<table>
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<tr>
<th>Report</th>
<th>Sponsor and Subject</th>
<th>Reviewing Entity</th>
<th>Recommended Committee Position</th>
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<tr>
<td>100</td>
<td>COMMISSION ON LAW AND AGING SECTION OF HEALTH LAW</td>
<td>Health Law</td>
<td>TBD</td>
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<td></td>
<td>Urges governments to enact legislation and regulation that will promote specific</td>
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<td>components in the provision of care to persons with advanced illness.</td>
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<td>102</td>
<td>STANDING COMMITTEE ON SPECIALIZATION</td>
<td>Business and Corporate Litigation</td>
<td>Support</td>
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<td></td>
<td>Reaccredits the Civil Trial Advocacy and the Social Security Disability Law programs</td>
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<td>of the National Board of Trial Advocacy as designated specialty certification programs for lawyers for additional five-year terms.</td>
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<tr>
<td>103A</td>
<td>NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS</td>
<td>Banking Law</td>
<td>Support</td>
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<td></td>
<td>Approves the Uniform Fiduciary Access to Digital Assets Act, promulgated by the National Conference of Commissioners on Uniform State Laws, as an appropriate Act for those states desiring to adopt the specific substantive law contained in the Act.</td>
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<tr>
<td>103B</td>
<td>NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS</td>
<td>Business and Corporate Litigation</td>
<td>Support</td>
</tr>
<tr>
<td></td>
<td>Approves the Uniform Recognition of Substitute Decision-Making Documents Act, promulgated by the National Conference of Commissioners on Uniform State Laws, as an appropriate Act for those states desiring to adopt the specific substantive law contained in the Act.</td>
<td>International Business Law Mergers and Acquisitions</td>
<td>Support</td>
</tr>
<tr>
<td>103C</td>
<td>NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS</td>
<td>Banking Law</td>
<td>Support</td>
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<tr>
<td></td>
<td>Approves the Uniform Voidable Transactions Act (as amended in 2014), promulgated by the National Conference of Commissioners on Uniform State Laws, as an appropriate Act for those states desiring to adopt the specific substantive law contained in the Act.</td>
<td>Business Bankruptcy Consumer Bankruptcy Commercial Finance Consumer Financial Services</td>
<td>Support</td>
</tr>
<tr>
<td>104</td>
<td>TAXATION SECTION</td>
<td>Taxation</td>
<td>TBD</td>
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<td></td>
<td>Urges Congress to amend 31 U.S.C. § 330(a) and (b) to include within the scope of those provisions non-attorney “tax return preparers,” as that term is defined by 26 U.S.C. § 7701(a)(36) and Treasury Department regulations promulgated thereunder.</td>
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<td>106</td>
<td>YOUNG LAWYERS DIVISION</td>
<td>Business Law Education</td>
<td>No position</td>
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<tr>
<td></td>
<td>Encourages law schools to offer comprehensive debt counseling and debt management</td>
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<td>education to all currently admitted and enrolled law students, and encourages bar</td>
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<td>associations to offer similar debt counseling and debt management education to young</td>
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<td>lawyers and newly admitted lawyers.</td>
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| 109B | COMMISSION ON DOMESTIC AND SEXUAL VIOLENCE  
COMMISSION ON HOMELESSNESS AND POVERTY  
COMMISSION ON YOUTH AT RISK | Consumer Financial Services | No position |
<table>
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<tbody>
<tr>
<td><strong>Urges governments and regulators to amend existing laws and regulations, or to enact new laws or regulations to expand housing protections for victims of domestic and sexual violence.</strong></td>
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| 110 | COMMITTEE ON DISASTER RESPONSE AND PREPAREDNESS  
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES  
COMMISSION ON HOMELESSNESS AND POVERTY | Pro Bono | Support |
<table>
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<tr>
<td><strong>Urges authorities to identify and address the special needs of vulnerable populations, including but not limited to individuals with disabilities, children, the frail, the elderly, the impoverished, and persons with language barriers, when planning for and responding to disasters.</strong></td>
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<thead>
<tr>
<th>111B</th>
<th>SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES</th>
<th>Banking Law</th>
<th>Oppose</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Urges Congress to enact legislation that supports the principles regarding consumer data privacy set forth in the Consumer Privacy Bill of Rights contained in the 2012 White House Report Consumer Data Privacy In a Networked World, and urges governments to enact legislation, regulations and practices that are consistent with and supportive of these principles.</strong></td>
<td>Consumer Financial Services</td>
<td>Cyberspace Law</td>
<td>Oppose</td>
</tr>
</tbody>
</table>

| 111C | SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES  
THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA  
BAR ASSOCIATION OF SAN FRANCISCO  
COMMISSION ON HOMELESSNESS AND POVERTY | Banking Law | Support |
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<tbody>
<tr>
<td><strong>Urges governments to continue to enforce and to enact rules or legislation that strengthen consumer protections regarding deceptive or fraudulent loan foreclosure rescue practices.</strong></td>
<td>Consumer Bankruptcy</td>
<td>Commercial Finance</td>
<td>No position</td>
</tr>
<tr>
<td>Consumer Financial Services</td>
<td>No position</td>
<td>No position</td>
<td></td>
</tr>
</tbody>
</table>

| 113 | WORKING GROUP ON UNACCOMPANIED MINOR IMMIGRANTS  
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES  
AMERICAN IMMIGRATION LAWYERS ASSOCIATION  
COMMISSION ON IMMIGRATION  
COMMISSION ON DOMESTIC AND SEXUAL VIOLENCE  
SECTION OF INTERNATIONAL LAW  
COMMISSION ON HISPANIC LEGAL RIGHTS AND RESPONSIBILITIES  
STANDING COMMITTEE ON PRO BONO AND PUBLIC SERVICE  
SECTION OF FAMILY LAW  
SECTION OF LITIGATION  
COMMISSION ON YOUTH AT RISK | Pro Bono | Support |
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<tbody>
<tr>
<td><strong>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.</strong></td>
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RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal governments to enact legislation and regulation that will promote the following components in the provision of care to persons with advanced illness:

1. Finance and payment mechanisms that support access to person-centered care coordination and care management across all care settings, providers, medical conditions, and time;

2. Advance care planning through counseling, disclosure and meaningful discussion of prognosis, goals of care, personal values, and treatment preferences, including planning for family caregivers’ needs;

3. Access to palliative care, community-based supportive services, and caregiver support to enable persons with advanced illness to remain in the home and community in accord with their preferences and needs;

4. Expanded research to improve care delivery and payment practices that will benefit individuals and families facing advanced illness;

5. A strong health care workforce educated and equipped with the clinical and social skills to serve people with advanced illness and their families and caregivers; and

6. Health information technology that promotes advance care planning and effective information sharing across time, place, and provider.
RESOLVED, That the American Bar Association reaccredits for an additional five-year term the following designated specialty certification programs for lawyers:

Civil Trial Advocacy program of the National Board of Trial Advocacy, a division of the National Board of Legal Specialty Certification; and

Social Security Disability Law program of the National Board of Trial Advocacy, a division of the National Board of Legal Specialty Certification.
REPORT

Background and Synopsis of the Recommendations

At the 1993 Midyear Meeting, via Resolution 105, the House adopted Standards for Accreditation of Specialty Certification Programs For Lawyers and delegated to the Standing Committee on Specialization the task of evaluating programs sponsored by organizations that apply to the ABA for accreditation, and making recommendations to the House of Delegates about the periodic renewal of accreditation.

The adoption of the Standards in February, 1993, followed an August, 1992, House resolution (Resolution 128) requesting that the Association develop standards for accrediting private organizations that certify lawyers as specialists, and that the Association establish and maintain a mechanism to accredit such organizations that meet those standards. The 1992 resolution affirmed that a national accreditation mechanism administered by the Association according to uniform standards would be an efficient and effective means of dealing with a multiplicity of organizations that are offering, or planning to offer, certification programs.

At the 1999 Annual Meeting, via Resolution 107A, the House extended the initial period of accreditation approved in the Standards from three to five years. In addition, the House lengthened the period of reaccreditation from every third year to every fifth year.

At the 2015 ABA Midyear Meeting the period of accreditation for two of the accredited legal specialty certification programs of the National Board of Legal Specialty Certification will expire: (1) the Civil Trial Advocacy program of the National Board of Trial Advocacy (“NBTA”), a division of the National Board of Legal Specialty Certification (the accreditation period of this program was extended for six months at the 2014 Annual Meeting); and (2) the Social Security Disability Law Advocacy program of the NBTA.

The application of the Civil Trial Advocacy program was given extended consideration (necessitating the extension of that program’s accreditation period) principally because the NBTA has been granting Civil Trial Advocacy certification to applicants who pass the examinations of similar certification programs administered by the state bars of Florida (Civil Trial) and Texas (Civil Trial Law and Personal Injury Law), and the Supreme Court of New Jersey (Civil Trial), necessitating the Standing Committee’s review of those state programs’ examinations. The volume of examinations to be reviewed for that program’s application was thus far greater than for other programs’ applications.

On the advice of the accreditation review panels and examination reviewers whom the Standing Committee appointed for these applications, the Standing Committee is here recommending reaccreditation of both the NBTA’s Civil Trial Advocacy and Social Security Disability Law programs for additional five-year terms. On the advice of its exam reviewers, however, the Standing Committee has advised the NBTA that there were topical dissimilarities between the Texas Bar’s Civil Trial Law examination and NBTA’s own Civil Trial Advocacy examinations, and that the NBTA should no longer accept passage of the Texas Bar’s Civil Trial
Law examination for certification of applicants to NBTA’s Civil Trial Advocacy program without further review and approval of the Standing Committee.

Requirements for Re-accreditation in the ABA Standards; Description of the Applicants

Sections 5.01 and 5.02 of the Standards require that “a certifying organization shall be required to apply for re-accreditation prior to the end of the fifth year of its initial accreditation period and every five years thereafter,” and that re-accreditation “shall be granted” if the certifying organization shows that the program continues to comply with the Standards’ detailed accreditation requirements. (Those accreditation requirements are set out in an endnote to this Report.) The NBTA complied with those requirements.

Reaccreditation and Evaluation Procedures for the NBTA Certification Programs

In evaluating the NBTA programs recommended for reaccreditation here, the Standing Committee followed the Rules it adopted on March 2, 1993, as amended on April 24, 1993, June 27, 1995, January 5, 1996, July 8, 1999, July 21, 2001, November 1, 2002, November 2006, and June 2013. The NBTA filed an application for reaccreditation of the Civil Trial Advocacy program with the Standing Committee in the summer of 2013, and filed an application for reaccreditation of the Social Security Disability Law program in the spring of 2014. The applications were accompanied by payment of a reaccreditation fee for the specialty certification programs for which the applicants sought reaccreditation.

In order to ensure that each of the programs continues to comply with ABA Standards, the Standing Committee requires that the following accompany all applications:

i. Current versions of the applicant's governing documents, including articles of incorporation, bylaws, and resolutions of the governing bodies of the applicant or any parent organization, which resolutions relate to the standards, procedures, guidelines or practices of the applicant's certification programs;

ii. Biographical summaries of members of the governing board, senior staff and members of advisory panels, certification committees, examination boards and like entities involved with the certification process, including specific information concerning the degree of involvement in the specialty area of persons who review and pass upon applications for certification;

iii. All materials furnished to lawyers seeking certification, including application forms, booklets or pamphlets describing the certification program, peer reference forms, rules and procedures, evaluation guides and any other information furnished to the public or the media regarding the certification process;

iv. A copy of the recent examinations given to applicants for specialty certification, along with a description of how the exam was developed, conducted and reviewed; a description of the grading standards; and the names of persons responsible for determining pass/fail standards.
Because in addition to passage of the examinations it administers itself for the Civil Trial Advocacy program, the NBTA had accepted applicants’ passage of examinations administered by the Florida Bar’s Board of Legal Specialization in Civil Trial Law, the New Jersey Supreme Court’s Board on Attorney Certification in Civil Trial Law, and the Texas Board of Legal Specialty Certification in Civil Trial Law and Personal Injury Law. Recent examinations from all of these programs were made available, on a confidential basis, for review by examination reviewers appointed by the Standing Committee.

**Accreditation Review Panelists:**

The Accreditation Review Panels appointed by the Standing Committee consisted of a chair and two other members, as well as the appointed examination reviewers. Applicants were provided notice, in writing, of the names and affiliations of the members of the Accreditation Review Panel and the examination reviewers. The reaccreditation procedures provide certifying organizations the opportunity to object for cause to the appointment of examination reviewer. The Accreditation Review Panel members were:

**NBTA Social Security Disability Law**

**Alice Neece Mine** (Raleigh, North Carolina), **Chair.** Ms. Mine is the Director of the North Carolina State Bar’s Board of Legal Specialization and the current Chair of the ABA Standing Committee on Specialization.

**Wesley Avery** (Valencia, California). Mr. Avery is certified as a specialist in Bankruptcy Law by the State Bar of California and by the American Board of Certification. Mr. Avery is a past Chairman of the Board of Legal Specialization of the State Bar of California and a current member of the ABA Standing Committee on Specialization.

**Jessica Thomas** (Minneapolis, Minnesota). Ms. Thomas is the director of the Minnesota State Bar Association’s Certified Legal Specialist programs.

**NBTA Civil Trial Law**

**Daniel Gourash** (Cleveland, Ohio), **Chair.** Mr. Gourash is a partner in the Cleveland firm of Seeley, Savidge, Ebert & Gourash LPA. He is a former Chair of the ABA Standing Committee on Specialization.

**Dian Gilmore** (Cedar Rapids, Iowa). Ms. Gilmore is the Executive Director of the American Board of Certification.

**Daniel Trujillo** (Denver, Colorado). Mr. Trujillo is the Director of Certification Programs for the National Association of Counsel for Children.
Examination Reviewers:

The appointed examination reviewers for the NBTA applications were:

**Caroline Chapman** (Chicago, Illinois), **NBTA Social Security Disability Law examination.** Ms. Chapman is the Director of LAF Chicago’s Public Benefits Practice Group.

**Patricia C. Bobb** (Chicago, Illinois), **NBTA Civil Trial Advocacy examinations.** Ms. Bobb is a principal in the Chicago firm of Patricia C. Bobb and Associates and a member of the ABA Standing Committee on Medical Professional Liability. Ms. Bobb examined the Civil Trial Law examinations of the New Jersey Supreme Court’s Board on Attorney Certification.

**David Lee** (Chicago, Illinois) **NBTA Civil Trial Advocacy examinations.** Mr. Lee is the principal of the Law Office of David L. Lee in Chicago, and the President of the National Employment Lawyers Association. Mr. Lee examined the Civil Trial Advocacy examinations prepared by the NBTA itself; the Civil Trial examinations prepared by the Florida Bar’s Board of Legal Specialization; and the Civil Trial examinations prepared by the Texas State Bar’s Board of Legal Specialty Certification.

**Keith Hebeisen** (Chicago, Illinois) **NBTA Civil Trial Advocacy examinations.** Mr. Hebeisen is a partner in the Clifford Law Offices in Chicago and a member and past Chair of the ABA Standing Committee on Medical Professional Liability. Mr. Hebeisen reviewed the Personal Injury Law examinations prepared by the Texas State Bar’s Board of Legal Specialty Certification.

The Standing Committee formally considered the reports of the Accreditation Review Panels and examination reviewers at its meetings on October 25, 2014, and November 6, 2014, and determined that the Civil Trial Advocacy and Social Security Disability Law programs of the NBTA continue to comply with the Standards. The Standing Committee therefore recommends to the House of Delegates that the NBTA programs in Civil Trial Advocacy and Social Security Disability Law be reaccredited for a further five year period.

Respectfully submitted,

Alice Neece Mine, Chair  
Standing Committee on Specialization  
February 2015

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1 The accreditation requirements appear in Section 4 of the Standards and are as follows:

4.01 Purpose of Organization -- The Applicant shall demonstrate that the organization is dedicated to the identification of lawyers who possess an enhanced level of skill and expertise, and to the development and improvement of the professional competence of lawyers.
4.02 Organizational Capabilities -- The Applicant shall demonstrate that it possesses the organizational and financial resources to carry out its certification program on a continuing basis, and that key personnel have by experience, education and professional background the ability to direct and carry out such programs in a manner consistent with these Standards.

4.03 Decision Makers -- A majority of the body within an Applicant organization reviewing applications for certification of lawyers as specialists in a particular area of law shall consist of lawyers who have substantial involvement in the specialty area.

4.04 Uniform Applicability of Certification Requirements and Nondiscrimination
(A) The Applicant's requirements for certifying lawyers shall not be arbitrary and shall be clearly understood and easily applied. The organization may only certify those lawyers who have demonstrably met each standard. The requirements shall be uniform in all jurisdictions in which the Applicant certifies lawyers, except to the extent state or local law or regulation imposes a higher requirement.
(B) Membership in any organization or completion of educational programs offered by any specific organization shall not be required for certification, except that this paragraph shall not apply to requirements relating to the practice of law which are set out in statutes, rules and regulations promulgated by the government of the United States, by the government of any state or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.
(C) Applicants shall not discriminate against any lawyers seeking certification on the basis of race, religion, gender, sexual orientation, disability, or age. This paragraph does not prohibit an Applicant from imposing reasonable experience requirements on lawyers seeking certification or re-certification.

4.05 Definition and Number of Specialties-- An Applicant shall specifically define the specialty area or areas in which it proposes to certify lawyers as specialists.
(A) Each specialty area in which certification is offered must be an area in which significant numbers of lawyers regularly practice. Specialty areas shall be named and described in terms which are understandable to the potential users of such legal services, and in terms which will not lead to confusion with other specialty areas.
(B) An Applicant may seek accreditation to certify lawyers in more than one specialty area, but in such event, the organization shall be evaluated separately with respect to each specialty program.

