### Council Meeting Agenda

<table>
<thead>
<tr>
<th>Item</th>
<th>Presenter</th>
</tr>
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<tbody>
<tr>
<td>1. Call to order; Introductions</td>
<td>Chip Lion</td>
</tr>
<tr>
<td>2. Chair Report</td>
<td>Chip Lion</td>
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<tr>
<td>2.1 Highlights from the Section Scorecard (distributed separately)</td>
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<td>2.2 Update on the Section Annual Meeting</td>
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**Action Items**

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<thead>
<tr>
<th>Item</th>
<th>Presenter</th>
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<tbody>
<tr>
<td>3. Consideration of Proposed 2015-2016 Budget</td>
<td>William Rosenberg/Renie Grohl</td>
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<tr>
<td>4. Approval of Section Positions on Reports and Recommendations, ABA House of Delegates</td>
<td>Lynne Barr/Mary Beth Clary/Maury Poscover/Steve Weise</td>
</tr>
</tbody>
</table>
DATE: July 16, 2015  
TO: Business Law Section Council  
FROM: Section Officers  
RE: FY 2015-2016 Budget

In late June, the Section Officers convened a special meeting to explore ways in which to invest the income from our reserves to better serve our members and the profession. Specifically, the Officers focused the discussion on strategizing about ways to enhance member benefits for not only practitioners in private practice, but also Judges, government lawyers, and in-house counsel.

A list of preliminary recommendations from that meeting has been developed and those recommendations are being prioritized and further refined. While no commitments have been made, some of the preliminary recommendations being discussed include:

- Conduct a Membership Survey and Focus Groups
- Develop an Online Training Academy and produce training videos on specific substantive topics
- Subsidize costs of Section meetings
- “Reimagine BLT” – create the next iteration of BLT
- Establish a Leadership Academy

As the Officers refine the list and consult with the Council Committees and other stakeholders, it is critical that Section funds be earmarked in the FY 15-16 budget to cover any expenses associated with the addition of new member benefits. These funds will be transferred from the Section’s Permanent Reserve. As is traditionally the case, the Council and Committee Chairs will be kept informed of any new member benefits as they are being developed and executed.

As a result of the June 25 meeting, the Officers requested that the FY 2016 Budget Roll-Up include a one-time expense line of $500,000 to cover any new member benefits resulting from the discussion. The Section Chair-elect, Secretary, Budget Officer and Incoming Budget Officer reviewed and approved the draft 2015-2016 Budget Roll-Up on July 2. The Budget Roll-Up includes a $500,000 line item for Member Benefit Projects (New) listed under the Membership category.

As new programs and initiatives are being developed and launched, the expenses associated with these will be funded from the $500,000. Quarterly Budget Variance Reports will address the use of the funds and expenses will be monitored closely.

We recommend that the Section Council support the new line item in the budget to enhance benefits offered to Section members. Thank you for your consideration. We look forward to providing even greater benefits to Section members.
## Business Law Section
### 2015-2016 Budget Roll Up

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<tbody>
<tr>
<td></td>
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<tr>
<td><strong>Dues</strong></td>
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<td>(214,226)</td>
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<td>(1,098,252)</td>
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<td>(22,905)</td>
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<td>Governance Special Projects</td>
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<td>Judges/Business Court Reps</td>
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<td>Delaware Law Forum</td>
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<td>Member Benefit Projects (New)</td>
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<td><strong>Total Special Projects</strong></td>
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<td>600,980</td>
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<td>Total Operations</td>
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<td>(6,767,211)</td>
<td>(653,736)</td>
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<td>Investment Income from Money Market</td>
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<td>Transfer from Permanent Reserve</td>
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<td>Transfer from Contingency Reserve</td>
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<td>Total Revenue/Expense</td>
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<td>(6,767,211)</td>
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<td>Report</td>
<td>Sponsor and Subject</td>
<td>Reviewing Entity</td>
<td>Recommended Committee Position</td>
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<tr>
<td>100</td>
<td>STANDING COMMITTEE ON PARALEGALS</td>
<td>Delegates</td>
<td>TBD</td>
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<td>Grants approval and reapproval to several paralegal education programs, withdraws the approval of two programs at the request of the institutions, and extends the term of approval to several paralegal education programs.</td>
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<td>101</td>
<td>SECTION OF TAXATION</td>
<td>Delegates and Taxation</td>
<td>TBD</td>
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<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>102</td>
<td>COMMISSION ON DISABILITY RIGHTS SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES</td>
<td>Professional Responsibility</td>
<td>TBD</td>
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<td>Urges state and territorial bar licensing entities, in their character and fitness determinations for the purpose of bar admission, to eliminate any questions that ask about mental health history, diagnoses, or treatment and instead focus questions on conduct or behavior that impairs an applicant’s ability to practice law in a competent, ethical and professional manner.</td>
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<td>103B</td>
<td>SECTION OF LITIGATION STANDING COMMITTEE ON THE AMERICAN JUDICIAL SYSTEM</td>
<td>Business and Corporate Litigation</td>
<td>Support</td>
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<td>Urges Congress to amend 28 U.S.C. §1332, to provide that unincorporated business entities shall, for diversity jurisdiction purposes, be deemed citizens of their states or organization and the states where they maintain their principal places of business.</td>
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<td>105</td>
<td>STANDING COMMITTEE ON MEDICAL PROFESSIONAL LIABILITY</td>
<td>Health Law and Life Sciences Corporate Counsel</td>
<td>TBD</td>
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<td>Urges the federal government to adopt laws that protect patients and promote patient safety from defective medical products and opposes legislation that limits and/or bans punitive damages for claims of patient harm allegedly by manufacturers of FDA-approved medical products or devices.</td>
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<td>107</td>
<td>SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR</td>
<td>Business Law Education</td>
<td>Support</td>
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<td>Concurs in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated August 2015 to the ABA Standards and Rules of Procedure for Approval of Law Schools.</td>
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<td>110</td>
<td>TASK FORCE ON THE FINANCING OF LEGAL EDUCATION</td>
<td>Business Law Education</td>
<td>Support</td>
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Encourages the Council of the Section of Legal Education and Admissions to the Bar to mandate through the ABA Standards for the Approval of Law Schools enhanced financial counseling for students on student loans and repayment programs, and urges all participates in the student loan business and process to develop and publish easily understood versions of the terms of various loan and repayment programs.

| 111 | STANDING COMMITTEE ON LAWYER REFERRAL AND INFORMATION SERVICE AUSTIN BAR ASSOCIATION CINCINNATI BAR ASSOCIATION NEW YORK CITY BAR ASSOCIATION OREGON STATE BAR SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES STANDING COMMITTEE ON DISASTER RESPONSE AND REPAREDNESS STANDING COMMITTEE ON GROUP AND PREPAID LEGAL SERVICES | Professional Responsibility | TBD |

Urges courts and legislative bodies to adopt rules clarifying that confidential communications between a client and a lawyer referral service for the purpose of retaining a lawyer or obtaining legal advice from a lawyer shall be deemed to be privileged lawyer-client communications and protected from disclosure to the same extent as confidential communications between lawyers and clients.

| 116 | CYBERSECURITY LEGAL TASK FORCE JUDICIAL DIVISION SECTION OF SCIENCE AND TECHNOLOGY LAW CRIMINAL JUSTICE SECTION SECTION OF INTERNATIONAL LAW SECTION OF ENVIRONMENT, ENERGY AND RESOURCES STANDING COMMITTEE ON LAW AND NATIONAL SECURITY STANDING COMMITTEE ON TECHNOLOGY & INFORMATION SYSTEMS | Cyberspace Law Business and Corporate Litigation Support Support |

Urges legislatures and government agencies to provide the funding necessary to develop, implement, and maintain appropriate cybersecurity programs for the courts and to train court personnel on methods to counter threats and protect judicial information systems from cyber intrusions or data breaches.

| TBD | Request for Cosponsorship for 2016 Midyear Meeting |

Commission on Women in the Profession

Urges public companies in the United States to diversify their boards so as to more closely reflect the gender balance and diverse nature of the society and workforce in the United States.
RESOLVED, That the American Bar Association approve the following program:

Tarrant County Community College, Paralegal Studies Program, Hurst, TX.

