciary. For purposes of that resolution, the administrative judiciary includes all individuals whose exclusive role in the administrative process is to preside and make decisions in a judicial capacity in evidentiary proceedings, but does not include agency heads, members of agency appellate boards, or other officials who perform the adjudicative functions of an agency head. Currently, EEOC administrative judges are unable to comply with judicial ethical standards in the event of a contrary instruction of a non-judicial superior. ⁴

It is critical that the issue of fairness in administrative adjudication not be overlooked in the midst of efforts to reform judicial systems and develop new procedural initiatives to resolve cases efficiently. ⁵

Under the APA, the EEOC would demonstrate respect for the adjudication program and staff by operating within the normal reporting structure including supervisory judges and a chief judge and the expected level of adequate support staff. By adopting APA procedures for its administrative hearings, EEOC would demonstrate a greater commitment to a fair, professional administrative hearings process.

Thomas Snook, Chair
Judicial Division, National Conference of Administrative Law Judiciary
August 2011

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⁴ Resolution 114, February 2005, would have extended a proposed §559 to require the Office of Government Ethics to adopt ethical standards to implement Resolution 101B, adopted August 6, 2001, in which the ABA recommended that members of the administrative judiciary be held accountable under the ABA's Model Code of Judicial Conduct in light of the "unique characteristics of particular positions in the administrative judiciary."

⁵ Again see Resolution 114, February 2005.
GENERAL INFORMATION FORM

Submitting Entity: National Conference of the Administrative Law Judiciary
Submitted by Thomas W. Snook, Chair of the National Conference of the Administrative Law Judiciary

1. Summary of Resolution
Hearings before the Equal Employment Opportunity Commission should be Administrative Procedure Act proceedings.

2. Approval of Submitting Entity
The Resolution was approved by the National Conference of the Administrative Law Judiciary by electronic vote on May 10, 2011

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?
In Resolution 113, July, 2000, the ABA adopted a resolution supporting the uniformity of process and of qualifications of presiding officers contemplated by the APA, and providing that Congress should amend the APA so that prospectively, absent a statutory requirement to the contrary in any future legislation that creates the opportunity for an adjudicatory hearing, such a hearing shall be subject to the APA. The ABA has supported APA adjudication in 1983, 1989, 1998, 2000, 2001, and 2005. In Resolution 114, February, 2005, the ABA urged Congress to amend and modernize the adjudication provisions of the Administrative Procedure Act and to expand certain fundamental fair hearings provisions of that Act by enacting legislation recognizing the administrative law judge adjudication as the preferred type of adjudication for evidentiary proceedings conducted under the Administrative Procedure Act.

5. What urgency exists which requires action at this meeting of the House?
No current urgency, although litigants should be provided APA hearings as soon as possible.

6. Status of Legislation. (If applicable.)
Not applicable at this time.

7. Cost to the Association. (Both direct and indirect costs.)
None.
8. **Disclosure of Interest. (If applicable.)**

Many members of the National Conference of the Administrative Law Judiciary are United States administrative law judges. No one who voted on this resolution has a conflict of interest.

9. **Referrals.**

It will be sent immediately to the Judicial Division; Government and Public Sector Lawyers Division; Commission on Women in the Profession; the Sections of Administrative Law and Regulatory Practice, Labor and Employment, Litigation, and Dispute Resolution; and Diversity Center.

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

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

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EXECUTIVE SUMMARY

a) Summary of the Resolution.

Litigants are entitled to a fair hearing with an opportunity to be heard before an impartial and well qualified adjudicator. The resolution would provide that hearings before the Equal Employment Opportunity Commission (“EEOC”) on employment discrimination claims brought by federal employees, applicants and former employees, be conducted pursuant to the Administrative Procedure Act (“APA”).

b) Summary of the issue which the Resolution addresses.

EEOC hearings are not conducted pursuant to the APA, so that the parties to those cases are not guaranteed that the proceeding will be decided on the facts and the law, rather than non-judicial factors; do not have the ability to subpoena information from third parties; and are not assured that the judge deciding their cases will have the same independence and the same qualifications as administrative law judges throughout the federal government.

c) An explanation of how the proposed policy position will address the issue.

Current legislation authorizes EEOC to hire administrative law judges pursuant to the APA. The Resolution recommends that the full protections of the APA be applied to EEOC hearings, and that any additional legislative and regulatory changes which are necessary for the APA to apply to those hearings be made.

d.) Minority Views or Opposition.

No opposition to this resolution is known to exist at this time.