4.06 Certification Requirements -- An Applicant shall require for certification of lawyers as specialists, at a minimum, the following:
(A) Substantial Involvement -- Substantial involvement in the specialty area throughout the three-year period immediately preceding application to the certifying organization. Substantial involvement is measured by the type and number of cases or matters handled and the amount of time spent practicing in the specialty area, and require that the time spent in practicing the specialty be no less than twenty-five percent (25%) of the total practice of a lawyer engaged in a normal full-time practice.
(B) Peer Review -- A minimum of five references, a majority of which are from attorneys or judges who are knowledgeable regarding the practice area and are familiar with the competence of the lawyer, and none of which are from persons related to or engaged in legal practice with the lawyer.
(1) Type of References -- The certification requirements shall allow lawyers seeking certification to list persons to whom reference forms could be sent, but shall also provide that the Applicant organization send out all reference forms. In addition, the organization may seek and consider reference forms from persons of the organization's own choosing.
(2) Content of Reference Forms -- The reference forms shall inquire into the respondent's areas of practice, the respondent's familiarity with both the specialty area and with the
lawyer seeking certification, and the length of time that the respondent has been
practicing law and has known the applicant. The form shall inquire about the
qualifications of the lawyer seeking certification in various aspects of the practice and,
as appropriate, the lawyer's dealings with judges and opposing counsel.
(C) Written Examination -- An evaluation of the lawyer's knowledge of the substantive and
procedural law in the specialty area, determined by written examination of suitable length and
complexity. The examination shall include professional responsibility and ethics as it relates to the
particular specialty.
(D) Educational Experience -- A minimum of 36 hours of participation in continuing legal
education in the specialty area in the three-year period preceding the lawyer's application for
certification. This requirement may be met through any of the following means:
(1) Attending programs of continuing legal education or courses offered by Association
accredited law schools in the specialty area;
(2) Teaching courses or seminars in the specialty area;
(3) Participating as panelist, speaker or workshop leader at educational or professional
conferences covering the specialty area; or
(4) Writing published books or articles concerning the specialty area.
(E) Good Standing -- A lawyer seeking certification is admitted to practice and is a member in good
standing in one or more states or territories of the United States or the District of Columbia.
(F) Affirmation of Compliance -- A lawyer seeking certification shall affirm in a manner
satisfactory to Applicant that the lawyer's practice in the specialty area is consistent with the
lawyer's status as a certified specialist.

4.07 Impartial Review -- The Applicant shall maintain a formal policy providing lawyers who are
denied certification an opportunity for review by an impartial decision maker.

4.08 Requirements for Re-certification -- The period of certification shall be set by the Applicant, but
shall be no longer than five years, after which time lawyers who have been certified must apply for re-
certification. Re-certification shall require similar evidence of competence as that required for initial
certification in substantial involvement, peer review, educational experience evidence of good
standing, and affirmation of compliance.

4.09 Revocation of Certification -- The Applicant shall maintain a procedure for revocation of
certification. The procedures shall require a certified lawyer to report his or her disbarment or
suspension from the practice of law in any jurisdiction to the certifying organization.
GENERAL INFORMATION FORM

Submitting Entity: American Bar Association Standing Committee on Specialization

Submitted By: Alice Neece Mine, Chair

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

   The recommendation requests that the American Bar Association grant reaccreditation to the Civil Trial Advocacy and Social Security Disability Law programs of the National Board of Trial Advocacy, a division of the National Board of Legal Specialty Certification.

2. **Approval by Submitting Entity.**

   At its meetings on October 25, 2014, and November 6, 2014, the Standing Committee on Specialization considered the applications and voted unanimously that it submit these recommendations to the House of Delegates for consideration at the 2015 Midyear Meeting.

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

   Yes. Each of these specialty certification programs have been previously accredited and re-accredited by the House of Delegates.

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

   At its August 1992 meeting, acting upon a recommendation proposed by 16 state and local bar associations, the House of Delegates passed a resolution (Resolution 128) calling for the Association to establish standards for accrediting private organizations that certify lawyers as specialists and to establish and maintain a mechanism to accredit such organizations that meet those standards. In February 1993, the House of Delegates adopted the Standards for Accreditation of Specialty Certification Programs for Lawyers (via Midyear Resolution 105), and delegated to the Standing Committee the task of evaluating organizations that apply to the Association for accreditation, and to periodically review accreditation after its initial grant.

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

   Not Applicable

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

   Not Applicable
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

Implementation will be self-executing if the programs are reaccredited by the House of Delegates.

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

There are no unreimbursed costs associated with the reaccreditation of specialty certification programs as proposed in the recommendation. The costs associated with the reaccreditation process are defrayed by fees charged to the organizations seeking reaccreditation.

Expenses are kept to a minimum by utilizing volunteers to serve as members of the Accreditation Review Panels, which evaluate the applications for reaccreditation. Staff members who provide services to the Standing Committee act as program advisors and administrators. Activities requiring in-person meetings are conducted at regularly scheduled and funded meetings of the Standing Committee on Specialization. Other functions needed for the evaluation process are conducted by mail, fax and telephone conference call. Costs associated with these functions, as well as those incurred in the printing of materials, are reimbursed out of the aforementioned fees.

9. Disclosure of Interest. (If applicable)

None

10. Referrals.

None

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

Alice Neece Mine  
Chair, Standing Committee  
on Specialization  
North Carolina State Bar  
217 East Edenton St.  
Raleigh, North Carolina 27601  
Phone: 919-828-4620  
Email: Amine@ncbar.gov

Martin Whittaker  
Staff Counsel, Standing Committee  
on Specialization  
321 North Clark Street  
Chicago, IL  60654  
Phone: 312-988-5309  
Email: Martin.Whittaker@Americanbar.org
12. **Contact Name and Address Information.** (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

   Alice Neece Mine  
   Chair, Standing Committee  
   on Specialization  
   North Carolina State Bar  
   217 East Edenton St.  
   Raleigh, North Carolina 27601  
   Phone: 919-828-4620  
   Email: [Amine@ncbar.gov](mailto:Amine@ncbar.gov)
EXECUTIVE SUMMARY

1. Summary of the Resolution

The recommendation requests that the American Bar Association grant reaccreditation to the Civil Trial Advocacy and Social Security Disability Law programs of the National Board of Trial Advocacy, a division of the National Board of Legal Specialty Certification.

2. Summary of the Issue that the Resolution Addresses

To respond to a need to regulate certifying organizations, the House of Delegates adopted standards for accreditation of specialty certification programs for lawyers, and delegated to the Standing Committee the task of evaluating organizations that apply to the ABA for accreditation and reaccreditation. This Resolution acquits the Standing Committee’s obligation to periodically review programs that the House of Delegates has accredited and recommend their further reaccreditation or revocation of accreditation.

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

The recommendation addresses the issue by implementing previous House resolutions calling on the ABA to evaluate specialty certification organizations that apply for accreditation and reaccreditation.

4. Summary of Minority Views

The Standing Committee on Specialization approved the proposed recommendation unanimously. No opposition has been identified.
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association approves the Uniform Fiduciary
Access to Digital Assets Act, promulgated by the National Conference of Commissioners
on Uniform State Laws, as an appropriate Act for those states desiring to adopt the
specific substantive law contained in the Act.
REPORT

Uniform Fiduciary Access to Digital Assets Act

- A Summary -

In the Internet age, the nature of property and our methods of communication have changed dramatically. A generation ago, a human being delivered our mail, photos were kept in albums, documents were saved in file cabinets, and money was kept on deposit at the corner bank. For most people today, at least some of their property and communications is stored as data on a computer server and accessed via the Internet.

Collectively, a person’s digital property and electronic communications are referred to as “digital assets” and the companies that store those assets on their servers are called “custodians.” Access to digital assets is usually governed by a terms-of-service agreement provided by the custodian that is not transferable to a person other than the account holder. This creates problems when account holders die or otherwise lose the ability to manage their own digital assets.

A fiduciary is a trusted person with the legal authority to manage another’s property, and the duty to act in that person’s best interest. The Uniform Fiduciary Access to Digital Assets Act (UFADAA) concerns four common types of fiduciaries:

1. Executors or administrators of deceased persons’ estates;
2. Court-appointed conservators of protected persons’ assets;
3. Agents appointed under powers of attorney; and
4. Trustees.

UFADAA gives people the power to plan for the management and disposition of their digital assets in the same way they can make plans for their tangible property: by providing instructions in a will, trust, or power of attorney. If a person fails to plan, the same court-appointed fiduciary that manages the person’s tangible assets can manage the person’s digital assets, distributing those assets to heirs or disposing of them as appropriate.

Under UFADAA, fiduciaries that manage an account holder’s digital assets have the same right to access those assets as the account holder, but only for the limited purpose of carrying out their fiduciary duties. Thus, for example, an executor may access a decedent’s email account in order to make an inventory of estate assets and ultimately to close the account in an orderly manner, but may not publish the decedent’s confidential communications or impersonate the decedent by sending email from the account. Moreover, a fiduciary’s management of digital assets may be limited by other law. For
example, a fiduciary may not copy or distribute digital files in violation of copyright law, and may not access the contents of communications protected by federal privacy laws.

In order to gain access to digital assets, UFADAA requires a fiduciary to send a request to the custodian, accompanied by a certified copy of the document granting fiduciary authority, such as a letter of appointment, court order, or certification of trust. Custodians of digital assets that receive an apparently valid request for access are immune from any liability for good faith compliance.

Some custodians of digital assets provide an online planning option by which account holders can affirmatively choose to delete or preserve their digital assets after some period of inactivity. UFADAA defers to the account holder’s choice in such circumstances, but overrides any provision in a click-through terms-of-service agreement that prevents fiduciary access outright.

UFADAA is an overlay statute designed to work in conjunction with a state’s existing laws on probate, guardianship, trusts, and powers of attorney. Enacting UFADAA will extend a fiduciary’s existing authority over a person’s tangible assets to include the person’s digital assets, with the same fiduciary duties to act for the benefit of the represented person or estate. It is a vital statute for the digital age, and should be enacted by every state legislature as soon as possible.


Respectfully submitted,

Harriet Lansing
President
National Conference of Commissioners
on Uniform State Laws
February 2015
GENERAL INFORMATION FORM

Submitting Entity: National Conference of Commissioners on Uniform State Laws

Submitted By: Harriet Lansing, President

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

   The National Conference of Commissioners on Uniform State Laws (NCCUSL) requests approval of the Uniform Fiduciary Access to Digital Assets Act by the American Bar Association (ABA) House of Delegates.

2. **Approval by Submitting Entity.**

   The National Conference of Commissioners on Uniform State Laws granted final approval to the Act at its July 2014 Annual Meeting.

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 no existing policies on fiduciary law, probate procedures, or estate administration. The ABA has approved the Uniform Trust Code and portions of the Uniform Probate Code for adoption in those states desiring to implement the substantive provision of those acts. The Uniform Fiduciary Access to Digital Assets Act furthers some of the same objectives advanced by those uniform acts by extending the applicability of certain provisions to digital property. The Resolution respects the ABA policies on privacy by deferring to federal privacy laws, including the Stored Communications Act, the Electronic Communications Privacy Act, and relevant provisions of the Health Insurance Portability and Accountability Act.

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

   Not applicable.

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

   The Uniform Fiduciary Access to Digital Assets Act has not yet been enacted in any jurisdiction, but Delaware enacted a substantially similar law in 2014 by working in collaboration with the drafters of the uniform act.
7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.**

   The National Conference will present the Act to state legislatures for consideration and enactment.

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

   None

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

   None

10. **Referrals.**

    Pursuant to the agreement between the NCCUSL and the ABA, all members of the House of Delegates and Chairs of all ABA entities were advised of the drafting project and those that expressed interest were provided with tentative drafts. The Drafting Committee’s work can be found at [http://www.uniformlaws.org/Committee.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets](http://www.uniformlaws.org/Committee.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets) and the final act is available for download at [http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014_UFADAA_Final.pdf](http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014_UFADAA_Final.pdf).

    The ABA Advisor for the Uniform Fiduciary Access to Digital Assets Act was Karin Prangley of the Section of Real Property, Trust and Estate Law. ABA Section Advisors included Christina Kunz from the Business Law Section and Vicki Levy Eskin and David Shulman from the Solo, Small Firm, and General Practice Division.

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

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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.)

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   1 Heather Place  
   Saint Paul, MN 55102-2615  
   (651) 224-3017  
   harrietlansing@cs.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

RESOLVED, That the American Bar Association approves the Uniform Fiduciary Access to Digital Assets Act, promulgated by the National Conference of Commissioners on Uniform State Laws, as an appropriate Act for those states desiring to adopt the specific substantive law contained in the Act.

2. Summary of the Issue that the Resolution Addresses

As the nature of our personal property has evolved, the law has failed to keep pace. As a result, fiduciaries have been unable to effectively administer estates containing digital property.

The Uniform Fiduciary Access to Digital Assets Act (UFADAA) extends a fiduciary’s traditional access to an account holder’s tangible assets to also include the account holder’s digital assets stored by a custodian and accessed via the Internet. The fiduciary’s access is subject to the account holder’s rights under any terms-of-service agreement and other laws, and the fiduciary remains bound by all the usual fiduciary duties. UFADAA provides default rules for access that may be overridden by the terms of an account holder’s estate plan or by the account holder’s affirmative act using an online account feature separate from the other terms of a terms-of-service agreement. UFADAA provides rules for four common types of fiduciaries: personal representatives of a decedent’s estate, conservators of a protected person’s estate, agents under a power of attorney, and trustees.

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

Approval of the Uniform Fiduciary Access to Digital Assets Act by the American Bar Association House of Delegates would demonstrate to states that the Act is an appropriate approach for addressing the issues described above. Enactment by a state legislature will extend a legally appointed fiduciary’s existing authority under other state laws to include authority over digital assets.

4. Summary of Minority Views

We know of no opposition at this time.
RESOLUTION

RESOLVED, That the American Bar Association approves the Uniform Recognition of Substitute Decision-Making Documents Act, promulgated by the National Conference of Commissioners on Uniform State Laws, as an appropriate Act for those states desiring to adopt the specific substantive law contained in the Act.
REPORT

Uniform Recognition of Substitute Decision-Making Documents Act

- A Summary -

Substitute decision-making documents are widely used in every U.S. State and Canadian Province for both financial transactions and health care decisions. These documents are commonly called powers of attorney, proxies, or representation agreements, depending on the jurisdiction, and the governing law of the jurisdiction. Consequently, a person’s authority under a decision-making document may not be recognized if the document is presented in a place outside the state of its origin. In our modern mobile society, this can create serious problems for the people who rely on their agents to make decisions when they are unable to make decisions.

However, a person asked to accept a decision-making document from another state faces problems as well. Because the law varies by jurisdiction, significant legal research may be required to determine whether a foreign document actually complies with the law where it was executed.

The Uniform Recognition of Substitute Decision-Making Documents Act (URSDDA) is the result of a joint project between the Uniform Law Commission and the Uniform Law Conference of Canada to resolve these problems. The act employs a three-part approach to portability:

1. First, the act recognizes the validity of a substitute decision-making document for use in the enacting state if the document is valid as determined by the law under which it was created.

2. Second, the act preserves the meaning and effect of a substitute decision-making document as defined by the law under which it was created regardless of where the document is actually presented.

3. Third, the act protects the persons asked to accept a foreign document from liability for either acceptance or rejection, if they comply with the law in good faith.

This same three-part approach to portability was used as part of the Uniform Durable Power of Attorney Act, which the ABA House of Delegates approved in 2007. However, the Uniform Power of Attorney Act applies only to financial powers of attorney. The URSDDA extends the portability provisions to health care powers, and is also appropriate for enactment by states with non-uniform financial power of attorney statutes.

Although URSDDA was originally conceived to allow persons in the United States to accept substitute decision-making documents drafted in a Canadian province (and vice-versa) similar problems occur when an agent presents a substitute decision-making
document in another jurisdiction within the principal’s home country. Therefore, the act was drafted to allow acceptance of any foreign substitute decision-making document, whether executed in a domestic or international jurisdiction.


Respectfully submitted,

Harriet Lansing  
President  
National Conference of Commissioners on Uniform State Laws  
February 2015
GENERAL INFORMATION FORM

Submitting Entity: National Conference of Commissioners on Uniform State Laws

Submitted By: Harriet Lansing, President

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

   The National Conference of Commissioners on Uniform State Laws (NCCUSL) requests approval of the Uniform Recognition of Substitute Decision-making Documents Act by the American Bar Association (ABA) House of Delegates.

2. **Approval by Submitting Entity.**

   The National Conference of Commissioners on Uniform State Laws granted final approval to the Act at its July 2014 Annual Meeting.

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 no existing policies concerning financial powers of attorney, but Policy 89A120 encourages the use of durable powers of attorney for delegation of health care decisions. This Resolution furthers that policy by ensuring powers of attorney are portable and legally enforceable in jurisdictions outside the jurisdiction of the power’s execution.

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

   Not applicable.

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

   The Uniform Recognition of Substitute Decision-Making Documents Act has not yet been enacted in any jurisdiction.

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

   The National Conference will present the Act to state legislatures for consideration and enactment.
8. **Cost to the Association.** (Both direct and indirect costs)
   
   None

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

10. **Referrals.**

    Pursuant to the agreement between the NCCUSL and the ABA, all members of the House of Delegates and Chairs of all ABA entities were advised of the drafting project and those that expressed interest were provided with tentative drafts. The Drafting Committee’s work can be found at [http://www.uniformlaws.org/Committee.aspx?title=Recognition%20of%20Substitute%20Decision-Making%20Documents](http://www.uniformlaws.org/Committee.aspx?title=Recognition%20of%20Substitute%20Decision-Making%20Documents) and the final act is available for download at [http://www.uniformlaws.org/shared/docs/Interjurisdictional%20Recognition%20of%20Advance%20Planning%20Documents/2014_URSDDA_Final.pdf](http://www.uniformlaws.org/shared/docs/Interjurisdictional%20Recognition%20of%20Advance%20Planning%20Documents/2014_URSDDA_Final.pdf).