FURTHER RESOLVED, That the American Bar Association reapprove the following paralegal education programs: Fremont College, Paralegal Studies Program, Cerritos, CA; Pasadena City College, Paralegal Studies Program, Pasadena, CA; University of California Santa Barbara, Paralegal Professional Certificate Program, Santa Barbara, CA; Nova Southeastern University, Paralegal Studies Program, Ft. Lauderdale, FL; Clayton State University, Legal Studies Program, Morrow, GA; Robert Morris University, Paralegal Studies Program, Chicago, IL; Robert Morris University, Paralegal Studies Program, Springfield, IL; Stevenson University, Paralegal Program, Owings Mills, MD; Webster University, Legal Studies Program, St. Louis, MO; University of Great Falls, Paralegal Studies Program, Great Falls, MT; College of St. Mary, Legal Studies Program, Omaha, NE; Mercer County Community College, Paralegal Studies Program, Trenton, NJ; LIU Brooklyn, Paralegal Studies Program, Brooklyn, NY; Nassau Community College, Paralegal Program, Garden City, NY; New York City College of Technology, Paralegal Program, Brooklyn, NY; Queen's College, Paralegal Studies Program, New York, NY; St. John's University, Legal Studies Program, Jamaica, NY; Cuyahoga Community College, Paralegal Studies Program, Parma, OH; Kent State University, Paralegal Studies Program, Kent, OH; Central Pennsylvania College, Paralegal and Legal Studies Program, Summerdale, PA: Harrisburg Area Community College, Paralegal Studies Program, Harrisburg, PA; Walters State Community College, Paralegal Studies Program, Morristown, TN; Lamar State College Port Arthur, Paralegal Program, Port Arthur, TX; Tacoma Community College, Paralegal Program, Tacoma, WA; and Northeast Wisconsin Technical College, Paralegal Program, Greenbay, WI;

FURTHER RESOLVED, That the American Bar Association withdraw the approval of Everest College Phoenix, Paralegal Program, Phoenix, AZ, and Rockford Career College, Paralegal Program, Rockford, IL, at the request of the institutions.

FURTHER RESOLVED, That the American Bar Association extend the terms of approval until the February 2016 Midyear Meeting of the House of Delegates for the following programs: University of Alaska Fairbanks, Paralegal Studies Program, Fairbanks, AK; Auburn University Montgomery, Paralegal Education Program, Montgomery, AL; Samford University, Division of Paralegal Studies, Birmingham, AL; University of Arkansas Fort Smith, Legal Studies Program, Fort Smith, AR; and Montreat College, Paralegal Program, Montreat, NC; and State University of New York, College at Fredonia, Paralegal Program, Fredonia, NY.
Assistance/Paralegals Program, Fort Smith, AR; NorthWest Arkansas Community College,
Paralegal Studies Program, Bentonville, AR; Coastline Community College, Paralegal Studies
Program, Fountain Valley, CA; El Camino Community College, Paralegal Studies Program,
Torrance, CA; Miramar College, Legal Assistant Program, San Diego, CA; Mt. San Antonio
College, Paralegal/Legal Specialty Program, Walnut, CA; National University, Paralegal Studies
Program, Los Angeles, CA; Santa Ana College, Paralegal Studies Program, Santa Ana, CA;
University of California LA-UCLA Ext, Paralegal Training Program, Los Angeles, CA;
University of California, Irvine Extension, Paralegal Certificate Program, Irvine, CA; University
of California, San Diego, Legal Assistant Training Program, La Jolla, CA; Norwalk Community
College, Legal Assistant Program, Norwalk, CT; Quinnipiac University, Legal Studies Program,
Hamden, CT; Widener University Law Center, Legal Education Institute, Wilmington, DE;
Seminole State College of Florida fka Seminole Community College, Legal Assistant/Paralegal
Program, Sanford, FL; South University, Legal Studies, Paralegal Studies Program, Royal Palm
Beach, FL; Kirkwood Community College, Legal Assistant Program, Cedar Rapids, IA;
Northwestern College fka Northwestern Business College, Institute of Legal Studies,
Bridgeview, IL; Roosevelt University, Paralegal Studies Program, Chicago, IL; William Rainey
Harper College, Paralegal Studies Program, Palatine, IL; Vincennes University, Paralegal
Program, Vincennes, IN; Bowling Green Community College of Western Kentucky University,
Paralegal Studies Program, Bowling Green, KY; Sullivan University, Louisville, Institute for
Legal Studies, Louisville, KY; University of Louisville, Paralegal Studies Program, Louisville,
KY; Tulane University, Paralegal Studies Program, New Orleans, LA; Baker College of Auburn
Hills, Paralegal Program, Auburn Hills, MI; Eastern Michigan University, Legal Assisting
Program, Ypsilanti, MI; Henry Ford Community College, Paralegal Studies Program, Dearborn,
MI; Oakland Community College, Paralegal Program, Farmington Hills, MI; Oakland
University, Paralegal Program, Rochester, MN; Minnesota State University Moorhead, Paralegal
Program, Moorhead, MN; Missouri Western State University, Legal Studies Program, St.
Joseph, MO; University of Southern Mississippi, Paralegal Studies Program, Hattiesburg, MS;
University of Montana Missoula, Paralegal Studies Program, Missoula, MT; Metropolitan
Community College, Paralegal Studies Program, Omaha, NE; Brookdale Community College,
Paralegal Studies Program, Lincroft, NJ; Fairleigh Dickinson University, Paralegal Studies
Program, Madison, NJ; Middlesex County College, Legal Studies Department, Edison, NJ;
Raritan Valley Community College, Paralegal Studies Program, Somerville, NJ; Genesee
Community College, Paralegal Studies Program, Batavia, NY; Suffolk County Community
College, Paralegal Studies Program, Selden, NY; Capital University Law School, Paralegal
Program, Columbus, OH; Sinclair Community College, Paralegal Program, Dayton, OH;
University of Cincinnati Clermont, Paralegal Technology Program, Batavia, OH; University of
Toledo, Paralegal Studies Program, Toledo, OH; Ursuline College, Legal Studies Program,
Pepper Pike, OH; Rose State College, Paralegal Studies Program, Midwest City, OK; University
of Oklahoma Law Center, Legal Assistant Education, Norman, OK; Delaware County
Community College, Paralegal Studies Program, Media, PA; Central Carolina Technical
College, Legal Assistant/Paralegal Program, Sumter, SC; Midlands Technical College, Paralegal
Program, Columbia, SC; Orangeburg-Calhoun Technical College, Paralegal Program,
Orangeburg, SC; Technical College of the Low Country, Paralegal Program, Beaufort, SC;
Western Dakota Technical Institute, Paralegal Program, Rapid City, SD; South College, Legal
Studies and Paralegal Studies Programs, Knoxville, TN; Kaplan College, General Practice
Paralegal Program, Dallas, TX; Lee College, Paralegal Studies Program, Baytown, TX; J.
Sargeant Reynolds Community College, Paralegal Studies Program, Richmond, VA;
Marymount University, Paralegal Studies Program, Arlington, VA; Edmonds Community
College, Paralegal Program, Lynnwood, WA; Chippewa Valley Technical College, Paralegal
Program, Eau Claire, WI; Western Technical College fka Western Wisconsin Technical College,
Paralegal Program, La Crosse, WI; Casper College, Paralegal Studies Program, Casper, WY; and
Laramie County Community College, Paralegal Studies Program, Cheyenne, WY.
In August, 1973, the House of Delegates of the American Bar Association adopted the Guidelines for the Approval of Legal Assistant Education Programs as recommended by the Special Committee on Legal Assistants, now known as the Standing Committee on Paralegals. The Committee subsequently developed supporting evaluative criteria and procedures for seeking American Bar Association approval. Applications for approval were accepted formally beginning in the Fall of 1974.

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

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

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

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

Tarrant County Community College, Paralegal Studies Program, Hurst, TX
Tarrant County Community College is a two-year community college accredited by the Southern Association of Colleges and Schools. The college offers an Associate of Applied Science degree and a Certificate in paralegal studies.
The following schools were recently evaluated for reapproval. Having demonstrated compliance with the Guidelines for the Approval of Paralegal Education Programs, the Standing Committee on Paralegals recommends that reapproval be granted to the following programs:

**Fremont College, Paralegal Studies Program, Cerritos, CA**
Fremont College is a four-year private college accredited by the Accrediting Commission for Career Schools and Colleges. The college offers an Associate of Arts degree in Paralegal Studies.

**Pasadena City College, Paralegal Studies Program, Pasadena, CA**
Pasadena City College is a two-year public college accredited by the Western Association of Schools and Colleges. The college offers an Associate of Arts degree and a Certificate in Paralegal Studies.

**University of California Santa Barbara, Paralegal Professional Certificate Program, Santa Barbara, CA**
University of California Santa Barbara is a four-year university accredited by the Western Association of Schools and Colleges. The university offers a Certificate in Paralegal Studies.

**Nova Southeastern University, Paralegal Studies Program, Ft. Lauderdale, FL**
Nova Southeastern University is a four-year university accredited by the Southern Association of Colleges and Schools. The university offers a Bachelor of Science degree and a Certificate in Paralegal Studies.

**Clayton State University, Legal Studies Program, Morrow, GA**
Clayton State University is a four-year university accredited by the Southern Association of Colleges and Schools. The university offers an Associate of Applied Science degree, a Bachelor of Science degree, and a Certificate in Paralegal Studies.

**Robert Morris University, Paralegal Studies Program, Chicago, IL**
Robert Morris University, Chicago, IL is a four-year university accredited by the North Central Association of Colleges and Schools. The university offers an Associate of Applied Science degree in Paralegal Studies.

**Robert Morris University, Paralegal Studies Program, Springfield, IL**
Robert Morris University, Springfield, IL is a four-year university accredited by the North Central Association of Colleges and Schools. The university offers an Associate of Applied Science degree in Paralegal Studies.

**Stevenson University, Paralegal Program, Owings Mills, MD**
Stevenson University is a four-year university accredited by the Middle States Association of Colleges and Schools. The university offers a Bachelor of Science degree and a second Bachelor of Science degree in Paralegal Studies.
Webster University, Legal Studies Program, St. Louis, MO
Webster University is a four-year university accredited by the North Central Association of Colleges and Schools. The university offers a Bachelor of Arts degree, a Master of Arts degree, and a Certificate in Paralegal Studies.

University of Great Falls, Paralegal Studies Program, Great Falls, MT
University of Great Falls is a four-year university accredited by the Northwest Association of Schools and Colleges. The university offers an Associate of Science degree, a Bachelor of Science degree, and an option with the U.S. Army for completion of a degree.

College of Saint Mary, Legal Studies Program, Omaha, NE
College of Saint Mary is a four-year college accredited by the North Central Association of Colleges and Schools. The college offers a Bachelor of Arts degree, an Associate of Arts degree and a Certificate in Paralegal Studies.

Mercer County Community College, Paralegal Studies Program, Trenton, NJ
Mercer County Community College is a two-year community college accredited by the Middle States Association of Colleges and Schools. The college offers an Associate of Applied Science degree and a Certificate in Paralegal Studies.

LIU Brooklyn, Paralegal Studies Program, Brooklyn, NY
LIU Brooklyn is a four-year university accredited by the Middle States Association of Colleges and Schools. The university offers a Certificate in Paralegal Studies and a Certificate in Legal Nurse Consulting.

Nassau Community College, Paralegal Program, Garden City, NY
Nassau Community College is a two-year community college accredited by the Middle States Association of Colleges and Schools. The college offers an Associate of Applied Science degree and a Certificate in Paralegal Studies.

New York City College of Technology, Paralegal Program Brooklyn, NY
New York City College of Technology is a four-year technical college accredited by the Middle States Association of Colleges and Schools. The college offers a Bachelor of Science degree and an Associate of Applied Science degree in Paralegal Studies.

Queen's College, Paralegal Studies Program, Queens, NY
Queen's College is a four-year college accredited by the Middle States Association of Colleges and Schools. The college offers a Certificate in Paralegal Studies.

St. John's University, Legal Studies Program, Jamaica, NY
St. John's University is a four-year university accredited by the Middle States Association of Colleges and Schools. The university offers a Bachelor of Science degree and an Associate of Science degree in Paralegal Studies.
Cuyahoga Community College, Paralegal Studies Program, Parma, OH
Cuyahoga Community College is a two-year community college accredited by the North Central Association of Colleges and Schools. The college offers an Associate of Applied Business degree, a Certificate in Paralegal Studies, and a Certificate in Legal Nurse Consulting.

Kent State University, Paralegal Studies Program, Kent, OH
Kent State University is a four-year university accredited by the North Central Association of Colleges and Schools. The university offers a Bachelor of Arts degree, a Minor, and a Certificate in Paralegal Studies.

East Central University, Legal Studies Program, Ada, OK
East Central University is a four-year university accredited by the North Central Association of Colleges and Schools. The university offers a Bachelor of Science degree in Paralegal Studies.

Central Pennsylvania College, Paralegal and Legal Studies Program, Summerdale, PA
Central Pennsylvania College is a four-year college accredited by the Middle States Association of Colleges and Schools. The college offers a Bachelor of Science degree and an Associate of Science degree in Paralegal Studies.

Harrisburg Area Community College, Paralegal Studies Program, Harrisburg, PA
Harrisburg Area Community College is a two-year community college accredited by the Middle States Association of Colleges and Schools. The college offers an Associate of Arts degree and a Certificate in Paralegal Studies.

Walters State Community College, Paralegal Studies Program, Morristown, TN
Walters State Community College is a two-year community college accredited by the Southern Association of Colleges and Schools. The college offers an Associate of Applied Science degree in Paralegal Studies.

Lamar State College Port Arthur, Paralegal Program, Port Arthur, TX
Lamar State College Port Arthur is a two-year college accredited by the Southern Association of Colleges and Schools. The college offers an Associate of Applied Science degree in Paralegal Studies.

Tacoma Community College, Paralegal Program, Tacoma, WA
Tacoma Community College is a two-year community college accredited by the Northwest Association of Schools and Colleges. The college offers an Associate of Applied Science degree and a Certificate in Paralegal Studies.

Northeast Wisconsin Technical College, Paralegal Program, Greenbay, WI
Northeast Wisconsin Technical College is a two-year technical college accredited by the North Central Association of Colleges and Schools. The college offers an Associate of Applied Science degree and a Certificate in Paralegal Studies.
Applications for reapproval have been filed by the following schools and are currently being evaluated. Until the evaluation process has been completed, the Committee recommends that the term of approval for each program be extended until the 2016 Midyear Meeting of the American Bar Association House of Delegates.