    The ABA Advisor for the Uniform Recognition of Substitute Decision-Making Documents Act was Robert L. Schwartz of the Health Law Section. Rolf C. Schuetz from the Solo, Small Firm, and General Practice Division served as an ABA Section Advisor.

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

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    Terry Morrow, NCCUSL Legislative Director and Legal Counsel
    111 North Wabash Avenue, Suite 1010
    Chicago, IL 60602
    (312) 450-6620 (office)
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    terry.morrow@uniformlaws.org
12. **Contact Name and Address Information.** (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

Harriet Lansing, NCCUSL President
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(651) 224-3017
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EXECUTIVE SUMMARY

1. Summary of the Resolution

RESOLVED, That the American Bar Association approves the Uniform Recognition of Substitute Decision-Making Documents Act, promulgated by the National Conference of Commissioners on Uniform State Laws, as an appropriate Act for those states desiring to adopt the specific substantive law contained in the Act.

2. Summary of the Issue that the Resolution Addresses

Substitute decision-making documents are called by different names in different jurisdictions (e.g. powers of attorney, proxies, and representation agreements), but are routinely used throughout the United States and Canada. In our modern, mobile society, legal recognition of documents executed in another jurisdiction is an increasingly common problem. New state laws are necessary to provide for legal recognition of foreign substitute decision-making documents while protecting persons asked to accept those documents from liability for good-faith compliance.

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

Approval of the Uniform Recognition of Substitute Decision-Making Documents Act by the American Bar Association House of Delegates would demonstrate to states that the Act is an appropriate approach for addressing the issues described above. Enactment by a state legislature will allow recognition of foreign-executed substitute decision-making documents and shield the persons who accept them from liability.

4. Summary of Minority Views

None known.
RESOLUTION

1 RESOLVED, That the American Bar Association approves the Uniform Voidable
2 Transactions Act (as Amended in 2014), promulgated by the National Conference of
3 Commissioners on Uniform State Laws, as an appropriate Act for those states desiring to
4 adopt the specific substantive law contained in the act.
REPORT

Uniform Voidable Transactions Act (as Amended in 2014)
- Summary -

State of the Law

The Uniform Fraudulent Transfer Act was promulgated in 1984 and has been enacted by 43 states, the District of Columbia, and the U.S. Virgin Islands as of 2014. The act replaced the very similar Uniform Fraudulent Conveyance Act, which was promulgated in 1918 and remains in force in two states as of 2014.

The Uniform Act: Nature of Amendments

The 2014 amendments are the first changes to the act since its original promulgation. The amendments address a small number of narrowly-defined issues, and are not a comprehensive revision. The principal features of the amendments are as follows:

Name Change. The amendments change the title of the act to the “Uniform Voidable Transactions Act.” The name change is not motivated by the substantive revisions made by the amendments, which are relatively minor. Rather, the original title of the act, though sanctioned by historical usage, has always been a misleading description of its provisions in two respects. First, fraud is not, and never has been, a necessary element of a claim under the act. Second, the act has always applied to incurring obligations as well as transferring property.

Choice of Law. The amendments add, for the first time, a choice-of-law rule for claims governed by the act. (Section 10)

Evidentiary Matters. New provisions add uniform rules allocating the burden of proof and defining the standard of proof with respect to claims and defenses under the act. (Sections 2(b), 4(c), 5(c), 8(g), and 8(h))

Deletion of the Special Definition of “Insolvency” for Partnerships. Under the general definition of “insolvency” in the act, a debtor is insolvent if, at a fair valuation, the sum of the debtor’s debts is greater than the sum of the debtor’s assets. The act as originally written set forth a special definition of “insolvency” applicable to partnerships, which adds to the sum of the partnership’s assets the net worth of each of its general partners. The amendments delete that special definition, with the result that a partnership will be subject to the general definition. (Section 2)

Defenses. The amendments refine in relatively minor respects several provisions relating to defenses available to a transferee or obligee, as follows:

- As originally written, Section 8(a) of the act creates a complete defense to an action under Section 4(a)(1) (which renders voidable a transfer made or obligation incurred with actual intent to hinder, delay, or defraud any creditor of the debtor) if the transferee or obligee takes in good faith and for a reasonably equivalent value. The amendments add to Section 8(a) the additional requirement that the reasonably equivalent value must be given to the debtor.
• Section 8(b), derived from Bankruptcy Code §§ 550(a), (b) (1984), creates a defense for a subsequent transferee (a transferee other than the first transferee) that takes in good faith and for value, and for any subsequent good-faith transferee from such a person. The amendments clarify the meaning of Section 8(b) by rewording it to follow more closely the wording of Bankruptcy Code §§ 550(a), (b) (which is substantially unchanged as of 2014).

• Section 8(e)(2) as originally written creates a defense to an action under Section 4(a)(2) or Section 5 to avoid a transfer if the transfer results from enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code. The amendments exclude from that defense acceptance of collateral in full or partial satisfaction of the obligation it secures (a remedy sometimes referred to as “strict foreclosure”).

Series Organizations. The amendments add a new section (Section 11) that provides that each “protected series” of a “series organization” is to be treated as a person for purposes of the act, even if it is not treated as a person for other purposes. This change responds to the emergence of the “series organization” as a significant form of business organization.

Medium Neutrality. To accommodate modern technology, the amendments replace references in the act to a “writing” with “record” and make related changes.

Conclusion

The amendments do not contemplate that states will enact a uniform effective date. However, the lack of a choice-of-law rule for claims of the nature governed by the act under current law has led to uncertainty and wasteful litigation when the claims arise from transactions that touch on more than one jurisdiction. To alleviate that problem and install a clear and uniform choice-of-law regime for these claims, all states are urged to adopt the 2014 amendments as quickly as possible.

The Drafting Committee’s work can be found at:


Respectfully submitted,

Harriet Lansing
President
National Conference of Commissioners on Uniform State Laws
February 2015
GENERAL INFORMATION FORM

Submitting Entity: National Conference of Commissioners on Uniform State Laws

Submitted By: Harriet Lansing, President

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

The National Conference of Commissioners on Uniform State Laws (NCCUSL) requests approval of the Uniform Voidable Transactions Act (as Amended in 2014) by the American Bar Association (ABA) House of Delegates.

2. **Approval by Submitting Entity.**

The National Conference of Commissioners on Uniform State Laws approved the Act at its July 2014 Annual Meeting.

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 ULC previously brought the Uniform Fraudulent Transfer Act (UFTA) to the House of Delegates and the act was approved (85M103A). The Uniform Voidable Transactions Act (UVTA) (as Amended in 2014) is an updated version of the act formerly named the Uniform Fraudulent Transfer Act (UFTA). The act was retitled as part of the 2014 amendments. The Uniform Voidable Transactions Act (UVTA) (as Amended in 2014) supersedes the Uniform Fraudulent Transfer Act.

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

Not applicable

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

The Uniform Voidable Transactions Act (as Amended in 2014) has not yet been enacted in any state legislature. The Uniform Voidable Transactions Act (as Amended in 2014)) was formerly named the Uniform Fraudulent Transfer Act (UFTA). The Uniform Fraudulent Transfer Act was promulgated in 1984 and has been enacted by 43 states, the District of Columbia, and the U.S. Virgin Islands.
7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.**

The National Conference will present the Act to state legislatures for consideration and enactment.

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

None

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

None

10. **Referrals.**

Pursuant to the agreement between the NCCUSL and the ABA, all members of the House of Delegates and Chairs of all ABA entities were advised of the drafting project and those that expressed interest were provided with tentative drafts. The Drafting Committee’s work can be found at:


The ABA Advisors for the Uniform Voidable Transactions Act (as Amended in 2014) were Patricia Redmond of the Business Law Section, Jay Adkisson of the Business Law Section, Dan Kleinberger of the Business Law Section, Charles Scherer of the International Law Section, and David Slenn of the Business Law Section.

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

John A. Sebert, Executive Director, National Conference of Commissioners on Uniform State Laws, 111 North Wabash, Suite 1010, Chicago, IL 60602; phone: 312/450-6603; cell: 312-218-1485; email: john.sebert@uniformlaws.org.

Terry Morrow, Legislative Director and Legal Counsel, National Conference of Commissioners on Uniform State Laws, 111 North Wabash Avenue, Suite 1010 Chicago, IL 60602; Office: (312) 450-6620; Cell: (312) 485-0451; email: tmorrow@uniformlaws.org.
12. **Contact Name and Address Information.** (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

Harriet Lansing, NCCUSL President, 1 Heather Place, Saint Paul, MN 55102-2615; Phone: (651) 224-3017; email: harrietlansing@cs.com.
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

That the American Bar Association approves the Uniform Voidable Transactions Act (as Amended in 2014) promulgated by the National Conference of Commissioners on Uniform State Laws in July 2013 as an appropriate Act for those states desiring to adopt the specific substantive law contained in the act.

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

The Uniform Voidable Transactions Act (UVTA) (as Amended in 2014), formerly named the Uniform Fraudulent Transfer Act (UFTA), strengthens creditor protections by providing remedies for certain transactions by a debtor that are unfair to the debtor’s creditors. The 2014 amendments to the UVTA address a small number of narrowly defined issues, and are not a comprehensive revision of the UFTA/UVTA. The amendments, among other things, clarify terminology that was confusing to many courts and litigants. The amendments add a clear choice-of-law provision that offers predictability and reduces costs. The amendments also improve provisions for determining a debtor’s insolvency, address emerging legal developments, and provide crucial guidance to courts and litigants regarding key evidentiary matters.

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

Approval of the Uniform Voidable Transactions Act (as Amended in 2014) by the American Bar Association House of Delegates would demonstrate to states that the Act is an appropriate approach for addressing the issues described above.

4. **Summary of Minority Views**

We know of no opposition at this time.
RESOLVED, That the American Bar Association urges Congress to amend 31 U.S.C. § 330(a) and (b) to include within the scope of those provisions non-attorney “tax return preparers,” as that term is defined by 26 U.S.C. § 7701(a)(36) and Treasury Department regulations promulgated thereunder.

FURTHER RESOLVED, That the American Bar Association urges Congress to amend 31 U.S.C. § 330(d) to clarify that the Treasury Department has the authority to regulate persons who advise taxpayers with respect to the reporting of items on Federal tax returns, provided that the scope of any such regulation should not exceed the scope set forth in Treasury Department Circular 230 as published on June 12, 2014.
I. Introduction

For 130 years, the Treasury Department has been authorized under 31 U.S.C. § 330 to regulate representatives of persons who practice before it. While the authorizing statute has been amended on several occasions, most recently in 2004, it remains largely unchanged since first enacted in 1884 to address unscrupulous practices arising in the wake of the Civil War.

The conduct of unscrupulous unregulated tax return preparers imposes significant costs on society, including by contributing to the “tax gap.” The clients of such preparers often find themselves ensnared in Internal Revenue Service examinations and collection proceedings, and those clients and the Internal Revenue Service are forced to expend significant resources to resolve those issues. Meanwhile, lawyers and certified public accountants (“CPAs”) who prepare tax returns operate within the confines of applicable professional standards (e.g., bar rules for lawyers and similar applicable rules for CPAs) and also are regulated under Circular 230 discussed below.

Regulations promulgated under 31 U.S.C. § 330 are set forth in Treasury Department Circular 230 (“Circular 230”). Those regulations have been amended numerous times in recent years to address the evolving and expanding role of paid tax advisors and to vest oversight of those advisors’ compliance with Circular 230 in the Internal Revenue Service’s Office of Professional Responsibility (“OPR”). As most recently modified, section 10.2(a)(4) of Circular 230 defines “practice before the Internal Revenue Service” to encompass:

[A]ll matters connected with a presentation to the Internal Revenue Service or any of its officers or employees relating to a taxpayer’s rights, privileges, or liabilities under the laws or regulations administered by the Internal Revenue Service. Such presentations include, but are not limited to, preparing documents; filing documents; corresponding and communicating with the Internal Revenue Service; rendering written advice with respect to any entity, transaction, plan or arrangement, or other plan or arrangement having a potential for tax avoidance or evasion; and representing a client at conferences, hearings, and meetings.

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1 American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418, §§ 820, 822 (authorizing the imposition of monetary sanctions under revised 31 U.S.C. § 330(b) and adding 31 U.S.C. § 330(d) to provide that nothing in the statute shall be construed to limit the authority of the Treasury Department to regulate the issuance of written tax advice with respect to transactions that have the potential for tax avoidance or abuse).

Only certain types of persons are permitted to “practice before the Internal Revenue Service.” Specifically, section 10.3 of Circular 230 authorizes attorneys, CPAs, and certain other categories of “practitioners” to “practice before the Internal Revenue Service.”

Recent judicial decisions have limited the Treasury Department’s authority to regulate the conduct of paid tax advisors, including tax return preparers, under 31 U.S.C. § 330. As discussed further below, those decisions interpret the term “practice before the Internal Revenue Service” more narrowly than such term is defined in Circular 230, and in so doing, those decisions have the effect of limiting both the types of practitioners and the scope of conduct that OPR previously could regulate under Circular 230. By urging Congress to enact legislation to ensure that the Treasury Department has authority to regulate all persons who, for compensation, advise or represent taxpayers with respect to any matters arising under the Internal Revenue Code, including the reporting of items on Federal tax returns, the Association would (1) promote competence, ethical conduct and professionalism, (2) protect our members and the public from unscrupulous unregulated tax return preparers, and (3) promote accountability through oversight of paid tax advisors by OPR.

II. Recent Judicial Decisions

On February 11, 2014, the U.S. Court of Appeals for the D.C. Circuit held in Loving v. Internal Revenue Service, 742 F.3d 1013 (D.C. Cir. 2014) that amendments made to Circular 230 in 2011 to expand its scope and cover all paid tax return preparers exceeded the statutory authority provided to the Treasury Department in 31 U.S.C. § 330. The Court of Appeals affirmed the District Court’s prior order enjoining the Internal Revenue Service from implementing a broad program to test the initial competence of hundreds of thousands of previously unregulated paid tax return preparers and to subject those persons to minimum continuing education requirements. The Court based its decision on six separate factors, including a finding that paid tax return preparers are not “representatives” of persons before the Treasury Department within the meaning of 31 U.S.C. § 330 and that “practice” before the Treasury Department is limited to adversarial or other proceedings where a taxpayer designates a representative to act on his or her behalf, and does not include the submission of tax returns or other documents to the Internal Revenue Service.

Six months after the D.C. Circuit’s decision in Loving, the U.S. District Court for the District of Columbia in Ridgely v. Lew, 2014 U.S. Dist. LEXIS 96447 (D.D.C. July 16, 2014), held that regulations set forth in section 10.27 of Circular 230 limiting certain contingent fee arrangements that can be charged by tax practitioners also exceeded the statutory authority of 31

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3 Enrolled agents, enrolled actuaries and enrolled retirement plan agents, which are specified categories of individuals who apply to the Internal Revenue Service for the right to represent taxpayers, also are subject to regulation under Circular 230. To be qualified under those rules, applicants must satisfactorily complete a written examination, or otherwise demonstrate proficiency through years of technical experience as an Internal Revenue Service employee, and once accepted, these individuals are required to complete a minimum number of hours of continuing education credits, including a minimum number of hours of ethics or professional conduct study credits.
U.S.C. § 330. The plaintiff in *Ridgely* was a CPA who was admittedly a “representative” of persons before the Treasury Department in other contexts. The District Court held, however, that this did not provide a basis for subjecting the plaintiff’s fee practices to regulation under Circular 230 when preparing “ordinary” refund claims because that activity, standing alone, did not constitute “practice” before the Treasury Department. Other cases are pending in courts around the country that rely on the D.C. Circuit’s decision in *Loving* to further challenge the Treasury Department’s authority to regulate paid tax advisors.

The *Loving* Court noted that its decision should not be construed as a commentary on the need to regulate paid return preparers. “It might be that allowing the IRS to regulate tax-return preparers more stringently would be wise as a policy matter. But that is a decision for Congress and the President to make if they wish by enacting new legislation.”

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4 The *Ridgely* court explained that an “ordinary refund claim” is a tax refund claim that is filed after a taxpayer has filed his original tax return but before the Internal Revenue Service has initiated an audit of the return.

5 For example, in, *Sexton v. Hawkins*, a disbarred lawyer is seeking to enjoin OPR from investigating his ability to prepare and file tax returns, and to enjoin the Internal Revenue Service from limiting his access to the electronic tax return filing system. After being disbarred in South Carolina following his conviction in federal court for mail fraud and money laundering, OPR suspended his right to practice before the Internal Revenue Service. The District Court recently denied OPR’s motion to dismiss, finding that the court had jurisdiction to hear the claim and enjoining OPR from enforcing its document requests during the pendency of the action. *Sexton v. Hawkins*, 2014 U.S. Dist. LEXIS 153766 (D. Nev. Oct. 30, 2014). See also, *Davis v. Internal Revenue Service*, Case No. 14-cv-0261 (N.D. Ohio) (challenging the Internal Revenue Service’s authority to limit access to its electronic tax return filing system). Separately, in *American Institute of Certified Public Accountants v. Internal Revenue Service*, 2014 U.S. Dist. LEXIS 157723 (D.D.C. Oct. 27, 2014), the District Court dismissed on jurisdictional standing grounds a challenge brought by the national association representing CPAs to the Internal Revenue Service’s authority to promulgate a voluntary preparer compliance program through Rev. Proc. 2014-42, 2014-29 I.R.B. 192.

III. Broad Consequences of the Recent Judicial Decisions

In *Loving* and *Ridgely*, the courts interpreted the statutory reference to “practice of representatives of persons before the Department of the Treasury” in 31 U.S.C. § 330(a). The rationale in those cases may be extended to support the conclusion that any work done by a paid tax professional that does not involve direct interaction with the Internal Revenue Service in an adversarial or other proceeding in which the professional is authorized to bind the taxpayer is not subject to regulation under 31 U.S.C. § 330.7 This interpretation is noteworthy given that in 2004 Congress amended 31 U.S.C. § 330 to clarify that the statute does not limit the authority of the Treasury Department to impose practice standards applicable to certain written tax advice.8 Accordingly, without amendment, 31 U.S.C. § 330, as construed by the Court of Appeals in *Loving*, authorizes the Treasury Department to regulate certain written tax advice that is at least one step removed from the preparation and filing of a tax return, but does not authorize the regulation of persons who prepare, sign and file hundreds or thousands of tax returns with multiple millions of dollars in tax consequences. *Ridgely* goes one step further in calling into question the Treasury Department’s authority to regulate a broader range of conduct by paid tax advisors that does not necessarily involve direct interaction with the Internal Revenue Service in a proceeding in which the taxpayer can bind the taxpayer. These include, for example, portions of the general due diligence rule in Circular 230 section 10.22, rules governing the submission of tax returns and other documents to the Internal Revenue Service in Circular 230 section 10.34, and rules governing certain written tax advice in Circular 230 section 10.37.

As the scope and complexity of the tax law continues to grow, taxpayers have increasingly come to rely on assistance from paid tax advisors in meeting their tax obligations. This has increased the need for those tax advisors to maintain a high level of competence and, at the same time, increased the need for oversight to ensure that minimum competence levels are maintained and that appropriate steps are taken to address incompetent and unscrupulous conduct. The Internal Revenue Code includes a number of civil and criminal penalty provisions that allow indirect regulation of paid tax advisors, but only through resource-intensive, after-the-fact proceedings.9 Recent studies have found that these provisions have not been adequate to

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7 A broader range of conduct is arguably subject to regulation under 31 U.S.C. § 330(b) if it rises to the level of “incompetence” or “disreputable” conduct. Although that subsection was not at issue in *Loving*, it uses terms similar to those that the D.C. Circuit interpreted narrowly in that case, *i.e.*, “practice before the [Treasury] Department” and “representative.” 31 U.S.C. § 330(b).

8 American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418, § 820. Notably, the “covered opinion” rules in prior Circular 230 section 10.35 that the amendment to 31 U.S.C. § 330 was designed to cover have recently been repealed based on a determination by the Treasury Department and the Internal Revenue Service that the burden they imposed outweighed the benefit they provided in terms of improved compliance with the tax law. T.D. 9669, 79 Fed. Reg. 33685 (June 12, 2014).

9 These include the preparer penalty provisions in 26 U.S.C. §§ 6694 and 6695, the penalty under 26 U.S.C. § 6700 for promoting abusive tax shelters, the penalty under 26 U.S.C. § 6701 for aiding and abetting an understatement of tax and the civil injunction provisions in 26 U.S.C. §§ 7407 and 7408. See also 26 U.S.C. § 7201 (criminal sanction for attempting to evade or defeat tax), § 7206(2) (criminal sanction for willful aid or assistance in making false or
ensure that paid tax advisors provide the necessary level of assistance to their clients in complying with their obligations under the tax law.\textsuperscript{10}

Despite the complexity of the Internal Revenue Code and the Treasury Regulations, unregulated return preparers are not subject to minimum educational or other competency requirements. In contrast, attorneys and CPAs must complete prescribed courses of study and then pass state licensing exams to practice their professions. Enrolled agents who do not have prior experience working for the Internal Revenue Service must pass a written examination to demonstrate their knowledge of tax law and procedure. In addition, attorneys and CPAs are subject to ethical requirements and, in most jurisdictions, continuing professional education requirements.\textsuperscript{11}

The proposed resolution is intended to benefit consumers and the overall tax system. Given the pervasive and growing role of the tax law in a wide range of socio-economic activities, the need for some level of affirmative practice standards applicable to paid tax advisors cannot be disputed. Yet, under \textit{Loving}, the vast majority of paid tax return preparers are subject to no such standards. Because more than half of all taxpayers use paid return preparers who are excluded from regulation under Circular 230 as a result of the \textit{Loving} decision,\textsuperscript{12} a substantial portion of the nearly 150 million tax returns filed each year are prepared by persons who are not subject to any generally applicable standards of competency.\textsuperscript{13} Beyond obvious examples of fraud and incompetence, the absence of any generally applicable competency standards is a driving factor in negligent or unintentional noncompliance with the tax law. Not only does this noncompliance result in lost tax revenue, it also imposes significant risks on taxpayers and the Internal Revenue Service in dealing with erroneous tax filings. In light of the complexity of the

\begin{itemize}
\item fraudulent submissions to the IRS), § 7212 (criminal sanction for attempting to interfere with the administration of the tax law), and § 7216 (improper disclosure of taxpayer return information).
\item As noted above, enrolled agents, enrolled actuaries and enrolled retirement plan agents are subject to the ethical requirements of Circular 230 and are required to complete a minimum number of hours of continuing education credits, including a minimum number of hours of ethics or professional conduct study credits.
\item Introduction to the April 2014 GAO Report, \textit{supra}.
\item Recognizing the importance of the issue and to fill the regulatory vacuum, four states have implemented their own regimes for regulating otherwise unlicensed paid return preparers. Cal. Code Ann. §§ 22250 et seq.; Md. Code Ann. §§ 10-824 et seq.; NY CLS Tax §§ 32 et seq.; Or. Rev. Stat. §§ 673.457 et seq. While paid return preparers in these states are subject to regulation and oversight, their reach is limited to state tax matters and would only cover issues pertaining to federal tax returns if there happened to be substantive overlap between applicable state and federal tax regimes.
\end{itemize}
tax law, there is a continued and growing demand for paid tax advisors. Maintaining minimum competence and practice standards will strengthen the market for tax advisors while at the same time protecting consumers and safeguarding the tax system.

It is important to note that Circular 230 regulates all professionals practicing before the Internal Revenue Service, including lawyers. The Association has a long history of opposing efforts by federal agencies to establish ethical standards governing federal agency practice, arguing that primary regulation and oversight of the legal profession should be vested in the highest court of the state in which the lawyer is licensed. However, the Association has long recognized limited exceptions to this view for regulation by the specified agencies, including the Internal Revenue Service. For example, at the 1982 Annual Meeting, the House of Delegates adopted a resolution that provides, in part, that “Except as existing legislation expressly provides, no federal agency shall adopt standards of practice to govern the professional conduct of attorneys who represent clients subject to the administrative procedures of or regulation by that federal agency . . .” 14 The report that accompanied that Resolution explained that existing legislation authorized both the Internal Revenue Service and the Patent Office to regulate attorneys and other practitioners appearing before those agencies, and suggested that because (i) practice before those agencies is conducted by many practitioners who are not attorneys, and (ii) the bars of those agencies did not appear dissatisfied with the current state of affairs, it would not be prudent to advocate for change of those exceptions. 15

Given that the 1982 and similar policies recognized an exception for regulation by the Internal Revenue Service, and given that the proposed Resolution is limited to regulation of those practicing before the Internal Revenue Service, the proposed Resolution is consistent with the policies previously adopted by the Association.

IV. Conclusion

To improve compliance with tax law and reduce the risks imposed on taxpayers and the Internal Revenue Service by erroneous tax returns, and to ensure that all paid return preparers demonstrate satisfaction of minimum competency requirements and will be subject to oversight by OPR, this resolution urges Congress to clarify the authority of the Treasury Department to regulate any person who, for compensation, advises or represents taxpayers with respect to any matters arising under the Internal Revenue Code, including the reporting of items on Federal tax returns. Specifically, this resolution urges Congress to amend 31 U.S.C. §§ 330(a) and (b) to allow the Treasury Department to regulate non-attorney paid “tax return preparers,” as that term is defined by 26 U.S.C. § 7701(a)(36) and the regulations thereunder. Moreover, because the rationale of the recent judicial decisions discussed above may be extended to support the conclusion that any work done by a paid tax professional that does not involve direct interaction with the Internal Revenue Service in an adversarial or other proceeding in which the professional is authorized to bind the taxpayer is not subject to regulation under 31 U.S.C. § 330, this

15 Similarly, in October 2009 the Board of Governors adopted a resolution opposing provisions of the Consumer Financial Protection Act that would regulate lawyers engaged in the practice of law “except to the extent that lawyers are currently subject to regulation by a federal agency under existing law.”
resolution also urges Congress to amend 31 U.S.C. § 330(d) to clarify that the Treasury Department has the authority to regulate practice before the Internal Revenue Service as set forth in Circular 230 as published on June 12, 2014.

Under current law, regulations generally applicable to civil preparer penalties appropriately limit the definition of persons subject to those penalties to exclude persons who are not compensated for their work in assisting taxpayers in preparing returns, or whose work is otherwise too attenuated from the filing of a tax return or other submission to the Internal Revenue Service. In addition, the regulations at issue in *Loving* did not impose any application requirements, examinations, or continuing education requirements on lawyers or other regulated professionals because the bar rules or other applicable professional standards already operate to ensure that lawyers and other regulated professionals meet the minimum competency requirements that the regulations sought to impose on the otherwise non-regulated paid return preparers. Those limitations should continue to apply and we do not support any expansion of the scope of Circular 230 beyond its present form.

Respectfully submitted,

Armando Gomez, Chair
Section of Taxation
February 2015

16 Treas. Reg. § 301.7701-15(f).
17 Treas. Reg. § 301.7701-15(a) (requiring that a person prepare “all or a substantial portion of” a tax return or claim for refund in order to be considered a “tax return preparer”).
1. **Summary of Resolution(s).**

The Resolution urges Congress to amend 31 U.S.C. § 330(a) and (b) to include within the scope of those provisions non-attorney “tax return preparers,” as that term is defined by 26 U.S.C. § 7701(a)(36) and Treasury Department regulations promulgated thereunder. The Resolution also urges Congress to amend 31 U.S.C. § 330(d) to clarify that the Treasury Department has the authority to regulate persons who advise taxpayers with respect to the reporting of items on Federal tax returns, provided that the scope of any such regulation should not exceed the scope set forth in Treasury Department Circular 230 as published on June 12, 2014. These changes would reverse the effect of recent judicial decisions limiting Treasury’s authority to regulate the conduct of paid tax advisors, including tax return preparers, to protect consumers and safeguard the tax system.

2. **Approval by Submitting Entity.**

This Resolution was discussed by the Council of the ABA Section of Taxation at a regularly scheduled meeting in Denver, Colorado on September 18, 2014, and was formally approved by the Council of the ABA Section of Taxation on November 13, 2014 through a vote conducted electronically in compliance with section 4.10 of the Section’s Bylaws. The Resolution will be presented for approval by the members of the ABA Section of Taxation during the plenary session of its Mid-Year Meeting in Houston, Texas on January 31, 2015.

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

No.

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

There are no Association policies that address the scope of the Treasury Department’s authority to regulate practice before the Internal Revenue Service in general, or with respect to paid tax return preparers. Through the blanket authority process, the Section of Taxation has supported efforts to regulate paid tax return preparers, including through testimony before the Internal Revenue Service,¹ and in a comment letter on proposed tax reform legislation.²

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Separately, the Standing Committee on Ethics and Professional Responsibility has issued formal opinions addressing the ethical relationship between the Internal Revenue Service and lawyers practicing before it, ethical considerations for lawyers issuing tax shelter opinions, and standards governing the position a lawyer may advise a client to take on a tax return. While limited to standards applicable to lawyers, the guidance expressed in those opinions has influenced the standards reflected in Treasury Department Circular 230. The proposed Resolution would not affect the guidance expressed in these formal opinions.

The Association has adopted policies in the past, including a resolution adopted in 1982 opposing efforts by federal agencies to adopt standards of practice to govern the professional conduct of attorneys who represent clients subject to the administrative procedures of or regulation by that federal agency, and a resolution adopted in 2009 opposing provisions of the Consumer Financial Protection Agency Act that would regulate lawyers engaged in the practice of law. Those policies, however, expressly excepted situations where lawyers were already subject to regulation by a federal agency, such as lawyers subject to regulation by the Internal Revenue Service under Circular 230. Accordingly, the proposed Resolution does not conflict with these pre-existing Association policies.

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

Not applicable.


Legislation has been introduced in the 113th Congress providing for broader regulation of paid tax return preparers, but has not been enacted. The Obama Administration has also supported legislation authorizing the Treasury Department and Internal Revenue Service to regulate paid

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4 Formal Opinion 346 (January 29, 1982).


tax return preparers. Similar legislation authorizing the regulation of paid tax return preparers has been introduced in prior Congresses but has also never been enacted.

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

If the Resolution is adopted, the Section of Taxation would be well positioned to advocate on the Association’s position in support of legislation to regulate paid tax return preparers. The Section of Taxation would work with the Governmental Affairs Office to urge Congress to act quickly to make the recommended legislative changes.

8. **Cost to the Association.**

Passage of the policy will incur no direct cost to the Association. Some staff time from the Section of Taxation and the Governmental Affairs Office would be required to support advocacy of this policy.

9. **Disclosure of Interest.**

None known at this time.

10. **Referrals.**

The Section of Taxation has referred the proposed Resolution to all interested parties, including the Section of Administrative Law and Regulatory Practice, the Section of Business Law, the Section of Family Law, the Section of International Law, the Section of Real Property, Trust and Estate Law, the Solo, Small Firm and General Practice Division, the Center for Professional Responsibility and the Governmental Affairs Office, among others. The proposed Resolution will also be referred to the Section of State and Local Government 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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7 See General Explanation of the Administration’s Fiscal Year 2015 Revenue Proposals, at 244 (March 2014).

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution urges Congress to amend 31 U.S.C. § 330(a) and (b) to include within the scope of those provisions non-attorney “tax return preparers,” as that term is defined by 26 U.S.C. § 7701(a)(36) and Treasury Department regulations promulgated thereunder. The Resolution also urges Congress to amend 31 U.S.C. § 330(d) to clarify that the Treasury Department has the authority to regulate persons who advise taxpayers with respect to the reporting of items on Federal tax returns, provided that the scope of any such regulation should not exceed the scope set forth in Treasury Department Circular 230 as published on June 12, 2014. These changes would reverse the effect of recent judicial decisions limiting Treasury’s authority to regulate the conduct of paid tax advisors, including tax return preparers, to protect consumers and safeguard the tax system.

2. Summary of the Issue that the Resolution Addresses

In 2011 the Treasury Department promulgated regulations under 31 U.S.C. § 330 to regulate paid tax return preparers. The Court of Appeals for the D.C. Circuit held in Loving v. Internal Revenue Service, 742 F.3d 1013 (D.C. Cir. 2014), that those regulations exceeded the Treasury Department’s authority. More recently, in Ridgely v. Lew, 2014 U.S. Dist. LEXIS 96447 (D.D.C. July 16, 2014), the U.S. District Court for the District of Columbia invalidated other regulations promulgated by the Treasury Department under 31 U.S.C. § 330 that limited certain contingent fee arrangements charged by tax practitioners. These and other cases have limited the Treasury Department’s authority to regulate the conduct of persons who, for compensation, advise or represent taxpayers with respect to any matters arising under the Internal Revenue Code, including the reporting of items on Federal tax returns.

3. Explanation of how the Resolution Will Address the Issue

By urging Congress to amend 31 U.S.C. § 330 to allow the Treasury Department to regulate paid tax return preparers, as that term is defined by 26 U.S.C. § 7701(a)(36) and the regulations thereunder, and provide a clear affirmative grant of authority of the Treasury Department to regulate a broader range of conduct engaged in by paid tax advisors, including applicable due diligence standards, fee arrangements and other activities of paid tax advisors that do not involve direct interaction with the Internal Revenue Service in an adversarial proceeding but nonetheless have a significant impact on the public fisc and on taxpayers’ compliance with their obligations under the tax law, the proposed Resolution would directly address the concerns presented in Loving. By approving this Resolution, the Association would (1) promote competence, ethical conduct and professionalism, (2) protect our members and the public from unscrupulous unregulated tax return preparers, and (3) promote accountability through oversight of paid tax advisors by the Internal Revenue Service’s Office of Professional Responsibility.

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

No minority views have been identified in opposition to the proposed Resolution.
RESOLVED, That the American Bar Association encourages law schools to offer comprehensive debt counseling and debt management education to all currently admitted and enrolled law students.

FURTHER RESOLVED, That the American Bar Association encourages bar associations to offer similar debt counseling and debt management education to young and newly admitted lawyers.
RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal
governments and regulators to amend existing laws and regulations, or to enact new laws or regulations,
to:

(1) ensure that victims of domestic violence, dating violence, sexual assault, and stalking have
meaningful access to safety and autonomy in their homes (whether owned, leased, subsidized,
offered incident to work or school, or otherwise), including prompt access to the criminal and
civil justice systems, by—

a. providing options such as no-penalty early lease termination, lease bifurcation, lease
   transfer, eviction defense, and lock changes; and

b. prohibiting retaliation, discrimination, or penalties in housing due to perpetrator behavior
   or status as a victim; and

c. preserving privacy and confidentiality to the greatest extent possible; and

(2) enable public and assisted housing agencies, tribally designated housing entities, private
landlords, property management companies, campus housing administrators and other housing
providers and agencies to respond appropriately to victims and perpetrators of domestic violence,
dating violence, sexual assault, and stalking, while maintaining a safe environment for all
housing residents;

consistent with the Congressional findings and policies expressed at 42 U.S.C. 14043e et seq.
(“Addressing the Housing Needs of Victims of Domestic Violence, Dating Violence, Sexual
Assault, and Stalking”)


RESOLVED, That the American Bar Association urges federal, state, local, tribal and territorial authorities to identify and address the special needs of vulnerable populations, including but not limited to individuals with disabilities, children, the frail, elderly, the impoverished, and persons with language barriers, when planning for and responding to disasters.