University of Alaska Fairbanks, Paralegal Studies Program, Fairbanks, AK;
Auburn University Montgomery, Paralegal Education Program, Montgomery, AL;
Samford University, Division of Paralegal Studies, Birmingham, AL;
University of Arkansas Fort Smith, Legal Assistance/Paralegal Program, Fort Smith, AR;
NorthWest Arkansas Community College, Paralegal Studies Program, Bentonville, AR;
Coastline Community College, Paralegal Studies Program, Fountain Valley, CA;
El Camino Community College, Paralegal Studies Program, Torrance, CA;
Miramar College, Legal Assistant Program, San Diego, CA;
Mt. San Antonio College, Paralegal/Legal Specialty Program, Walnut, CA;
National University, Paralegal Studies Program, Los Angeles, CA;
Santa Ana College, Paralegal Studies Program, Santa Ana, CA;
University of California LA-UCLA Ext, Paralegal Training Program, Los Angeles, CA;
University of California, Irvine Extension, Paralegal Certificate Program, Irvine, CA;
University of California, San Diego, Legal Assistant Training Program, La Jolla, CA;
Norwalk Community College, Legal Assistant Program, Norwalk, CT;
Quinnipiac University, Legal Studies Program, Hamden, CT;
Widener University Law Center, Legal Education Institute, Wilmington, DE;
Seminole State College of Florida fka Seminole Community College, Legal Assistant/Paralegal Program, Sanford, FL;
South University, Legal Studies/Paralegal Studies Program, Royal Palm Beach, FL;
Kirkwood Community College, Legal Assistant Program, Cedar Rapids, IA;
Northwestern College fka Northwestern Business College, Institute of Legal Studies, Bridgeview, IL;
Roosevelt University, Paralegal Studies Program, Chicago, IL;
William Rainey Harper College, Paralegal Studies Program, Palatine, IL;
Vincennes University, Paralegal Program, Vincennes, IN;
Bowling Green Community College of Western Kentucky University, Paralegal Studies Program, Bowling Green, KY;
Sullivan University, Louisville, Institute for Legal Studies, Louisville, KY;
University of Louisville, Paralegal Studies Program, Louisville, KY;
Tulane University, Paralegal Studies Program, New Orleans, LA;
Baker College of Auburn Hills, Paralegal Program, Auburn Hills, MI;
Eastern Michigan University, Legal Assisting Program, Ypsilanti, MI;
Henry Ford Community College, Paralegal Studies Program, Dearborn, MI;
Oakland Community College, Paralegal Program, Farmington Hills, MI;
Oakland University, Paralegal Program, Rochester, MI;
Minnesota State University Moorhead, Paralegal Program, Moorhead, MN;
Missouri Western State University, Legal Studies Program, St. Joseph, MO;
University of Southern Mississippi, Paralegal Studies Program, Hattiesburg, MS;
University of Montana Missoula, Paralegal Studies Program, Missoula, MT;
Metropolitan Community College, Paralegal Studies Program, Omaha, NE; Brookdale Community College, Paralegal Studies Program, Lincroft, NJ; Fairleigh Dickinson University, Paralegal Studies Program, Madison, NJ; Middlesex County College, Legal Studies Department, Edison, NJ; Raritan Valley Community College, Paralegal Studies Program, Somerville, NJ; Genesee Community College, Paralegal Studies Program, Batavia, NY; Suffolk County Community College, Paralegal Studies Program, Selden, NY; Capital University Law School, Paralegal Program, Columbus, OH; Sinclair Community College, Paralegal Program, Dayton, OH; University of Cincinnati--Clermont, Paralegal Technology Program, Batavia, OH; University of Toledo, Paralegal Studies Program, Toledo, OH; Ursuline College, Legal Studies Program, Pepper Pike, OH; Rose State College, Paralegal Studies Program, Midwest City, OK; University of Oklahoma Law Center, Legal Assistant Education, Norman, OK; Delaware County Community College, Paralegal Studies Program, Media, PA; Central Carolina Technical College, Legal Assistant/Paralegal Program, Sumer, SC; Midlands Technical College, Paralegal Program, Columbia, SC; Orangeburg-Calhoun Technical College, Paralegal Program, Orangeburg, SC; Technical College of the Low Country, Paralegal Program, Beaufort, SC; Western Dakota Technical Institute, Paralegal Program, Rapid City, SD; South College, Legal Studies and Paralegal Studies Programs, Knoxville, TN; Kaplan College, General Practice Paralegal Program, Dallas, TX; Lee College, Paralegal Studies Program, Baytown, TX; J. Sargeant Reynolds Community College, Paralegal Studies Program, Richmond, VA; Marymount University, Paralegal Studies Program, Arlington, VA; Edmonds Community College, Paralegal Program, Lynnwood, WA; Chippewa Valley Technical College, Paralegal Program, Eau Claire, WI; Western Technical College fka Western Wisconsin Technical College, Paralegal Program, La Crosse, WI; Casper College, Paralegal Studies Program, Casper, WY; and Laramie County Community College, Paralegal Studies Program, Cheyenne, WY.

Respectfully submitted,
Laura C. Barnard, Chair
Standing Committee on Paralegals
August 2015
GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Paralegals

Submitted By: Laura C. Barnard, Chair

1. Summary of Resolution(s).

This Resolution recommends that the House of Delegates grants approval to one program, grants reapproval to twenty-six paralegal education programs, withdraws the approval of two programs at the request of the institutions, and extends the term of approval to several paralegal education programs.

2. Approval by Submitting Entity.

April 2015

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

This resolution has not been previously submitted.

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

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

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

Action is timely.

6. Status of Legislation. (If applicable.)

N/A

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

Approved programs are notified of the action of the House of Delegates by the Standing Committee on Paralegals. The programs are monitored for compliance during the approval term by the Standing Committee.
8. **Cost to the Association.** (Both direct and indirect costs.)
   
   None

9. **Disclosure of Interest.** (If applicable.)
   
   N/A

10. **Referrals.**
    
    None

11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address.)
    
    Peggy C. Wallace, Staff Counsel  
    Standing Committee on Paralegals  
    American Bar Association  
    321 North Clark Street  
    Chicago, IL 60654  
    (312) 988-5618  
    E-Mail: peggy.wallace@americanbar.org

12. **Contact Name and Address Information.** (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)
    
    Laura C. Barnard  
    Chair, Business Department  
    Director, Paralegal Program  
    Lakeland Community College  
    7700 Clocktower Drive  
    Kirtland, OH 44094  
    (440) 525-7352  
    Cell: (517) 485-3232  
    E-Mail: lgbarnard@lakelandcc.edu
EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution recommends that the House of Delegates grants approval to one program, grants reapproval to twenty-six programs, withdraws the approval of two programs, and extends the term of approval of sixty-seven programs.

2. Summary of the issue which the Resolution Addresses

The programs recommended for approval and reapproval in the enclosed report meet the Guidelines for the Approval of Paralegal Education Programs.

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

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

4. Summary of Minority Views

No other positions on this resolution have been taken by other Association entities, affiliated organizations or other interested groups.
AMERICAN BAR ASSOCIATION
SECTION OF TAXATION
REPORT TO THE HOUSE OF DElegates

RESOLUTION

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 American Bar Association continues to oppose any legislation establishing or expanding the regulatory jurisdiction of any federal agency with respect to the regulation of 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.
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 2004,1 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 as discussed below.

Regulations promulgated under 31 U.S.C. § 330 are set forth in Treasury Department Circular 230 (“Circular 230”).2 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.

This Association has previously addressed the scope and extent of standards of practice that may be adopted by federal agencies concerning the conduct of attorneys who practice before such agencies. Specifically, a resolution addressing this question was adopted by the House of Delegates in 1982, and an additional resolution concerning this issue was adopted by the Board of Governors at its meeting in October 2009. Consistent with those prior resolutions, copies of which are attached to this Report, this resolution would not permit the expansion of regulation of attorneys who practice before the Treasury Department. Rather, this resolution would urge Congress to clarify that the level and scope of regulation that existed prior to the recent judicial decisions was appropriate. Moreover, this resolution expressly reaffirms the Association’s long standing opposition to any legislation that would establish or expand the regulatory jurisdiction of any federal agency with respect to the regulation of 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.

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

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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.

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, 55 F. Supp. 3d 89 (D.D.C. 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 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 brought in courts around the country have relied 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

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5 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.