FURTHER RESOLVED, That Congress, state legislatures, territorial legislatures, tribal and local authorities should adequately fund departments and entities charged with responding to and assisting disaster survivors to cover the increased and unique needs of and disparate impact upon vulnerable populations in planning for, responding to, and recovering from major disasters.

FURTHER RESOLVED, That lawyers should participate in community-wide disaster planning activities to ensure that plans comply with legal and regulatory requirements applicable to the provision of government services and benefits to all disaster survivors, and to identify and help address gaps in policy, practice, and regulation that disproportionately and adversely affect vulnerable populations in times of major disaster.
REPORT

Introduction

Virtually every major disaster, by definition, harms persons and damages homes, infrastructure, and businesses in affected communities. The disaster affects the lives and livelihood of everyone in the community to some degree. But for some, the harms are more severe and the ability to recover is substantially more difficult. These include the impoverished, who lack private transportation to evacuate, hotels to fall back on, and resources and disposable income to get them back on their feet; the frail and elderly, who are trapped in high rise apartment buildings unable to leave or get assistance when the elevators go down; the disabled, who may seek temporary shelter in a facility not equipped to handle their special needs; the non-English speaking, who cannot follow directions from first responders or understand their rights to assistance; the medically fragile, who are often left without their medications, ventilators, or other critical medical devices; and infants and children, who may be separated from their caregivers. Together these and others who are vulnerable or disadvantaged, individually and collectively, need help from lawyers, both before and after a disaster strikes.

The lawyer’s role to help the vulnerable and disadvantaged following a disaster is clear. Lawyers advocate for disaster victims to help overcome legal obstacles. They assist in obtaining Federal Emergency Management Agency (FEMA) and other public benefits and private insurance, help in landlord tenant disputes, intervene when there are fraudulent consumer practices, and help when critical vital documents are destroyed. This role has long been at the forefront of the organized bars’ commitment to serve the community following a disaster. The ABA Young Lawyers Division (YLD), through a Memorandum of Understanding (MOU) with FEMA, coordinates Disaster Legal Services (DLS). DLS is one of the individual assistance services offered under the Stafford Act, which is the statutory authority for most federal disaster response activities especially as they pertain to FEMA and FEMA programs.1 Through this MOU, when invoked by FEMA following a major disaster, the ABA YLD sets up and ensures staffing of a disaster legal services hotline and works with local bar associations, attorneys, pro bono programs, law schools, legal services entities and others to make available and often train lawyers to assist disaster victims.

After a disaster, lawyers may also advocate for the collective needs of disadvantaged populations. For example, following Hurricane Katrina, a large number of elderly, low-income, and minority groups were without adequate housing. Yet, the media reported that nearly $600 million of Mississippi’s federal disaster grants were being reallocated to expand the state port at Gulfport. The Mississippi Center for Justice filed suit on behalf of community groups and individuals against the U.S. Department of Housing and Urban Development, resulting in a settlement with $132 million set aside to assist low-income households.2

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2 Mississippi Center for Justice, http://mscenterforjustice.org/our-work/disaster-
A lawyer’s ability to help the vulnerable and disadvantaged prior to a disaster may be less clear, but is equally if not more important. The more prepared a community is for a disaster, especially for the disadvantaged, the more manageable the after-effects will be. A community’s failure to incorporate in its disaster planning the special needs of its most vulnerable residents and visitors places them at an added risk of injury and even death, should disaster strike. Indeed, federal judges across the county have confirmed that a community’s failure to incorporate the needs of vulnerable populations in their community disaster plan violates federal law. Lawyers should be at the table as advocates, community leaders, and problem solvers as their communities develop, test, and update community-wide emergency management plans, with special attention to the disadvantaged, who are the most in need of a lawyer’s advocacy skills.

Attorneys and other community advocates cannot alone safeguard the well-being of the disadvantage and vulnerable following a disaster. Governments, especially state, local, and territorial, must execute its primal duty of helping those most in need. Toward this end, governments can and must: survey and pre-understand the prevalence of different vulnerable populations in the community; coordinate interagency and intergovernmental implementation of emergency plans related to the vulnerable and disadvantaged; consider and plan for the needs of their own public employees who are at risk; allocate sufficient resources so that shelters can accommodate persons with special needs or those without ready access to transportation such as the homeless; ensure hospital patients and nursing home residents are evacuated and emergency notification and communication methods are accessible to those with vision and hearing impairments and in languages prevalent in the community; increase awareness level of first responders and emergency managers on issues relating to individuals with disabilities and other vulnerable populations; and ensure that relevant laws, such as the Americans with Disabilities Act are followed, and where necessary, ensure new laws are enacted or regulations and policies implemented to cover gaps in services and protections to vulnerable disaster survivors.

Problems Faced by Disadvantaged and Vulnerable Populations

A great deal of public awareness and attention to the importance of planning for vulnerable populations can be traced back to Hurricane Katrina, when the public’s attention was riveted by images of individuals who were already vulnerable and as a result were unable to protect themselves. The aftermath of Superstorm Sandy served as a painful reminder. Both events focused public attention on the plight of our most vulnerable populations and the realities they confront during and after a disaster. Among the biggest challenges faced by these vulnerable populations is transportation, short and

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long-term shelter, post-disaster housing, food, accessibility, communication, medical care, and supervision. Individuals without access to a car or who are physically unable to drive will need help through public transportation. However, public transportation systems are often damaged or overtaxed following a disaster. Limited hearing, vision, speech, and English proficiency can restrict an individual’s ability to receive and appropriately respond to important information in times of emergency. Some conditions, particularly mental illness or disorder, will require supervision and many of these people are pushed aside because of the higher level of complication or difficulty of their situation or because their behavior is misunderstood and can make people uncomfortable.

Images of disaster survivors in makeshift shelters with limited food and water and rapidly deteriorating sanitation are seared in our memories. Not to be forgotten is that most of those trapped in the Superdome were the impoverished and lacked the means to escape the city or find other accommodations. Post mortems of Katrina are replete with statistics and stories of how the storm devastated the most vulnerable – and how much of this devastation could have been avoided. For example, around 75% of reported deaths in New Orleans occurred among the city’s elderly, many of whom were unable to escape the storm. Yet, according to aftermath reports, the majority of nursing homes remained full even though school buses were available to transport the patients as the storm approached. Tragically, however, there were not enough bus drivers or enough buses equipped to transport patients in need of wheelchairs or other medical devices.

While incredible strides have been made since Katrina, Superstorm Sandy reminded us that much remains to be done. Like Katrina, the Sandy aftermath reports provide stories and statistics of its disproportionate impact on disadvantaged and other vulnerable populations. One such report by the New York Women’s Foundation described the immediate and long term (one year later) impacts of the storm: undocumented immigrants were unable to understand storm “surge” warnings, children were traumatized by multiple school transfers, jobs and wages were lost among those least able to recover, subsidized housing dried up, the instances of rent gouging and evictions rose, homophobic violence increased in shelters, homebound seniors were overlooked and left isolated in their apartments, and low-income residents were fearful of abandoning their homes because they were uncertain of where to go or whether they could return.

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4 Nat’l Council on Disability, Effective Communications for People with Disabilities: Before, During, and After Emergencies 40-48 (2014), [http://www.ncd.gov/publications/2014/05272014](http://www.ncd.gov/publications/2014/05272014) (This report shares some of the common, overlooked problem areas, such as televised emergency announcements by officials that do not include American Sign Language (ASL) interpreters, inaccessible emergency notification systems, inaccessible evacuation maps, websites with emergency information that is not accessible to screen readers used by people who are blind or who have low vision, shelters at which no one is able to communicate with people who are deaf or hard of hearing. Key to its findings and recommendation is the engagement of the disabled and advocates in the planning process).


6 Hurricane Sandy: the Aftermath and Moving Forward An overview of the Impact on the New York Women’s Foundation Hurricane Sandy Response and Recovery Team, [available at](#)
York City’s own after-action report highlights the needs of vulnerable populations and includes recommendations to address this issue, such as “better coordination of relief to affected areas and to vulnerable or homebound populations, including more efficient deployment of volunteers and donations to residents and business owners” and improved pre-storm communication to vulnerable areas such as public housing.7

**Attorney Involvement in Community Planning**

Successful management of a disaster begins at the local level. A decade ago such planning was the near exclusive domain of emergency managers, but contemporary thinking calls for a community wide approach involving all segments of the community. FEMA now actively encourages citizens to join forces with community planning agencies to prepare for disaster. As part of this effort, FEMA hosts a program called the Community Emergency Response Team (CERT) that helps to educate citizens on this role.8

Despite the growth and acceptance of community-wide disaster planning and response efforts, the needs of vulnerable and disadvantaged populations are not always anticipated and addressed sufficiently.9 Often missing is a lack of education, training and guidance on how to include vulnerable populations at the planning stage, lack of consumer-oriented aids and resources for these populations, and lack of guidelines and testing of how to promote collaboration among agencies and entities that serve the vulnerable.10

To address these shortcomings, disadvantaged and vulnerable populations must have their voices heard and needs anticipated and addressed as part of this planning. Yet there are barriers to their participation. Many times they are reluctant to advocate for themselves. Undocumented immigrants risk deportation if they come forward because they may be turned over to immigration authorities. Domestic violence victims may not wish to expose themselves in a public setting, even though a disaster can place them at even greater risk when courts shut down, police are diverted, and their security systems and safety net worsen. Opportunistic predators may seize upon the comparative chaos and lack of security to rape and assault. The impoverished feel voiceless. Others, by definition – the very young, the mentally ill, the declining senior – may need advocates to speak for or with them. Lawyers can help to fill this role. They often represent these constituencies and understand their needs. They know how to advocate and be heard in the community planning process. And they can ensure that the plans anticipate and comport with applicable laws and regulations, and offer practical solutions.

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10 Wingate, supra, at note 4.
One such law, the Americans with Disabilities Act (ADA), is particularly germane to a large segment of the vulnerable population. While the ADA does not mention disasters and emergency preparedness per se, Title II which prohibits public entities from discriminating against disabled individuals through services or programs would cover local government emergency preparedness and response programs. These activities and programs must be accessible to people with disabilities and can cover a wide range of activities.\footnote{11 Nancy L. Jones, Congressional Research Service, The Americans with Disabilities Act and Emergency Preparedness and Response 3 (2010), \url{http://fas.org/sgp/crs/homesec/RS22254.pdf}.} For example, shelters must be ADA compliant and even able to accommodate service dogs, emergency evacuation transportation must be wheel chair accessible, and emergency responders directions must be intelligible to the sight or sound impaired.

Disasters neither excuse nor mitigate the government’s obligations to plan for and protect its most vulnerable citizens. In numerous ways the federal government has acknowledged the ADA’s applicability to disasters and issued orders or guidance. For example, the Department of Justice has issued an ADA guide for local governments regarding community emergency preparedness and response programs and accessibility;\footnote{12 An Americans With Disabilities Act Guide for Local Governments Making Community Emergency Preparedness and Response Programs Accessible to People with Disabilities, \url{http://www.usdoj.gov/crt/ada/emergencyprep.htm} (last visited Dec. 10, 2014).} FEMA has offered guidance on planning for functional needs support services in shelter plans (i.e. services that enable individuals to maintain their independence) for state emergency planners;\footnote{13 Federal Emergency Management Agency, Guidance on Planning for Integration of Functional Needs Support Services in General Population Shelters (2010), \url{http://www.fema.gov/pdf/about/odic/fnss_guidance.pdf}.} President Bush, in 2004, issued Executive Order 13347, “Individuals with Disabilities in Emergency Preparedness,” affirmed the policy “to ensure that the Federal Government appropriately supports safety and security for individuals with disabilities in situations involving disasters....” The Order also created the Interagency Coordination Council on Emergency Preparedness and Individuals with Disabilities. And finally, as part of the Post-Katrina Emergency Management Reform Act of 2006 a disability coordinator to FEMA position was created, reporting directly to the FEMA administrator with a detailed list of responsibility.\footnote{14 Post-Katrina Emergency Management Reform Act of 2006, Pub. L. No. 109-295, 120 Stat. 1355 (2006).}

This view is also supported by the American Bar Association. At the 2007 annual meeting, the House of Delegates adopted a set of principles, “Rule of Law in Times of Major Disaster.” These 12 principles collectively support the proposition that the rule of law, justice, and rights must be preserved and safeguarded, even in times of major disaster. Additionally, these principles recognize and support the proposition that only by lawyer engagement in advance proactive planning can the rule of law be preserved. In the preamble to the principles, the observation is made that “the legal system cannot create a plan to insure the safety of incarcerated arrestees [a vulnerable population] when all the jail personnel have been stricken with avian flu.”
Notwithstanding the growing acceptance of ADA as applied to emergency planning, response, and recovery, there is still failure to follow its requirements or anticipate the many ways it can be implicated post disaster. In CALIF v. City of Los Angeles, a federal district court concluded that the City of Los Angeles had violated federal and state disability laws—including the Americans with Disabilities Act (ADA) and the California Disabled Persons Act (CDPA)—by failing to consider the needs of over 800,000 disabled residents in its emergency preparedness program.

In a groundbreaking case that began shortly after Hurricane Irene (2011) but was amplified by the Sandy experience, a federal district court found that New York City’s emergency plans violated the ADA, leaving almost 900,000 residents in danger. In late 2014, the parties agreed to a stipulation of settlement that covers a broad array of remedial actions the City must take to comport with the ADA. These actions include emergency shelter accessibility, post disaster canvassing and services for persons with disabilities, training of staff on the needs of persons with disabilities, ensuring accessible transportation and training of operators of communicating with and serving the disabled, and the creation of a Disability and Access Functional Needs Coordinator and a broad based Disability Community Advisory Panel.

The ADA and its state and local counterparts admittedly do not cover all vulnerable populations disproportionately affected by disasters. Lawyers can utilize other laws and regulations to buttress their advocacy, on behalf of the vulnerable, through the community emergency planning process, including a call for increased funding and specialized services. Where no defining law or regulation exists, the legal profession’s participation in community planning is even more critical. State and local bar associations, as well as individual lawyers, using traditional notions of equal protection and fairness which may be buttressed by state constitutional and statutory civil rights provisions, can lobby, and if necessary litigate, argue for services, programs, and funding. The ABA has already adopted a policy that one type of service – civil legal assistance to help meet the needs of low income disaster survivors – receive increased funding from all levels of government. Professor Sharona Hoffman, in her 2009 law review article, “Preparing for Disaster: Protecting the Most Vulnerable in Emergencies,” argues that “existing legal and ethical frameworks entitle vulnerable populations to significant protection.” At the same time she notes the shortcomings in existing laws and urges for legislative solutions, which can be another opportunity for lawyers to have meaningful impact in community planning.

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15 Communities Actively Living Independent and Free Et Al v. City of Los Angeles, CV 09-0287 CBM (RZx) U.S. Dist. Ct., Central Dist. CA (2011).
18 Resolution and Report #104, February 2009
19 42 U. Cal Davis LR 1491-1547 (2009).
Aside from using law, regulation, and policy to advocate for the needs of vulnerable populations, lawyers can bring practical law or policy-related insights and suggestions to the planning deliberations. For example, lawyers could advocate for mechanisms to suspend in the event of a disaster any existing cooperative agreements between federal and local authorities that refer undocumented immigrants to federal authorities for deportation. Lawyers can also promote proactive policies that reassure all individuals that if they report to shelters or seek other disaster assistance their immigration status will not be questioned. Also, lawyers can work to ensure that allocating resources (e.g., food, blankets, and other rations) are not restricted to “heads of household” so that victims of domestic violence are not made even more dependent on and vulnerable to the abuser.

**Conclusion**

Much of this resolution and report relies on information arising from Hurricanes Katrina and Sandy, but its importance should not be seen as addressing isolated needs. Even the casual observer cannot escape concluding that tornados, hurricanes, floods, wild fires, earthquakes and other disasters are an almost everyday occurrence, different only by scope and scale of destruction. Every community must engage in disaster planning and hope that it is never needed. Lawyers, in their historic professional role of giving back to the community and protecting the rights of the most vulnerable, must engage in this planning process.

Respectfully submitted,

Anthony Barash, Chair
Standing Committee on Disaster Response and Preparedness
February 2015
GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Disaster Response and Preparedness

Submitted By: Anthony Barash, Chair

1. **Summary of Resolution(s).** This resolution urges federal, state, local, tribal, and territorial authorities and legislative bodies to proactively identify and address the special needs of vulnerable populations that are disproportionately affected by disasters and to provide appropriate funding. It also urges lawyers to participate in community planning to help ensure that plans comport with legal requirements applicable to services and benefits offered disaster survivors, especially for the most vulnerable.

2. **Approval by Submitting Entity.** This resolution was approved by the Standing Committee at its business meeting on October 24, 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 House of Delegates over the past decade has adopted several policies related to disaster response and preparedness. This Resolution does not conflict with these policies but is rather a natural extension, building upon the concepts of disaster planning, respect for rule of law in times of disaster, and funding of legal services to meet legal needs of disaster survivors. Specifically these policies urge lawyers and law firms to undertake their own disaster planning (August 2011), advocate for increased funding to legal services, pro bono programs, and bar associations to address the unmet civil legal needs of disaster survivors (February 2009), and a set of 12 principles supporting the continuation of the rule of law in times of major disaster (August 2007).

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

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

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** The Committee will support this policy, if adopted, primarily through educational efforts. This will include, for example, workshops at the Equal Justice Conference, inclusion in trainings the Committee periodically does for state and local bar associations, and incorporation into its existing training “simulation” program on impact of disaster on low income survivors that is offered in communities throughout the country. The Committee will also be prepared, working
with the President’s Office, Media Relations, and Government Affairs Office to “educate the public” on this topic in the aftermaths of a major disaster. Unfortunately, the media and public’s attention to disaster planning is often greatest following a major disaster, at which time a Presidential Op-Ed or letters to Congress, especially to members in affected areas, will resonate strongly.

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

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

10. **Referrals.** A draft of the resolution has been circulated to Commissions who address legal issue representative of the vulnerable populations identified in this resolution and report, including the Commissions on Domestic and Sexual Violence, Homelessness and Poverty, Immigration, Disability Rights, and Youth at Risk, and to the Section of Individual Rights and Responsibilities.

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

   Anthony Barash, Chair  
   210 E Pearson Street  
   Chicago, IL 60611-2396  
   864-915-2150  
   barashah@earthlink.net

   Robert Horowitz, Staff Director  
   Standing Committee on Disaster Response and Preparedness  
   American Bar Association  
   1050 Connecticut Ave., NW  
   Washington, DC 20036  
   202-662-1742  
   Bob.horowitz@americanbar.org

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

   Anthony Barash, Chair  
   210 E Pearson Street  
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   864-915-2150  
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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges federal, state, local, tribal, and territorial authorities and legislative bodies to proactively identify and address the special needs of vulnerable populations that are disproportionately affected by disasters and to provide appropriate funding. It also urges lawyers to participate in community planning to help ensure that plans comport with legal requirements applicable to services and benefits offered disaster survivors, especially for the most vulnerable.

2. Summary of the Issue that the Resolution Addresses

This resolution seeks to address and remediate the tragic, devastating and disproportionate impact of major disasters on disadvantaged and vulnerable populations. Examples of such impact are many: The disabled may have difficulty or be unable to access services and benefits, the frail and elderly may be isolated from emergency responders, the poor do not have disposable income or means to find alternative housing or replace lost wages, the non-English speaker may not understand evacuation instructions or have service providers fluent in their language, children may experience multiple and disruptive school changes.

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

There is widespread consensus in the emergency management community that the best way to address problems that may be caused by a disaster is to eliminate or alleviate the problem beforehand, through disaster planning. This Resolution addresses the human tragedies identified above by urging all levels of government to identify populations in their communities most vulnerable and to plan for their need should disaster strike. Additionally, the resolution, mindful of the important contributions lawyers can make in advocating for the legal protections and rights of the most vulnerable and in serving their communities, urges lawyers to participate in these planning processes.

4. Summary of Minority Views

We are unaware of any minority views or opposition to this Resolution.
RESOLVED, That the American Bar Association urges the United States Congress to enact legislation that supports the following principles regarding consumer data privacy:

1. Individual Control: Consumers have a right to exercise control over what personal data companies collect from them and how they use it.

2. Transparency: Consumers have a right to easily understandable and accessible information about privacy and security practices.

3. Respect for Context: Consumers have a right to expect that companies will collect, use, and disclose personal data in ways that are consistent with the context in which consumers provide the data.

4. Security: Consumers have a right to secure and responsible handling of personal data.

5. Access and Accuracy: Consumers have a right to access and correct personal data in usable formats, in a manner that is appropriate to the sensitivity of the data and the risk of adverse consequences to consumers if the data is inaccurate.

6. Focused Collection: Consumers have a right to reasonable limits on the personal data that companies collect and retain.

7. Accountability: Consumers have a right to have personal data handled by companies with appropriate measures in place to assure they adhere to the Consumer Privacy Bill of Rights.

FURTHER RESOLVED, That the American Bar Association urges state, local, territorial and tribal governments to enact legislation, regulations and practices that are consistent with and supportive of these principles.
REPORT

1. Introduction

American consumers are exposed to data privacy violations through gaps in the coverage offered by federal consumer privacy law in the United States. The law is comprised of sector-specific statutes, leaving some areas of consumer privacy well-protected and others entirely exposed. Some statutes protect types of consumer data – for example, certain types of health data and credit data. Other statutes protect types of consumers – for example, children under the age of 13 and students. Some federal privacy statutes overlap in their protections, and some privacy statutes cover only a tiny fraction of consumer interactions. The methods of enforcement and the means of redress vary across the statutes, depriving consumers of a consistent baseline of privacy protections.

While other countries have dedicated data privacy commissions, the United States lacks even a core set of data privacy rules with which businesses must comply. In response to this void, the White House proposed in 2012 a Consumer Privacy Bill of Rights ("CPBR"), based on the widely known Fair Information Practices ("FIPs"). FIPs appear in various privacy laws and frameworks, such as the Organization for Economic Cooperation and Development (OECD) Privacy Guidelines, the Privacy Act of 1974, and the European Commission's recent Data Protection Regulation and the Federal Trade Commission's reports.

The CPBR is the most significant formulation of the FIPs in the United States. The CPBR is a comprehensive framework that lists seven substantive privacy protections for consumers: Individual Control, Transparency, Respect for Context, Security, Access and Accuracy, Focused Collection, Accountability. When the CPBR was first published, the White House stated that the executive would:

work to advance these principles and work with Congress to put them into law. With this Consumer Privacy Bill of Rights, we offer to the world a dynamic model of how to offer strong privacy protection and enable ongoing innovation in new information technologies.

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2 OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, available at http://www.oecd.org/document/18/0,3343,en_2649_34255_1815186_1_1_1_1,00.html.
3 Privacy Act of 1974, 5 USC § 552a.
6 Id.
7 CPBR Report, Introduction.
By enacting the CPBR and making it into law, Congress could ensure that the personal data of consumers is protected throughout the data’s lifecycle. More importantly, Congress could put in place the baseline privacy standards that are widely recognized around the world and necessary to protect the interests of consumers.

2. Data Privacy Statutes in the United States

Data privacy law in the United States is a patchwork of sector-specific statutes. There is no general federal privacy legislation; instead, specific types of data are subject to one or more federal statutes. These statutes are briefly summarized below.

A. The Children’s Online Privacy Protection Act

The Children’s Online Privacy Protection Act\(^8\) (“COPPA”) took effect in April 2000. COPPA specifically protects the privacy of children under the age of 13.\(^9\) COPPA requires that website operators acquire verifiable parental consent prior to collection of personal information from a child under the age of 13. It also gives parents the right to revoke consent and have children’s information deleted.\(^10\) The Act requires that website operators incorporate detailed privacy policies that describe the information collected from users, disclosure to parents of any information collected on their children by the website, limits to the collection of personal information when a child participates in online games or contests, and a general requirement to protect the confidentiality, security, and integrity of any personal information that is collected online from children.\(^11\) COPPA focuses on a narrow segment of consumers, limiting the scope to children under the age of 13. It does not protect children aged 13-17.

B. The Health Insurance Portability and Accountability Act

The Health Insurance Portability and Accountability Act\(^12\) (“HIPAA”) was passed in August 1996 with the goals of increasing efficiency in health care delivery and increasing health coverage insurance among Americans.\(^13\) The Act itself is split into three main sections including “portability provisions,” “tax provisions,” and “administrative simplification provisions.”\(^14\) The HIPAA Privacy Rule\(^15\) is found in the administrative simplification section, and it focuses on protecting the “electronic transmission of health information.”\(^16\)

HIPAA serves as the floor for health data protection in that it does not supersede more protective State laws.\(^17\) Within the Act, “protected health information” is defined broadly to

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\(^13\) http://www.ncbi.nlm.nih.gov/books/NBK9576/
\(^14\) Id.
\(^16\) Id.
\(^17\) http://epic.org/privacy/medical/
include individually identifiable health information related to past, present, or future payments for providing health care to individuals. The Rule establishes a federal mandate for individual rights in health information, imposes restrictions on uses and disclosures of individually identifiable health information, and provides for civil and criminal penalties for violations.

Complementary to the Privacy Rule is the HIPAA Security Rule that provides standards for protection of health information in electronic form. This Rule lays out the technical security standards that health care providers must implement to ensure the protection of protected health information.

C. The Telephone Consumer Protection Act

The Telephone Consumer Protection Act of 1991 ("TCPA") provides certain prohibitions and regulations, addresses specific aspects of telemarketing and authorizes the FTC to issue Telemarketing Sales Rules, and gives the FCC authority to collect complaints and institute enforcement actions against violators. Among other provisions, the TCPA provides certain prohibitions and regulations on commercial telemarketing. The TCPA requires that telemarketers include accurate date, time, and sending telephone number information in the margin of the message of all commercial facsimile messages. TCPA also creates a private right of action allowing individuals, businesses, and state officials to bring a case in court where telemarketers knowingly or willfully violated the Act.

D. The Video Privacy Protection Act

The Video Privacy Protection Act of 1988 ("VPPA") was passed in response to the disclosure of a Supreme Court nominee’s video rental records, and was amended in 2011 due to pressure from online video companies, like Netflix. The Act in its original form prevents the disclosure of personally identifiable rental records unless one of the following occurs: (1) consumer consents, or (2) police officers obtain a warrant or court order. The Act further empowers consumers to opt out of their information being sold or used for marketing, and it requires that video stores destroy rental records within a year of account termination. The Act provides civil remedies, including possible punitive damages and attorney’s fees, not less than $2,500.

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19 Id.
21 Id.
23 Id.
27 Id.
E. The Drivers Privacy Protection Act

The Drivers Privacy Protection Act of 1994\(^1\) ("DPPA") was enacted to protect the privacy of personal information assembled by State Departments of Motor Vehicles ("DMVs"). It prohibits the release or use of any personal information about an individual obtained by the State DMVs in connection with a motor vehicle record. It sets penalties for violations and makes violators liable for a civil action to be brought by the individuals whose information was released.

The DPPA was passed in response to a number of murder, robbery, and stalking cases where the criminals used information pulled from individuals’ DMV records to commit the crimes.\(^2\) Congress amended the law to give drivers additional privacy protections in 1999.\(^3\) This amendment, known at the Shelby Amendment, changed the DPPA to require that states obtain a driver’s express consent before releasing any personal information, regardless of whether the request is made for a particular individual’s information or in bulk for marketing purposes.\(^4\)

The purpose of the DPPA is to limit the use of a DMV record to certain purposes.\(^5\) These limits include: legitimate government agency functions, use in matters of motor vehicle safety, insurance activities, motor vehicle market research and surveys, notice for impounded vehicles, and use in connection with a civil, criminal, administrative, or arbitral proceeding.\(^6\) DMV information may also be used in research activities and statistical reports, so long as personal information is not disclosed or used to contact individuals.\(^7\) In certain other enumerated circumstances, DMV information can be released with the express consent of the individual.\(^8\)

Like the other statutes listed in this section, the DPPA provides a floor for protection and is of very limited scope as it only applies to DMV records.

F. The Gramm-Leach-Bliley Act

The Gramm-Leach-Bliley Act\(^9\) ("GLBA"), also known as the Financial Services Modernization Act of 1999,\(^10\) provides limited privacy protections against the sale of private financial information. The GLBA permitted the merger of banks, brokerage companies, and insurance companies, all of which used to be separate entities.\(^11\) These mergers led to privacy

\(^{3}\) Id.
\(^{4}\) Id.
\(^{6}\) Id.
\(^{7}\) Id.
\(^{8}\) Id.
\(^{10}\) Id.
\(^{11}\) See EPIC: Gramm-Leach-Bliley Act, https://epic.org/privacy/glba/
risks because these new amalgamated financial institutions would have access to a vast trove of personal data.\textsuperscript{42}

The GLBA’s privacy protections only regulate financial institutions, which are defined as “businesses engaged in banking, insuring, stocks and bonds, financial advice, and investing.”\textsuperscript{43} The GLBA requires that these institutions develop security measures to protect consumer information, provide notice to consumers of their information sharing policies, and give consumers the right to opt out of this information sharing.\textsuperscript{44} The GLBA also prohibits disclosing access codes or account numbers to any non-affiliated party for marketing purposes; however, consumers have no right under the GLBA to stop financial institutions from sharing nonpublic personal information among affiliates.\textsuperscript{45}

However, the GLBA’s protections are limited in scope and application. First, the burden is still placed on consumers to opt out of policies they do not wish to apply to them.\textsuperscript{46} Second, consumers have no control over how their information is shared among affiliates.\textsuperscript{47} Third, the notices of information practices required under the GLBA are too confusing for many consumers to understand how their records are kept.\textsuperscript{48} Finally, the GLBA lacks significant enforcement or compensation mechanisms.\textsuperscript{49}

F. The Fair Credit Reporting Act

The Fair Credit Reporting Act\textsuperscript{50} (“FCRA”) was enacted in 1970 to promote accuracy, fairness, and the privacy of personal information assembled by credit reporting agencies. Credit reporting agencies collect information and assemble reports on individuals, and sell them to businesses like credit card companies, banks, employers, and landlords.\textsuperscript{51} These reports are used by the businesses to evaluate the creditworthiness of individuals. The FCRA requires credit reporting agencies to follow “reasonable procedures” to assure the confidentiality, accuracy, and relevance of credit information.\textsuperscript{52} The FCRA was amended in 1996, and again in 2003, both times including a number of improvements to credit reporting law.\textsuperscript{53}

The FCRA limits who can access individuals’ credit reports and protects consumers by giving them a right to correct inaccurate information and providing procedures to report and recover from identity theft.\textsuperscript{54} However, the scope of the Act is limited to credit reporting agencies, and consumers continue to be largely ignorant of the collection and use of their data. For instance, consumers are not notified when adverse actions occur on their account or when

\textsuperscript{42} Id.
\textsuperscript{48} Id.
\textsuperscript{51} https://www.epic.org/privacy/fcra/
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
inquiries are made on their account. Further, FCRA established an opt-out standard for credit prescreening, although the opt-out standard has been widely recognized as an ineffective form of privacy protection. Finally, consumers cannot access their entire file, including the names of sources of negative information. Overall, FCRA is too limited in scope to provide the broader consumer privacy protections that are necessary in the digital age.

3. Overview of Fair Information Practices

A. The HEW Report and the Privacy Act of 1974

The Fair Information Practices are proscriptive rules that have been broadly accepted as the guidelines for the way that consumer information should be treated in the electronic marketplace. The FIPS were first articulated in a 1973 report drafted by an advisory committee from the Department of Health, Education, and Welfare. The report, entitled Records, Computers and the Rights of Citizens, predicted the rise of computers in recordkeeping. The report cautioned that any institution that keeps records on individuals must safeguard the rights of each individual to his or her information. The HEW Report noted:

An individual's personal privacy is directly affected by the kind of disclosure and use made of identifiable information about him in a record. A record containing information about an individual in identifiable form must, therefore, be governed by procedures that afford the individual a right to participate in deciding what the content of the record will be, and what disclosure and use will be made of the identifiable information in it. Any recording, disclosure, and use of identifiable personal information not governed by such procedures must be proscribed as an unfair information practice unless such recording, disclosure or use is specifically authorized by law.

55 Id.
57 Id.
60 Id.
61 Id. at 40-41.
The HEW Report recommended that institutions should adhere to a set of core principles in furtherance of this philosophy. They called these core principles the “Code of Fair Information Practices.”

The Code consisted of five tenets:

- There must be no personal-data record-keeping systems whose very existence is secret.
- There must be a way for an individual to find out what information about him is in a record and how it is used.
- There must be a way for an individual to prevent information about him obtained for one purpose from being used or made available for other purposes without his consent.
- There must be a way for an individual to correct or amend a record of identifiable information about him.
- Any organization creating, maintaining, using, or disseminating records of identifiable personal data must assure the reliability of the data for their intended use and must take reasonable precautions to prevent misuse of the data.

The next year, these principles were incorporated into the Privacy Act of 1974. The Privacy Act implemented the FIPs in federal executive agencies that kept “systems of records” about individuals. Under the Privacy Act, an individual has many of the rights – and federal agencies have many of the obligations - outlined in the HEW Report. For example, the individual has the right to access any records an agency maintains on that individual; the agency is restricted from disseminating records on individuals except under limited circumstances; the agency must keep accurate accounts of when and to whom it has disclosed personal records, to promote accountability and facilitate auditing; the agency must maintain in its records only the minimum amount of information “relevant and necessary” to accomplish its purposes; the agency is restricted from sharing information about individuals with other agencies except under limited circumstances; and the individual has a means of redress.

B. The Federal Trade Commission and the Consumer

While other statutes have incorporated the FIPs since the passage of the Privacy Act in 1974, these statutes governed only administrative agency behavior. The FIPs were not

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62 Id. at 41.
63 Id.
65 Id. at § 552a(a)(8)(A)(i).
66 Id. at § 552a(d).
67 Id. at § 552a(b).
68 Id. at § 552a(c).
69 Id. at § 552a(e)(1).
70 Id. at § 552a(e)(1).
71 Id. at § 552a(g).
72
specifically recommended as a set of baseline consumer protections for American businesses until the FTC’s 1998 report to Congress, *Privacy Online.* 73 In that report, the Commission identified “five core principles of privacy protection: (1) Notice/Awareness; (2) Choice/Consent; (3) Access/Participation; (4) Integrity/Security; and (5) Enforcement/Redress.” 74 In a follow-up report to Congress in 2000, the Federal Trade Commission formally recommended that commercial websites that collect personal identifying information from or about consumers online should be required to comply with “the four widely-accepted fair information practices.” These four practices were Notice, Choice, Access, and Security. 75 The FTC’s analysis of these four practices is excerpted below.