6 For example, in Sexton v. Hawkins, a disbarred lawyer sought to enjoin OPR from investigating his tax return preparation related activities, including opinion writing, 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 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) (individual challenged the Internal Revenue Service’s authority to limit access to its electronic tax return filing system; case was settled in December 2014). 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; the AICPA has appealed that decision to the Court of Appeals for the D.C. Circuit.
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.”

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. 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. 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

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8 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).

9 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).
a proceeding in which the tax advisor 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. 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 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).

Recent studies have found that these provisions have not been adequate to ensure that paid tax advisors provide the necessary level of assistance to their clients in complying with their obligations under the tax law.

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.

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 Loving, the vast majority of paid tax return preparers are subject to no

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10 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 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).


12 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.
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 Loving decision, 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. 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 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 . . .” 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. To ensure that there is no conflict between the proposed Resolution and the Resolutions adopted in 1982 and 2009, the proposed Resolution expressly reaffirms the Association’s long standing opposition to any legislation establishing or expanding the regulatory jurisdiction of any federal agency with respect to the

13 Introduction to the April 2014 GAO Report, supra.

14 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.


16 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.”
regulation of 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.

We further note that the Association’s long standing opposition to federal agency regulation of lawyers is based, in large part, on the view that lawyers are adequately regulated by state courts. In most areas this view cannot be disputed. However, when it comes to matters involving information reflected on federal tax returns, or otherwise obtained by the Internal Revenue Service in the course of an examination of tax return information, state courts or bar associations will not ordinarily have access to such information, and, therefore, ordinarily would not be in any position to know that a lawyer might have undertaken the type of conduct with respect to which discipline might be appropriate. For example, under Circular 230, OPR can sanction a practitioner for “giving a false opinion, knowingly, recklessly, or through gross incompetence, including an opinion which is intentionally or recklessly misleading, or engaging in a pattern of providing incompetent opinions on questions arising under Federal tax laws.”

The Internal Revenue Service ordinarily would learn about such conduct only through conducting examinations of tax returns filed by clients who received such opinions from the practitioner. However, because information obtained by the Internal Revenue Service in such examinations is confidential and cannot be disclosed by the Internal Revenue Service except pursuant to limited exceptions set forth in 26 U.S.C. § 6103, the Internal Revenue Service could not disclose such information to a state court or bar association that regulates the lawyer who gave such opinions. Similarly, under Circular 230, OPR can sanction a practitioner for “willfully failing to make a Federal tax return in violation of the Federal tax laws, or willfully evading, attempting to evade, or participating in any way in evading or attempting to evade any assessment or payment of any Federal tax.”

Again, unless the Internal Revenue Service prosecutes an individual for such actions, information on nonfiling of Federal tax returns or nonpayment of Federal taxes would not be available to a state court or bar association that regulates lawyers. Because the Internal Revenue Service is the only agency that would have access to such information, it is uniquely positioned to use that information, when appropriate, to ensure that persons who violate the Federal tax laws are not counseling or otherwise representing other taxpayers before the agency. Moreover, because state courts do not have access to such information, regulation of lawyers on the basis of information available only to the Internal Revenue Service does not undermine the ability of state courts to supervise and discipline lawyers. Accordingly, the limited exception to the Association’s long standing opposition to federal agency regulation of lawyers to permit the Internal Revenue Service to regulate lawyers and others who practice before the agency is justified to ensure that those who fail to comply

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17 31 C.F.R. § 10.51(a)(13).

18 An exception to the general confidentiality of tax return information would permit the Internal Revenue Service to disclose information regarding the assessment of certain tax return preparer penalties to a state agency that regulates tax return preparers, but only upon the written request of that state agency. See 26 U.S.C. § 6103(k)(5).

19 31 C.F.R. § 10.51(a)(6).
with the Federal tax laws, or engage in a pattern of giving false or incompetent opinions on matters of Federal tax law, can be disciplined when appropriate.\textsuperscript{20}

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.

This resolution also addresses the authority of the Treasury Department to regulate persons (including attorneys) who advise taxpayers with respect to the reporting of items on federal tax returns by urging Congress to allow such regulation. In doing so, we are mindful of prior resolutions of the Association concerning the extent to which federal agencies may establish standards of practice for attorneys who practice before such agencies. Specifically, a resolution addressing the scope and extent of standards of practice that may be adopted by federal agencies concerning the conduct of attorneys who practice before such agencies was adopted by the House of Delegates in 1982 (107 Annu. Rep. A.B.A. 603, 669 (1982)), and an additional resolution was adopted by the Board of Governors at its meeting in October 2009. The purpose of this resolution is not to permit the expansion of the regulation of attorneys who practice before the Treasury Department but, rather, to urge Congress to clarify that the level and scope of regulation that existed prior to the \textit{Loving} and \textit{Ridgely} decisions was appropriate.

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,\textsuperscript{21} or whose work is otherwise too attenuated from the filing of a tax return or other submission to the Internal Revenue Service.\textsuperscript{22} In addition, the regulations at issue in \textit{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

\textsuperscript{20} In this regard, we note that, with respect to the delivery of tax advice, Circular 230 focuses on patterns of conduct, and that OPR traditionally has pursued discipline only in cases where it has determined that the conduct at issue was particularly egregious.

\textsuperscript{21} Treas. Reg. § 301.7701-15(f).

\textsuperscript{22} 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”).
the scope of Circular 230 beyond its present form. In particular, we would expressly oppose any expansion of the authority of the Treasury Department or the Internal Revenue Service to regulate lawyers in matters that extend beyond the Federal tax laws and practice before the Internal Revenue Service, or if any such expansion of authority would adversely affect key aspects of the confidential lawyer-client relationship such as the attorney-client privilege and client confidentiality, or would otherwise undermine the ability of state courts to supervise and discipline lawyers.

Respectfully submitted,

Armando Gomez, Chair
Section of Taxation
August 2015

23 We also note that Circular 230 expressly recognizes privilege, and does not adversely affect the confidential lawyer-client relationship. See, e.g., 31 C.F.R. §§ 10.20 and 10.71(d).
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 Resolution expressly reaffirms the American Bar Association’s long standing opposition to any legislation establishing or expanding the regulatory jurisdiction of any federal agency with respect to the regulation of 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. 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 was approved 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, and amended under authority granted at such time.

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

A similar resolution was submitted in February 2015. After consultation with other Sections, that resolution was withdrawn and revised.

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.\(^2\)

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,\(^3\) ethical considerations for lawyers issuing tax shelter opinions,\(^4\) and standards governing the position a lawyer may advise a client to take on a tax return.\(^5\) 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 previously addressed the scope and extent of standards of practice that may be adopted by federal agencies concerning the conduct of attorneys who practice before such agencies. Specifically, a resolution addressing this question was adopted by the House of Delegates in 1982,\(^6\) and an additional resolution concerning this issue was adopted by the Board of Governors at its meeting in October 2009. Consistent with those prior resolutions, this resolution would not permit the expansion of regulation of attorneys who practice before the Treasury Department. Rather, this resolution would urge Congress to clarify that the level and scope of regulation that existed prior to the Loving and Ridgely decisions was appropriate.

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

Not applicable.

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6. **Status of Legislation.**

Legislation has been introduced in the 114th Congress providing for broader regulation of paid tax return preparers, but has not yet been acted upon. The Obama Administration has also supported legislation authorizing the Treasury Department and Internal Revenue Service to regulate paid 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.


8 See General Explanation of the Administration’s Fiscal Year 2016 Revenue Proposals, at 259 (February 2015).

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 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 Resolution expressly reaffirms the American Bar Association’s long standing opposition to any legislation establishing or expanding the regulatory jurisdiction of any federal agency with respect to the regulation of 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. 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, 55 F. Supp. 3d 89 (D.D.C. 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. Comments expressed in February 2015 questioned whether the proposed Resolution might conflict with the Resolutions adopted in 1982 and 2009. Those comments have been addressed in the revised proposed Resolution.
RESOLVED, That the American Bar Association urges state and territorial bar licensing entities to eliminate any questions that ask about mental health history, diagnoses, or treatment when determining character and fitness for the purpose of bar admission. The questions should focus instead on conduct or behavior that impairs an applicant’s ability to practice law in a competent, ethical, and professional manner.