1. **Notice**

“[T]he Notice principle states that consumers should be given clear and conspicuous notice of an entity’s information practices before any personal information is collected from them, including: identification of the entity collecting the data, the uses to which the data will be put, and the recipients of the data; the nature of the data collected and the means by which it is collected; whether provision of the requested data is voluntary or required; and the steps taken by the data collector to ensure the confidentiality, integrity and quality of the data. Notice, then, requires more than simply making an isolated statement about a particular information practice.” 76

2. **Choice**

“The Choice principle relates to giving consumers options as to how any personal information collected from them may be used for purposes beyond those necessary to complete a contemplated transaction. Under the Choice principle, data collectors must afford consumers an opportunity to consent to secondary uses of their personal information, such as the placement of consumers names on a list for marketing additional products or the transfer of personal information to entities other than the data collector.” 77

3. **Access**

“The third core principle, Access, refers to an individual’s ability both to access data about him or herself i.e., to view the data in an entity’s files and to contest that data’s accuracy and completeness. Access is essential to improving the accuracy of data collected, which benefits both data collectors who rely on such data, and consumers who might otherwise be harmed by adverse decisions based on incorrect data. It also makes data collectors accountable to consumers for the information they collect and maintain about consumers, and enables consumers to confirm that Web sites are following their stated practices.” 78

74 *Id.* at 7.
75 *2000 FTC Report.*
76 *Id.* at 14.
77 *Id.* at 15. It is worth noting again that opt-out has been proven ineffective as an assessment of consumers’ preferences. *See* footnote 56, *supra.*
78 *2000 FTC Report at 16.*
4. Security

“The fourth fair information practice principle, Security, refers to a data collector’s obligation to protect personal information against unauthorized access, use, or disclosure, and against loss or destruction. Security involves both managerial and technical measures to provide such protections. The Commission believes that Security, like Access, presents unique implementation issues and that the security provided by a Web site should be adequate in light of the costs and benefits.” 79

IV. The Role of the Consumer Privacy Bill of Rights

If enacted, the Consumer Privacy Bill of Rights would provide a foundation of privacy rights for online consumers. It would codify an expanded version of the FIPs, incorporating several practices that initially appeared in the HEW Report, and several other practices that appear in other countries’ data protection mandates. The CPBR, attached, is composed of seven core practices:

1. **Individual Control**: Consumers have a right to exercise control over what personal data companies collect from them and how they use it.

2. **Transparency**: Consumers have a right to easily understandable and accessible information about privacy and security practices.

3. **Respect for Context**: Consumers have a right to expect that companies will collect, use, and disclose personal data in ways that are consistent with the context in which consumers provide the data.

4. **Security**: Consumers have a right to secure and responsible handling of personal data.

5. **Access and Accuracy**: Consumers have a right to access and correct personal data in usable formats, in a manner that is appropriate to the sensitivity of the data and the risk of adverse consequences to consumers if the data is inaccurate.

6. **Focused Collection**: Consumers have a right to reasonable limits on the personal data that companies collect and retain.

7. **Accountability**: Consumers have a right to have personal data handled by companies with appropriate measures in place to assure they adhere to the Consumer Privacy Bill of Rights.

The White House Report stated, “Congress should act to protect consumers from violations of the rights defined in the Administration’s proposed Consumer Privacy Bill of Rights. These rights provide clear protection for consumers and define rules of the road for the rapidly growing marketplace for personal data. The legislation should permit the FTC and State Attorneys General to enforce these rights directly. The legislation will need to state companies’

79 *Id.* at 18.
obligations under the Consumer Privacy Bill of Rights with greater specificity than this document provides.”

VI. CONCLUSION

The Consumer Privacy Bill of Rights would not supercede the existing sector-specific laws. Instead, it would provide a set of protections for all consumer interactions on the internet, some of which are already encoded in federal consumer privacy legislation. Enactment of the CPBR would strengthen the existing federal statutes. Those statutes would provide an extra layer of protection for the types of data and the types of consumers that Congress has designated as particularly important.

This floor of protections will ensure that consumers will be granted not only the basic fair information rights established more than 40 years ago in the United States but never enacted, but also the confidence that arises from a consistent, uniform articulation of those rights.

Respectfully Submitted,

Mark I. Schickman, Chair
ABA Section of Individual Rights and Responsibilities
February 2015

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80 CPBR, footnote 1, supra.
1. **Summary of Resolution(s).**

This Resolution urges the United States Congress to enact legislation that supports the principles set forth in the Consumer Privacy Bill of Rights contained in the 2012 White House Report *Consumer Data Privacy In a Networked World* and urges state, local, territorial and tribal governments to enact legislation, regulations and practices that are consistent with and supportive of these principles.

2. **Approval by Submitting Entity.**

The filing of this Resolution and Report was approved by the Council of the Section of Individual Rights and Responsibilities on November 8, 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?**

Although this Resolution will not affect any existing ABA policies, it is consistent with and builds upon ABA policy adopted in 1992 on the Use of Information in Electronic Form, which “[s]upport[ed] actions designed to facilitate and promote the orderly development of legal standards to: . . . encourage the use of appropriate and properly implemented security techniques, procedures and practices to assure authenticity of information in electronic form.”

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

The report is not late filed, but the Resolution should be considered at the 2015 Midyear meeting because, as is evident from the growing number of sector-specific statutes addressing data privacy law, there is an increasing need for general federal privacy legislation to provide a floor of protections that will ensure a consistent and uniform articulation of data privacy rights.

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

There is no relevant legislation pending.
7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.**

The sponsoring entity, subject to consultation with the ABA’s Governmental Affairs Office and with its assistance, plans on sending copies of the Resolution and the report to the Judicial Conference of the United States and to similar U.S. state judicial conferences, as well as to the American and Federal Judges Association and to similar U.S. state bodies.

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

There are no known costs to the Association.

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

There are no known conflicts of interest.

10. **Referrals.**

By copy of this form, the Resolution will be referred to the following entities:

- Section of Administrative Law and Regulatory Practice
- Section of Business Law
- Criminal Justice Section
- Section of Litigation
- Section of State and Local Government Law
- Government and Public Sector Lawyers Division
- Judicial Division
- Law Practice Division
- Law Student Division
- Senior Lawyers Division
- Solo, Small Firm and General Practice Division
- Young Lawyers Division

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

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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 urges the United States Congress to enact legislation that supports the principles set forth in the Consumer Privacy Bill of Rights contained in the 2012 White House Report *Consumer Data Privacy In a Networked World* and urges state, local, territorial and tribal governments to enact legislation, regulations and practices that are consistent with and supportive of these principles.

2. Summary of the Issue that the Resolution Addresses

American consumers are exposed to data privacy violations through gaps in the coverage offered by federal consumer privacy law in the United States. The law is comprised of sector-specific statutes, leaving some areas of consumer privacy well-protected and others entirely exposed. The methods of enforcement and the means of redress vary across the statutes, depriving consumers of a consistent baseline of privacy protections.

While other countries have dedicated data privacy commissions, the United States lacks even a core set of data privacy rules with which businesses must comply. In response to this void, the White House proposed in 2012 a Consumer Privacy Bill of Rights ("CPBR"), based on the widely known Fair Information Practices ("FIPs"). Despite being articulated as long ago as 1973, the FIPs have not been incorporated into legislation that addresses baseline consumer protections directed at American businesses. To date, the FIPs have been incorporated only into statutes that address administrative agency behavior, leaving the United States without a general floor of privacy protection for consumers.

The CPBR is the most significant formulation of the FIPs in the United States. It provides a comprehensive framework that lists seven substantive privacy protections for consumers: Individual Control, Transparency, Respect for Context, Security, Access and Accuracy, Focused Collection, Accountability.

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

By enacting the CPBR and making it into law, Congress could ensure that the personal data of consumers is protected throughout the data’s lifecycle. More importantly, Congress could put in place the baseline privacy standards that are widely recognized around the world and necessary to protect the interests of consumers. This Resolution will encourage Congress, as well as state, local, territorial and tribal governments, to enact legislation that establishes a floor of consumer privacy protections and thus enables a consistent and uniform articulation of data privacy rights within the United States.

4. Summary of Minority Views

No minority views or opposition have been identified at this time.
RESOLVED, That the American Bar Association urges federal, state, local, territorial and tribal
governments to continue to enforce and to enact rules or legislation that strengthen consumer
protections regarding deceptive or fraudulent loan foreclosure rescue practices;

FURTHER RESOLVED, That the American Bar Association supports ongoing efforts of state
courts and lawyer disciplinary agencies to investigate allegations of deceptive or fraudulent loan
foreclosure rescue practices by lawyers and, when appropriate, to prosecute and discipline law-
yers who commit this type of misconduct;

FURTHER RESOLVED, That the American Bar Association supports programs by federal,
state, local, territorial, and tribal bar associations to educate lawyers and consumers about decept-
tive or fraudulent foreclosure rescue practices, including those involving lawyers.
In response to the economic downturn and foreclosure crisis, companies have formed and thrived by offering services to struggling homeowners. Services are generally called mortgage assistance relief services which have been defined as any service, plan, or program, offered or provided to the consumer in exchange for consideration, that is represented, expressly or implied to assist or attempt to assist the consumer with negotiating, obtaining, or arranging a modification of any term of a dwelling loan, including a reduction in the amount of interest, principal balance, monthly payments or fees. The offered services vary but have generally fit into one of four categories: loan modifications, foreclosure rescue, forensic audits or mass joinder suits. Almost all derivations of these services have seen accompanying scams that follow one model: they make promises, collect money and offer little, if any, meaningful assistance to homeowners who are in desperate financial circumstances and vulnerable to schemes to save their homes.

In a traditional loan modification scam a person or company will offer to negotiate with the homeowner’s lender to favorably change the original terms of the mortgage. These individuals or companies generally collect an up-front fee, often ranging from $1,500 to $3,000. The loan modification scams have advanced and deviated as some companies have created fraudulent documents which are being sent to the homeowner which purport to approve the homeowner for a modification. The letter will approve the homeowner for a lower monthly payment and give instructions as to where to send future payment. The payments are not going to the lender as the homeowner believes, but rather are being routed to the scammer. Therefore, the homeowners are unknowingly not paying their mortgage and are therefore at risk of losing their home. Many times after months of inaction, the homeowner will end up negotiating their own modification after being frustrated with the loan modification company.

The typical foreclosure rescue scam targets homeowners who are in default of their mortgage by offering to help save their home from foreclosure for a fee. The most prevalent version of the foreclosure rescue scam is a lease buyback agreement. In this scam the homeowner will transfer the deed of their property to the foreclosure consultant in order to save the home from foreclosure. In return, the foreclosure consultant will allow the homeowner to remain living in the property under a lease agreement. The arrangement as it is explained to the homeowner is that the rent will go towards their eventual repurchase of the property. However, this generally ends with the homeowner losing all rights to the property as the rent is either set at a price that the homeowner cannot afford or the buyback price is set far above the current fair market value. Often, the homeowner does not

1 16 C.F.R. § 322.2(I)(2), recodified as 12 C.F.R. § 1015.2

realize that they are transferring their interest in the property due to the promises of the foreclosure consultant coupled with the dire situation of the homeowner.

Another frequent scam is the purported offer to join a mass joinder suit whereby so called specialized law firms are sending direct mail solicitations to desperate homeowners urging them to join in a lawsuit against their lender with other individuals who are similarly situated. The promise is that this is an effective way to obtain a loan modification or stop the foreclosure process. The firms collect advance fees to join the suit, which range from a couple thousand dollars to up to $10,000.

The last major scam is the offering of forensic audits. Individuals or companies offer to perform a forensic audit, complete with a report for a couple hundred dollars upfront. These companies tout the training and expertise of their forensic auditor and sometime claim that a forensic attorney will complete the review. The homeowner is told that the forensic auditor will review the homeowner’s mortgage documents to determine whether their lender complied with state and federal laws. The companies suggest that if noncompliance is found then the use of the forensic audit report will allow the homeowner to either, obtain a loan modification, reduce their principal balance, stop foreclosure or eliminate their entire mortgage. In 2010, the Federal Trade Commission and its law enforcement partners issued an advisory to homeowners stating that there is no evidence that a forensic audit will assist a homeowner in obtaining a loan modification or any other foreclosure relief.3

ABA RESPONSE TO PREDATORY MORTGAGE LENDING PRACTICES

In 2002, the ABA took a measured stand against predatory mortgage lending. The policy noted and warned against lending practices that we now know pervaded the subprime lending market, and the effects of which are now felt far beyond the individual predatory loans. The nation faces unprecedented foreclosures and broader economic consequences. Unfortunately, in the midst of the foreclosure crisis, certain actors, including some lawyers, are exploiting families’ economic stress and desire to stay in their homes by engaging in mortgage assistance rescue scams.

The 2002 ABA policy resolved to urge Congress to “enact uniform national legislation that, without reducing access to legitimate home mortgage loans for consumers, provides objective standards to define and curb lending practices that are abusive, deceptive, or fraudulent” and to urge “national, state, and local bar associations to establish and support bar programs to educate consumers about and protect them from practices that are abusive, deceptive, or fraudulent.” In support of the resolution, the ABA’s report specifically noted practices such as:

- lending without regard to a borrower’s ability to repay,

• flipping, i.e. refinancing without any net tangible benefit to the borrower,
• packing unnecessary and excessive fees into the loan amount, and
• outright fraud and abuse.

The report warned of the devastating impacts of such practices on individual borrowers, as well as neighborhoods and cities, since such predatory loans tended to increase the likelihood of foreclosures.

ABA activity underway at that time to protect consumers included the project “SafeBorrowing.org,” an initiative of the ABA Business Law Section to help consumers get information about how to avoid predatory mortgage loans. The report concluded that because predatory lending was an issue of national concern, and the lack of federal legislation combined with the fact that “problems associated with predatory lending involve the victimization of underserved populations such as elderly and minority borrowers,” it was necessary for the ABA to lend support to protect consumers.

Since the passage of the 2002 resolution and report, there is confirmation in the ABA’s prescience of the scope and consequences of predatory mortgage lending practices. There is also now state and national legislation that seeks to address them.

Data available about the mortgage market show the widespread presence of the practices noted in the 2002 report. For example, in regards to making loans without regards to a borrower’s ability to repay, from 2000 to 2005 the number of subprime loans without full documentation grew from 26% in 2000 to 44% in 2005. As an example of packing excessive and unnecessary fees into the loan amount was the pervasive use of yield spread premiums (YSPs), which were extra payments lenders paid to brokers for putting borrowers into more expensive loans. While YSPs did not increase the cost of the loan in the form of actual fees, their presence created brokers’ economic incentive to drive up the loan cost. YSPs resulted in borrowers paying up to $3,000 more for a loan. More than 90% of subprime loans carried YSPs. Borrowers were locked into these higher cost loans due to prepayment penalties that discouraged or prohibited affordable refinancing. Inside Mortgage Finance found that 67% of subprime loans securitized from 2005–2007 had prepayment penalties.

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As predicted by the 2002 ABA resolution, these practices typically, and often disproportionately, impacted financially vulnerable populations – elderly, borrowers of color, and lower-income consumers. An analysis of the subprime lending market found that borrowers 65 and older have five times greater odds of receiving a subprime loan than borrowers younger than 35.\(^7\) Nationally, there was frequent incidence of racially disparate pricing: African-Americans and Latinos received higher interest, riskier loans even when their credit risks were identical to whites.\(^8\) Although predatory lending disproportionately impacts borrowers and communities of color, the Community Reinvestment Act is not to blame. Over 94% of subprime loans that caused the subprime meltdown were not counted under the CRA, and the majority of subprime loans did not go to minorities.\(^9\)

The United States has experienced an unprecedented number of foreclosures since the time of the ABA’s predatory lending policy. As noted in 2002, the impact of foreclosures reaches far beyond the families’ losing their homes, with costs spilling over to neighbors and communities as a whole. Among homeowners who received loans between 2004 and 2008, 2.7 million (6.4%) had already lost their home due to foreclosure as of February 2011.\(^10\) An estimated additional 3.6 million (8.3%) were still at risk of losing their homes.\(^11\) The great majority of homes lost were owner-occupied, as are those at imminent risk of being lost. Foreclosure patterns are closely linked with patterns of risky lending. Foreclosure rates are consistently worse for borrowers with high-risk loan products such as loans with prepayment penalties and ARMs.

The effort to stem the tide of these foreclosures has been multi-pronged, such as federal, state, and local government responses for foreclosure prevention\(^12\) and neighborhood sta-


\(^8\) Debbie Gruenstein Bocian, Wei Li, and Carolina Reid, Center for Responsible Lending, “Lost Ground: Disparities in Mortgage Lending and Foreclosures,” (Nov. 2011)

\(^9\) Federal Reserve Board, Frequently Asked Questions, “Did the Community Reinvestment Act (CRA) contribute to foreclosures and the financial crisis? And, is the CRA being reformed?,” (“The Federal Reserve Board has found no connection between CRA and the subprime mortgage problems.”), http://www.federalreserve.gov/faqs/banking_12625.htm

\(^10\) Debbie Gruenstein Bocian, Wei Li, and Carolina Reid, Center for Responsible Lending, “Lost Ground: Disparities in Mortgage Lending and Foreclosures,” Nov. 2011

\(^11\) *Id.*

\(^12\) The centerpiece of the federal government’s effort to prevent foreclosures is the Home Affordable Modification Program (HAMP), which is a voluntary program that utilizes up to $50 billion in TARP funds to help homeowners modify their mortgages by directing incen-
The response also includes mobilization within the legal community to provide pro bono representation to families facing foreclosure or to serve as judges in special foreclosure proceedings. In February 2012, 49 state attorneys general reached a nationwide settlement with the five largest mortgage servicers to address abuses such as signing foreclosure documents en masse. Despite these efforts, foreclosures far outpace loan modifications that could help prevent unnecessary foreclosures.

Other pieces of the federal foreclosure prevention response include refinancing incentives through programs such as Home Affordable Refinance Program (HARP), the U.S. Treasury’s deployment of Hardest Hit Funds to state entities for the purpose of providing foreclosure assistance, and provisions included in the 2010 Wall Street Reform and Consumer Protection Act such as $1 billion in assistance in bridge loans to unemployed homeowners and $35 million to support non-profit foreclosure assistance programs. In January 2013, the Consumer Finance Protection Bureau enacted national rules that went into effect in January 2014 for mortgage servicing, addressing among other things, single point of contact requirements, loss mitigation, dual tracking, error resolution and force-placed insurance. See Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10695 (Feb.14, 2013) (to be codified at 12 C.F.R. §1024), available at http://www.gpo.gov/fdsys/pkg/FR-2013-02-14/pdf/2013-01248.pdf. There have been a myriad of responses at the state level. Because state’s have exclusive jurisdiction over their foreclosure laws, state legislatures and courts have been enacting rules and programs, such as mandatory mediation, tougher rules of evidence to ensure the foreclosing entity actually has standing to bring the action, and preventing dual track, such as in CT, ME, MD, MA, CA, NV, CO, MN, and others in varying forms. Finally, local governments and courts have also been taking steps to curb unnecessary foreclosures, such as the City of Philadelphia’s foreclosure mediation program, and city ordinances such as those passed in Springfield, MA, Providence, RI, and Cook County, IL.

See, e.g. U.S. Dep’t of Housing and Urban Development, Neighborhood Stabilization Program Grants (providing funding to state and local governments and non-profit entities for the purpose of stabilizing neighborhoods by purchasing and developing foreclosed and abandoned homes), http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/communitydevelopment/programs/neighborhoodspg

A number of states, local jurisdictions, and programs rely on the volunteer services of pro bono attorneys to help families navigate the foreclosure process. Among these are programs such as the Florida Attorneys Saving Home Program, and the Lawyers’ Foreclosure Intervention Network in New York City, both of which pair homeowners at risk of losing their home with pro bono attorneys. See Siobhan Morrissey, ABA Journal, “Prime Aid, Subprime Crisis,” (Sept. 1, 2008), http://www.abajournal.com/magazine/article/prime_aid_subprime_crisis/

See generally, National Mortgage Settlement, www.nationalmortgagesettlement.com
Outreach and Regulation

The spread of mortgage assistance relief scams has led to various educational efforts for consumers and lawyers by both state and federal government agencies, as well as educational and enforcement efforts by both state and federal government agencies. The Department of Treasury in partnership with Housing and Urban Development, Fannie Mae, Freddie Mac and NeighborWorks created the Homeowner’s Hope hotline (888-995-HOPE), which provides free foreclosure assistance and housing counselor services. By offering free assistance to homeowners, the government is providing homeowners an alternative to hiring for-profit companies to assist them with their mortgage. Additional data, to support enforcement actions as well as education and outreach, were necessary to combat the mortgage related scam epidemic, therefore, the Lawyers’ Committee for Civil Rights Under Law collaborated with non-profit and government agencies to form the Loan Modification Scam Prevention Network (LMSPN). The LMSPN leads a large scale complaint gathering process and mobilization of pro bono legal resources in a national campaign to support federal, state and local efforts to stop scammers. Their efforts include a national complaint and data collection network, empowering local organizations, increased private and public enforcement actions, and public education. From 2010 to March 2014, the LMSPN compiled over 40,000 complaints into the national Loan Modification Scam database managed by the Lawyers’ Committee with total reported losses of $90 million from homeowners.16

Due to the economic climate and prevalence of mortgage rescue scams many states and the federal government prohibit the collection of upfront fees in exchange for mortgage rescue services. However, many states have included attorney exemptions from the statutory limitations. The attorney exemptions vary but generally allow for attorneys to offer mortgage rescue services or loan modifications if the work is done in their normal course of business, meaning that if the lawyer is only offering foreclosure rescue or loan modifications then the exemption would not apply. The purpose of the attorney exemption was to allow attorneys representing clients in bankruptcy or foreclosure to not be subject to mortgage rescue services laws. Generally, the statutory limitations include a ban on upfront fees. When attorneys offer these services, under the exemption they are permitted to collect the upfront fees so long as they place the fees in their client trust account and withdraw the funds only as fees are earned.17


17 Furthermore, in 2010 the Federal Trade Commission “FTC” enacted the Mortgage Assistance Relief Services “MARS” (16 C.F.R. Part 322) advance fee ban. As of January 31, 2011, companies that offer to help homeowners get their loans modified or sell them other mortgage assistance relief services are no longer allowed to charge up-front fees. Federal Trade Commission, Mortgage Assistance Relief Services Advance Fee Ban Takes Effect, http://www.ftc.gov/opa/2011/02/mars.shtm (Feb. 10, 2011). Under the rule, a mortgage
Enforcement

In addition to statutory provisions, enforcement efforts have increased. The CFPB filed its first ever civil enforcement action in Federal court in July of 2012. According to the complaint filed by the CFPB, a lawyer and his law firm lured distressed homeowners to pay upfront fees by promising to obtain loan modifications. Additionally, the law firm created a bifurcated business model that involved a fee-based forensic audit coupled with pro bono legal services in an effort to avoid the laws that prohibit advance fees and deception by mortgage relief operations. In the end, the homeowners were provided with little to no assistance. Lastly, the complaint alleges that the law firm used consumers’ last dollars to fund their own lavish lifestyles which included cars, expensive dinners and visits to nightclubs.

Due to the economic downturn, some lawyers as well as foreclosure consultant are attempting to create successful businesses based on offering services to struggling homeowners. Often times the attorneys are approached by the foreclosure consultants who propose a business model that they suggest will be widely successful by offering loan modifications, short sales or other foreclosure related services on behalf of distressed homeowners. Like the distressed homeowners who are tempted by scams that promise to

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assistance relief provider may not collect a fee until the consumer has signed a written agreement with the lender that states the relief obtained by the provider. *Id.* Attorneys are generally exempt from the rule, if the mortgage assistance relief services are offered as part of the practice of law, the attorney is licensed in the state where the consumer or home is located, and complies with state laws and regulations governing attorney conduct. *Id.* To be exempt from the advance fee ban, attorneys must also place any collected advance fees into a client trust account and abide by applicable rules of professional conduct and other laws regarding such accounts. *Id.* The FTC MARS rule has been recodified with the Consumer Fraud Protection Bureau “CFPB” as the Mortgage Assistance Relief Services (Regulation O, 12 CFR 1015). Although the MARS rule places restrictions on attorneys offering mortgage assistance relief, there has not been a complete ban. Therefore, some attorneys are continuing to offer such services to distressed homeowners. There is evidence that some foreclosure consultants are partnering with attorneys in an effort to avoid the statutory prohibition on collecting fees prior to services being rendered.

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18 Consumer Financial Protection Bureau v. Chance Edward Gordon, et al. (Filed in United States District Court, Central District of California on Jul. 18, 2012)

19 *Id.*

help them save their homes, some attorneys are also being lured by a seemingly lucrative business model.\textsuperscript{21} Bar associations across the county have been bombarded with inquiries and complaints regarding attorneys’ involvement with mortgage rescue transactions.\textsuperscript{22} When lawyers partner or collaborate with non-lawyer foreclosure consultants they risk violating applicable professional conduct rules, including, but not limited to jurisdictional equivalents of Rules 5.4 (Professional Independence of Lawyers), 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law), 7.2(b) Advertising) and 8.4 (Misconduct) of the ABA Model Rules of Professional Conduct. Lawyers who individually offer services should similarly take care to comport their conduct to applicable rules and laws, including the rules of professional conduct.

Due to the numerous ethical risks associated with mortgage rescue services a number of attorneys have faced discipline, including the loss of their law license due to their involvement with mortgage rescue businesses. The Office of Chief Trial Counsel (OCTC) in California created a task force in February of 2009 to address the problem of attorneys being involved in mortgage rescue scams. Between 2009 and 2012, the OCTC has received a total of 11,449 complaints regarding loan modifications with 8,724 of those being formally investigated.\textsuperscript{23} The OCTC has pursued disciplinary charges related to loan modification services in approximately 1,344 cases that involved roughly 169 licensed California attorneys.\textsuperscript{24} Of those cases, approximately 959 cases have resulted in discipline, involving 114 attorneys, and 292 cases have resulted in disbarment, involving 22 attorneys.\textsuperscript{25} As of September 2012, there were 371 cases involving 64 attorneys which

\textsuperscript{21} Martha Niel, ABA Journal, “Tempted by Foreclosure Crisis, Some Lawyers Overcharge and Underpay,” (Oct. 2009), (noting that the Florida Bar received 100 complaints in a six months’ time concerning lawyers involved in loan modifications and the state attorney general's office got 756 complaints, up from 61 complaints the year before. The California State Bar made public the names of 16 attorneys accused of misconduct concerning loan modification matters.) http://www.abajournal.com/news/article/tempted_by_foreclosure_crisis_some_lawyers_overcharge_underwork/

\textsuperscript{22} Id.

\textsuperscript{23} E-mail from Laura Ernde, Acting Communications Director for the State Bar of California, to Erin McCarthy Naylor, Maryland Director of Mortgage Fraud, California Loan Modification Fraud Stats (Sep. 19, 2012).

\textsuperscript{24} Id.

\textsuperscript{25} Id.
are pending before the State Bar Court with another 335 matters, involving 145 attorneys, under active investigation by the OCTC.\textsuperscript{26}

As described above, some lawyers have engaged in deceitful and unlawful practices when offering foreclosure rescue or loan modification services. Lawyers who collaborate with non-lawyer foreclosure consultants risk having their law license used by the consultant as a stamp of legitimacy as well as a way for the consultant to evade the statutory limitations on the collection of upfront fees. By marketing to consumers that an attorney is participating in the business, the consultants are able to request a higher fee. The Lawyers’ Committee found that when an attorney is involved in the offered services, the average loss per homeowner is $3,601, higher than the average loss reported in complaints that do not involve attorneys ($2,871).\textsuperscript{27} Analysis of complaints in the database also indicates these costs are greater for certain groups: Hispanics on average lost $4,020 when an attorney is alleged to be involved, followed by Asians with an average loss of $3,792, followed by African Americans with an average loss of $3,079 and lastly Caucasian with an average loss of $2,826.\textsuperscript{28}

More troubling is the increase of attorney involvement in mortgage rescue cases over the last three years. According to the data collected by LMSPN, complaints of rescue scams involving attorneys has risen every year since 2010, and by 2013, attorney-involved complaints were a shocking 59% of all complaints received.\textsuperscript{29} A number of state bars and lawyer disciplinary agencies have developed and post online ethics alerts for lawyers to help lawyers recognize fraudulent schemes when they are approached by non-lawyer consultants. Those jurisdictions, include, but are not limited to Florida, Illinois, California and Washington State.

\textsuperscript{26} Id.


Respectfully Submitted,

Mark I. Schickman, Chair
Section of Individual Rights and Responsibilities

Theodore W. Small, Jr., Chair
Commission on Homelessness and Poverty

Christopher A. Zampogna, President
The Bar Association of the District of Columbia

Stephanie Powers Skaff, President
Bar Association of San Francisco

February 2015
1. **Summary of Resolution(s).**

The Resolution urges federal, state, local, territorial and tribal governments to continue to enforce and enact rules or legislation that strengthen consumer protections regarding deceptive or fraudulent loan foreclosure rescue practices; supports ongoing efforts of state courts and lawyer disciplinary agencies to investigate allegations of deceptive or fraudulent loan foreclosure rescue practices by lawyers and, when appropriate, to prosecute and discipline lawyers who commit this type of misconduct; and encourages national, state, local, territorial, and tribal bar associations to establish and support programs to educate lawyers and consumers about deceptive or fraudulent foreclosure rescue practices, including those involving lawyers.

2. **Approval by Submitting Entity.**

The Council of the Section of Individual Rights and Responsibilities approved the filing of this Resolution and Report on November 8, 2014.

The Board of The Bar Association of the District of Columbia approved the filing of this Resolution and Report on November 19, 2014.

The Board of the Bar Association of San Francisco approved the filing of this Resolution and Report on November 19, 2014.

The Commission on Homelessness and Poverty approved the filing of this Resolution and Report on November 14, 2014.
3. Has this or a similar resolution been submitted to the House or Board previously?

An earlier version of this resolution was filed for the August 2014 House of Delegates meeting but was withdrawn by the sponsors to allow time to discuss proposed changes offered by other ABA entities.

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

This recommendation is consistent with and builds upon existing ABA policy adopted in 2002 that resolved to urge Congress to “enact uniform national legislation that, without reducing access to legitimate home mortgage loans for consumers, provides objective standards to define and curb lending practices that are abusive, deceptive, or fraudulent” and to urge “national, state, and local bar associations to establish and support bar programs to educate consumers about and protect them from practices that are abusive, deceptive, or fraudulent.” The 2002 policy warned against lending practices which we now know pervaded the subprime lending market, and the effects of which are now felt far beyond the individual predatory loans.

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

In January 2014, Senate Commerce Committee Chairman John D. (Jay) Rockefeller IV began an investigation of several companies that offer consumer mortgage modification services and that have been the subject of a substantial number of consumer complaints. In his letters requesting information from the companies, the Chairman pointed out that despite ongoing vigorous efforts by enforcement agencies in this area, consumer complaints remain high regarding false and deceptive practices by foreclosure rescue companies, and recent reports indicate that companies are engaging in increasingly complex schemes to elude enforcement actions.

In Fall 2014, Chairman Rockefeller plans to hold Congressional hearings on the issue of fraudulent mortgage loan modification practices. Adoption of the proposed resolution will enable the ABA to participate in these and future proceedings.

6. Status of Legislation. (If applicable)

None pending, however, the U.S. Congress and several states are investigating the proliferation of fraudulent mortgage loan scams. On July 23, 2014, the Consumer Financial Protection Bureau (CFPB), the Federal Trade Commission (FTC), and 15 states announced a sweep against foreclosure relief scammers that used deceptive marketing tactics to defraud distressed homeowners across the country. The Bureau is filing three lawsuits against companies and individuals that collected more than $25 million in illegal advance fees for services that falsely promised to prevent foreclosures or renegotiate troubled mortgages. The CFPB is seeking compensation for victims, civil fines, and injunctions against the scammers. Separately, the FTC is filing six lawsuits, and the states are taking 32 actions.
7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.**

The sponsoring entities will work with the ABA Governmental Affairs Office to actively engage in federal and state legislative activities related to this issue.

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

There are no known costs to the Association.

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

There are no known conflicts of interest.

10. **Referrals.** By copy of this form, the Resolution will be referred to the following entities:
    - Section of Administrative Law and Regulatory Practice
    - Section of Business Law
    - Criminal Justice Section
    - Section of Litigation
    - Section of Real Property, Trust and Estate Law
    - Section of State and Local Government Law
    - Forum on Affordable Housing & Community Development Law
    - Judicial Division
    - Law Practice Division
    - Law Student Division
    - Senior Lawyers Division
    - Solo, Small Firm and General Practice Division
    - Young Lawyers Division
    - Center for Racial and Ethnic Diversity
    - Commission on Law and Aging
    - Commission on Disability Rights
    - Commission on Racial and Ethnic Diversity in the Profession
    - Commission on Women in the Profession
    - Standing Committee on Ethics and Professional Responsibility
    - Standing Committee on Lawyers’ Professional Liability
    - Standing Committee on Professional Discipline
    - Hispanic National Bar Association
    - National Asian Pacific American Bar Association
    - National Association of Bar Executives
    - National Bar Association Inc.
    - National Conference of Bar Presidents
    - National Native American Bar Association
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution urges federal, state, local, territorial and tribal governments to continue to enforce and enact rules or legislation that strengthen consumer protections regarding deceptive or fraudulent loan foreclosure rescue practices; supports ongoing efforts of state courts and lawyer disciplinary agencies to investigate allegations of deceptive or fraudulent loan foreclosure rescue practices by lawyers and, when appropriate, to prosecute and discipline lawyers who commit this type of misconduct; and encourages national, state, local, territorial, and tribal bar associations to establish and support programs to educate lawyers and consumers about deceptive or fraudulent foreclosure rescue practices, including those involving lawyers.

2. Summary of the Issue that the Resolution Addresses

In the midst of the current economic turmoil and foreclosure crisis, millions of distressed homeowners have become vulnerable targets to unscrupulous and sometimes criminal third-party scammers posing as "loan modification specialists," an increasing number of whom are lawyers. The alleged "rescuers" employ various scams with disastrous consequences for homeowners: phantom foreclosure counseling, lease-back or repurchase scams, fraudulent refinance, fraudulent loan modification, bankruptcy foreclosure, and reverse mortgage fraud. While waiting for the promised relief, homeowners not only lose their money but often fall deeper into default and lose valuable time.

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

Since 2010, the Lawyers' Committee for Civil Rights Under Law and its partners in the Loan Modification Scam Prevention Network (LMSPN) have lead a national complaint and data collection effort to track foreclosure rescue scams. The LMSPN has compiled over 40,000 complaints with total reported losses of $90 million from homeowners. According to the data collected, complaints of rescue scams involving attorneys has risen every year since 2010, and by the end of 2013, attorney-involved complaints were 59% of all complaints received. This percentage continues to climb and is expected to surpass 70% of all complaints by the end of 2014. This resolution will help the ABA and others educate lawyers about the ethical pitfalls of engagement in foreclosure rescue schemes and encourage the enactment and enforcement of rules and legislation to strengthen consumer protections against these fraudulent practices.

4. Summary of Minority Views

No minority views or opposition have been identified.
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.”

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

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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. 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 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. The figure is substantially higher for those who are detained, with around 84% unrepresented. 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.

There is strong evidence that representation affects the 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.” 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. Another study has shown that whether

10 Id.
13 Id. The CLINIC BIA Pro Bono Project was developed in 2001 to alleviate some of this 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.
15 Id.
a noncitizen is represented is the “single most important factor affecting the outcome of [an asylum] case.”16 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.17 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.18

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.19

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.20 Among the most common forms of relief that unaccompanied children are eligible for are (1) Special Immigrant Juvenile Status (SIJS) for children who have

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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?

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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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\(^{29}\) See Bridges v. Wixon, 326 U.S. 135, 147 (1945).

\(^{30}\) 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 uncounseled. 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. 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. "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." 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 exceeding 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) 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 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 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

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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.\textsuperscript{46} 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

\textsuperscript{46} See Justice of AmericaCorps Legal Services for Unaccompanied Children, NATIONAL & COMMUNITY SERVICE, \texttt{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)

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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"\(^47\) 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

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
Judicial Division
Center for Children and the Law
Commission on Youth at Risk
Young Lawyers Division
Center for Human Rights
Standing Committee on Pro Bono and Public Service
Standing Committee on the American Judicial System
Commission on Homelessness and Poverty

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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.