FURTHER RESOLVED, That this resolution replaces the 1994 policy, ABA Resolution No. 110, Aug. 1994 (94A110).
REPORT

Introduction

State and territorial bar examiners have a duty to the public to ensure that all licensed attorneys are fit to practice law. To fulfill this duty, state bars ask all applicants a series of moral character and fitness questions. Many of these questions focus on conduct or behavior, including deceit, fraud, financial irresponsibility, criminal arrests and convictions, academic, employment and professional discipline, and driving under the influence of alcohol or drugs.¹

In addition to conduct and behavior-related questions, many state bars inquire about applicants’ mental health diagnoses and treatment. Applicants who answer these questions affirmatively are subject to burdensome supplemental investigations that are not imposed on other applicants. Typically, they are required to authorize their treatment providers to release information relating to mental health diagnoses and treatment, including medical and hospitalization records. These records contain highly sensitive, personal information such as details about childhood, parents, siblings, and sexual history that is not relevant to one’s ability to practice law. These applicants may also have to undergo examinations by independent psychiatrists or psychologists at their expense. Questions about mental health history, diagnoses, or treatment are not only unduly intrusive, but screen out or tend to screen out individuals with disabilities, are ineffective for the presumed purpose of identifying unfit applicants, and are likely to deter individuals from seeking mental health counseling and treatment.

Purpose

This Resolution urges state and territorial bar licensing entities, when determining character and fitness for the purpose of bar admission, to eliminate all questions that ask about mental health history, diagnoses, or treatment and instead focus on conduct or behavior that in a material way impairs an applicant’s ability to practice law competently, ethically, and professionally.

This Resolution replaces ABA Resolution No. 110 (Aug. 1994),² which stated:

BE IT RESOLVED, That the American Bar Association recommends that when making character and fitness determinations for the purpose of bar admission, state and territorial bar examiners, in carrying out their responsibilities to the public to admit only qualified applicants worthy of the public trust, should

¹ See, e.g., NATIONAL CONFERENCE OF BAR EXAMINERS, REQUEST FOR PREPARATION OF A CHARACTER REPORT, at 13, available at http://ncbex.org/character-and-fitness (e.g., “Within the past five years, have you exhibited any conduct or behavior that could call into question your ability to practice law in a competent, ethical, and professional manner?”).
² Available at http://www.americanbar.org/content/dam/aba/directories/policy/1994_am_110.authcheckdam.pdf.
consider the privacy concerns of bar admission applicants, tailor questions concerning mental health and treatment narrowly in order to elicit information about current fitness to practice law, and take steps to ensure that their processes do not discourage those who would benefit from seeking professional assistance with personal problems and issues of mental health from doing so.\(^3\)

Although the 1994 policy was a step forward in limiting unnecessary and intrusive questions regarding mental health and treatment, it stopped short of calling for their elimination. The drafters recognized it might well become necessary to revisit the issue in the future, and expressed their intent “to pursue further dialogue and interaction.” The 20 years that have elapsed since adoption of that policy have brought significant developments in the law and our understanding of mental disabilities that call into question the continued use of even narrowly-tailored questions regarding mental health and treatment. It has become clear that questions about mental health history, diagnoses, or treatment are inherently discriminatory, invade privacy, stigmatize and needlessly exclude applicants with disabilities, are ineffective in identifying applicants who are unfit, and discourage some applicants from seeking necessary treatment. By calling for the elimination of such questions, the proposed Resolution will help ensure that bar applicants with disabilities are assessed—like other applicants—solely on the basis of their fitness to practice law.

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\(^3\) This concern was acknowledged in a subsequent policy adopted by the House of Delegates in February 1998 regarding character and fitness determinations of state and territorial judicial candidates, nominees, or appointees. Available at [http://www.americanbar.org/content/dam/aba directories/policy/1998_my_114.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/policy/1998_my_114.authcheckdam.pdf). Brought before the House by the Commission on Mental and Physical Disability Law (now the Commission on Disability Rights), the Resolution stated:

RESOLVED, That the American Bar Association recommends that when making character and fitness determinations of state and territorial judicial candidates, nominees, or appointees, any nominating or evaluating entity: 1) consider the privacy concerns of the candidates; 2) narrowly tailor questions concerning physical and mental disabilities or physical and mental health treatment in order to elicit information about current fitness to serve as a judge, with such reasonable modifications as may be required; and 3) take steps to ensure that the process does not have the effect of discouraging those who would seek judicial office from pursuing professional assistance when needed. (Emphasis added.)

FURTHER RESOLVED, That fitness determinations may include specific, targeted questions about a state and territorial judicial candidate's behavior, conduct, or current impairment as it affects the ability to serve as a judge.
Developments Since Adoption of 1994 Policy

In early 2014, the U.S. Department of Justice (DOJ) informed the states of Vermont and Louisiana that their questions about bar applicants’ mental health diagnoses and treatment violate Title II of the Americans with Disabilities Act (ADA). The decision with respect to Louisiana followed an extensive investigation in response to a complaint filed by Louisiana bar applicants, resulting in a formal finding in February 2014 that Louisiana’s character and fitness questions regarding applicants’ mental health diagnoses and treatment discriminate based on disability and thus violate Title II of the ADA. The questions at issue were:

25. Within the past five years, have you been diagnosed with or have you been treated for bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder?

26A. Do you currently have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) which in any way currently affects, or if untreated could affect, your ability to practice law in a competent and professional manner?

26B. If your answer to Question 26A is yes, are the limitations caused by your mental health condition or substance abuse problem reduced or ameliorated because you receive ongoing treatment (with or without medication) or because you participate in a monitoring program?

27. Within the past five years, have you ever raised the issue of consumption of drugs or alcohol or the issue of a mental, emotional, nervous, or behavioral disorder or condition as a defense, mitigation, or explanation for your actions in the course of any administrative or judicial proceeding or investigation; any inquiry or other proceeding; or any proposed termination by an educational

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4 Letter from Jocelyn Samuels, Acting Assistant Attorney General, U.S. Department of Justice, Civil Rights Division, to Karen L. Richards, Executive Director, Vermont Human Rights Commission (Jan. 21, 2014) [Vermont Letter]. Richards had requested the Department of Justice’s (DOJ) position regarding the extent to which states may consider mental health in their screening process for bar applicants. DOJ stated its position—the questions are eligibility criteria that screen out or tend to screen out persons with disabilities and subject them to additional burdens; the questions are unnecessary because questions related to applicants’ conduct are sufficient and most effective to evaluate fitness; and the questions are unnecessary because they do not effectively identify unfit applicants—but did not make a formal finding because no complaint was lodged.

Applicants who responded affirmatively to these questions were required to provide a detailed description of their condition(s) and treatment, list all of their treatment providers, and authorize their providers to release all of their medical records to bar officials.

The DOJ found that, to comply with the ADA, “attorney licensing entities must base their admissions decisions on an applicant’s record of conduct, not the applicant’s mental health history.” Moreover, “[i]nquiring about bar applicants’ medical conditions substitutes inappropriate questions about an applicant’s status as a person with a disability for legitimate questions about an applicant’s conduct.” The DOJ concluded that the questions at issue: impermissibly screen out or tend to screen out persons with disabilities “based on stereotypes and assumptions about their disabilities”; are unnecessary to determine fitness and ineffective in identifying unfit applicants; and are likely to deter individuals from seeking mental health counseling and treatment and, therefore, are counterproductive to the goal of ensuring fitness to practice.

As to Question 26A, the DOJ found that asking whether a condition or impairment “if untreated could affect” an applicant’s ability to practice law “reduces the question to one about an applicant’s diagnosis, not the effect of that diagnosis on his or her fitness to practice law.” Because the question “considers an applicant’s disability in a hypothetical future untreated form,” it fails to “inform an assessment of how the disability affects an applicant’s current fitness to practice law.” It assumes “a worst case scenario that may never come to pass” and “appears rooted in unfounded stereotypes about individuals with these diagnoses.”

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6 Id. at 5.
7 Id. at 8.
8 Id. at 19.
10 Findings Letter, supra note 4, at 19, 22. See also Banta, supra note 8, at 182-83.
11 Findings Letter, supra note 4, at 22. Id. at 23. See also Jennifer McPherson Hughes, Suffering in Silence: Questions Regarding an Applicant's Mental Health on Bar Applications and Their Effect on Law Students Needing Treatment, 28 J. Legal Prof. 187 (2003-04); Banta, supra note 8, at 183-84.
12 Findings Letter, supra note 4, at 22. See also Sutton v. United Air Lines, Inc., 527 U.S. 471, 472 (1999) (finding that a “disability” under the Americans with Disability Act “exists only where the impairment ‘substantially limits’ a major life activity, not where it ‘might,’ ’could,’ or ‘would’ be substantially limiting if mitigating measures were not taken.”)
13 Findings Letter, supra note 4, at 22.
14 Id.
In August 2014, the DOJ entered into a settlement agreement with the Louisiana Supreme Court to ensure the right of qualified bar applicants with mental health conditions to have equal access to the legal profession. The settlement requires the court to revise its character and fitness questions so that they focus on an applicant’s conduct or behavior. Under the terms of the settlement, inquiries into mental health diagnoses or treatment are prohibited unless an applicant voluntarily discloses this information (1) to explain conduct or behavior that may otherwise warrant denial of admission or (2) in response to Question 26A on the National Conference of Bar Examiners’ Character and Fitness application, “Do you currently have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) that in any way affects your ability to practice law in a competent, ethical, and professional manner?”

Although the settlement did not require Louisiana to eliminate Question 26A, at least one other state has done so. The Tennessee Board of Law Examiners decided to remove Questions 26A and B from the National Conference of Bar Examiners’ application accessed by applicants for licensure in Tennessee.

The Law and Its Application

Title II of the ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” DOJ is the federal agency charged with enforcing Title II. Its regulations bar public entities from “administering a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of a disability.” In addition, public entities cannot impose or apply “eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary” for the provision of the service, program, or activity. Also prohibited are policies that “unnecessarily impose

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16 26. A. Do you currently have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) that in any way affects your ability to practice law in a competent, ethical, and professional manner? □ Yes □ No
B. If your answer to Question 26(A) is yes, are the limitations caused by your condition or impairment reduced or ameliorated because you receive ongoing treatment or because you participate in a monitoring or support program?
19 28 C.F.R. § 35.130(b)(6).
20 Id. § 35.130(b)(8).
requirements or burdens on individuals with disabilities that are not placed on others.”

State bars are public entities and thus fall within the scope of coverage under Title II.

As the DOJ concluded in its Findings Letter, inquiries about bar applicants’ mental health diagnoses and treatment constitute eligibility criteria that screen out or tend to screen out individuals based on speculation, stereotypes, and assumptions about their disabilities. Bar examiners appropriately ask a wide range of questions that focus on conduct relevant to applicants’ fitness. Such conduct-based questions are not only sufficient to evaluate fitness, but also the most effective means for doing so. A history of mental health diagnosis or treatment is not a useful predictor of future attorney misconduct or malpractice.

Furthermore, as the DOJ observed, questions concerning mental health diagnoses and treatment are counterproductive to the goal of ensuring the fitness of licensed attorneys by deterring applicants from seeking counseling and treatment for mental health concerns. Applicants fear that such disclosures may preclude them from becoming licensed attorneys.

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23 Findings Letter, supra note 4, at 19.
24 Id. at 22-23. See also Allison Wielobob, Bar Application Mental Health Inquiries: Unwise and Unlawful, 24:1 HUMAN RIGHTS 12, 14 (Winter 1997) (“But questions about behavior, not mental health treatment, would more accurately discover potentially problematic practitioners.”); Banta, supra note 8, at 186-87 (“Permissible inquiries into conduct and behavior to determine fitness are sufficient to serve bar examiners’ purpose of protecting the public.”); Phyllis Coleman & Ronald A. Shellow, Ask About Conduct, Not Mental Illness: A Proposal for Bar Examiners and Medical Boards to Comply with the ADA and Constitution, 20 J. LEGIS. 147, 149 (1994) (“Consequently, professional licensing boards should inquire about conduct, not treatment for or history of mental illness or substance abuse.”).
25 See, e.g., Jon Bauer, The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans with Disabilities Act, 49 UCLA L. REV. 93, 141 (2001) (“there is simply no empirical evidence that applicants’ mental health histories are significantly predictive of future misconduct or malpractice as an attorney”); Banta, supra note 8, at 182-83 (Psychological records are not a reliable predictor of behavior, since the range and severity of individuals’ problems vary.”); In re Petition & Questionnaire for Admission to R.I. Bar, 683 A.2d 1333, 1336 (R.I. 1996) (“Research has failed to establish that a history of previous psychiatric treatment can be correlated with an individual’s capacity to function effectively in the workplace.”); Clark v. Va. Bd. of Bar Exam’rs, 880 F. Supp. 430, 446 (E.D. Va. 1995) (licensing questions related to mental health status or treatment were unnecessary where “the Board presented no evidence of correlation between obtaining mental counseling and employment dysfunction”; “past behavior is the best predictor of present and future mental fitness.”); Application of Underwood, 1993 WL 649283, at *2 (Me. Dec. 7, 1993) (“Although it is certainly permissible for the Board of Bar Examiners to fashion other questions more directly related to behavior that can affect the practice of law without violating the ADA, the questions and medical authorization objected to here are contrary to the ADA.”) (emphasis in original).
26 Findings Letter, supra note 4, at 23-24 (citing American Psychiatric Ass’n, Recommended Guidelines Concerning Disclosure and Confidentiality (1999) (disclosure policies “inhibit individuals who are in need of treatment from seeking help”); Clark v. Va. Bd. of Bar Exam’rs, 880 F. Supp. 430, 445-46 (E.D. Va. 1995) (bar examiners’ mental health question “deters the counseling and treatment from which [persons with disabilities] could benefit” and “has strong negative stigmatic and deterrent effects upon applicants”); In re Petition & Questionnaire for Admission to R.I. Bar, 683 A.2d 1333, 1336 (R.I. 1996) (bar examiners’ questions regarding mental health may prevent a person in need of treatment from seeking assistance); In re
lawyers. In addition, such questions may prevent applicants who seek treatment from being totally candid about their conditions, thereby limiting the health care provider’s ability to accurately diagnose and treat them.\textsuperscript{27}

Finally, unnecessary burdens are placed on applicants who respond affirmatively to mental health questions.\textsuperscript{28} Typically, they are subjected to further investigations such as interviews and independent psychiatric or psychological examinations at their own expense, and are required to submit detailed medical information related to their condition and treatment, including copies of medical and hospitalization records. These records contain highly sensitive, personal information such as details about childhood, parents, siblings, and sexual history that is not relevant to one’s ability to practice law. These practices impose significant expense, delays, and invasions of privacy on applicants with disabilities.

**Conclusion**

Nearly 25 years after the passage of the ADA, in the wake of intervening court and federal agency decisions, the time has come for the ABA to update its position on this issue of great significance to our profession and our members. The ABA has long sought to “promote the full and equal participation in the association, our profession, and the justice system by all persons.”\textsuperscript{29} In 2000, the House adopted policy urging courts to ensure equal access to justice by making courthouses and court proceedings accessible. The accompanying report cited the congressional finding that people with disabilities frequently face restrictions and limitations “resulting from stereotypical assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.”\textsuperscript{30}

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\textit{Petition of Frickey}, 515 N.W.2d 741 (Minn. 1994) (“the prospect of having to answer the mental health questions in order to obtain a license to practice causes many law students not to seek necessary counseling”).

\textsuperscript{27} Findings Letter, \textit{supra} note 4, at 24 (citing \textit{Clark v. Va. Bd. of Bar Exam’rs}, 880 F. Supp. 430, 438 (E.D. Va. 1995); U.S. Dep’t of Health & Human Services, \textit{Mental Health: A Report of the Surgeon General} 441 (1999) (“evidence also indicates that people may become less willing to make disclosures during treatment if they know that information will be disseminated beyond the treatment relationship”).

\textsuperscript{28} Vermont Letter, \textit{supra} note 3, at 8-9 (citing \textit{Clark v. Va. Bd. of Bar Exam’rs}, 880 F. Supp. at 442-43 (E.D. Va. 1995) (finding applicants with disabilities cannot be subjected to additional unnecessary burdens); \textit{Ellen S. v. Fla. Bd. of Bar Exam’rs}, 859 F. Supp. 1489, 1494 (S.D. Fla. 1994); \textit{Med. Soc’y of N.J. v. Jacobs}, 1993 WL 413016, at *8 (D.N.J. Oct. 5, 1993) (holding that licensing board may not place burden of additional investigations on applicants who respond affirmatively to questions about disability status); \textit{Brewer v. Wis. Bd. of Bar Exam’rs}, 2006 WL 346958, at *10 (E.D. Wis. Nov. 28, 2006) (concluding licensing entities may not require additional investigation solely because of applicants’ disabilities)). See also Coleman & Shellow, \textit{supra} note 23, at 148 (stating that applicants who disclose a history of illness o treatment are injured because their admission is delayed, they are compelled to reveal private details of mental health, and face the stigma associated with mental conditions).

\textsuperscript{29} ABA Goal III: Eliminate Bias and Enhance Diversity, \textit{available at http://www.americanbar.org/about_the_aba/aba-mission-goals.html}.

\textsuperscript{30} ABA Recommendation No. 112, at 4 (2000).
The signatories to the 1994 Resolution wrote in the conclusion to their report, “What has been accomplished to date represents both progress and the promise of greater progress.” We believe this new Resolution represents that “greater progress” and we commend it to the House of Delegates for its favorable consideration.

Respectfully submitted,
Mark D. Agrast
Chair
Commission on Disability Rights

Mark I. Schickman
Chair
Section of Individual Rights and Responsibilities

August 2015
1. **Summary of Resolution(s).** This resolution urges state and territorial bar licensing entities, in their character and fitness determinations for the purpose of bar admission, to eliminate any questions that ask about mental health history, diagnoses, or treatment and instead focus questions on conduct or behavior that in a material way impairs an applicant’s ability to practice law in a competent, ethical, and professional manner. This resolution replaces the 1994 policy (ABA Resolution No. 110 (Aug. 1994)).

2. **Approval by Submitting Entity.** The Commission on Disability Rights approved the resolution at its fall meeting in Washington, DC, on November 17, 2014. The Section of Individual Rights and Responsibilities approved the resolution at its council meeting on April 24, 2015.

3. **Has this or a similar resolution been submitted to the House or Board previously?** No. However, this proposed resolution would replace existing policy as noted under Question 4.

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

   In August 1994, the House passed policy—submitted by the Commission on Mental and Physical Disability Law (now the Commission on Disability Rights), the Section of Legal Education and Admissions to the Bar, and the Association of American Law Schools—recommending that state and territorial bar examiners, when making character and fitness determinations for the purpose of bar admission, should tailor questions concerning mental health and treatment narrowly in order to elicit information about current fitness to practice law and take steps to ensure that their processes do not discourage those who would benefit from seeking professional assistance with personal problems and issues of mental health from doing so. The proposed resolution would replace this 1994 policy by urging state and territorial bar licensing entities and the National Conference of Bar Examiners to no longer ask any questions concerning mental health and treatment.

   In February 1998, the House passed policy—submitted by the Commission on Mental and Physical Disability Law (now the Commission on Disability Rights) and the Section of Individual Rights and Responsibilities—urging any nominating or evaluating entity making character and fitness determinations of state judicial
candidates, nominees, and appointees to: consider the privacy interests of the candidates; narrowly tailor questions concerning physical and mental disabilities and health treatment in order to elicit information about current fitness to serve as a judge, with such reasonable modifications as may be required; and take steps to ensure that the evaluation process does not have the effect of discouraging those who would seek judicial office from pursuing professional assistance when needed. This policy would not be affected by the proposed resolution, which does not address judicial character and fitness determinations.

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. Adoption of this policy will enable the Association to urge state and territorial bar licensing entities to eliminate any questions that ask about mental health history, diagnoses, or treatment and instead ask questions that focus on conduct or behavior that in a material way impairs a bar applicant’s ability to practice law in a competent, ethical, and professional manner.

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

9. Disclosure of Interest. (If applicable) N/A

10. Referrals.

Criminal Justice Section
Section of Family Law
Section of Legal Education and Admissions to the Bar
Section of Real Property, Trust and Estate Law
Judicial Division
Law Student Division
Senior Lawyers Division
Young Lawyers Division
Association of American Law Schools
National Conference of Bar Examiners
Standing Committee on Client Protection
Standing Committee on Ethics and Professional Responsibility
Standing Committee on Legal Assistance for Military Personnel
11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)
Commission on Disability Rights
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Washington, DC 20036
(202) 662-1575
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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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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges state and territorial bar licensing entities, in their character and fitness determinations for the purpose of bar admission, to eliminate any questions that ask about mental health history, diagnoses, or treatment and instead focus questions on conduct or behavior that in a material way impairs an applicant’s ability to practice law in a competent, ethical, and professional manner. This resolution replaces the 1994 policy (ABA Resolution No. 110 (Aug. 1994)).

2. Summary of the Issue that the Resolution Addresses

The resolution addresses the extent to which questions about mental health history, diagnoses, or treatment are necessary or appropriate in determining an applicant’s character and fitness. It provides that such questions are unnecessary and ineffective in identifying applicants who are unfit and are likely to deter individuals from seeking mental health counseling and treatment. These kinds of questions are counterproductive to the goal of ensuring fitness to practice; unnecessarily invade applicants’ privacy; and impermissibly tend to screen out persons with disabilities based on stereotypes and assumptions about their disabilities, rather than focusing on their conduct or behavior that impairs their ability to practice law in a competent, ethical, and professional manner.

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

The proposed resolution urges state and territorial bar licensing entities to eliminate any questions that ask bar applicants about mental health history, diagnoses, or treatment.

4. Summary of Minority Views

At this time, we are unaware of any opposition. However, to the extent that some licensing entities currently ask questions about mental health history, diagnoses, or treatment, it is possible that there will be some opposition to the resolution.
AMERICAN BAR ASSOCIATION

SECTION OF LITIGATION
STANDING COMMITTEE ON AMERICAN JUDICIAL SYSTEM

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association urges Congress to amend 28 U.S.C. §1332, to provide that any unincorporated business entity shall, for diversity jurisdiction purposes, be deemed a citizen of its state of organization and the state where the entity maintains its principal places of business.
REPORT

Introduction

Determining the citizenship of unincorporated business litigants has turned into a complicated jurisdictional morass. The subject matter diversity jurisdiction statute was last amended to address citizenship of business entities in 1958. At that time, as a matter of substantive law only corporations were treated as “entities” with an existence apart from that of their membership. Since that change, substantive law has changed with respect to general and other partnerships, and a host of other entities. Moreover, today exponentially more businesses are operating as unincorporated associations, such as general partnerships, limited liability companies (LLCs), limited partnerships (LPs), professional corporations (PCs), limited liability partnerships (LLPs), business trusts, and other forms of business entities. Yet, under the current subject matter jurisdiction statute, in determining whether diversity jurisdiction exists there is still a major difference between corporations and all other entities. Corporations are treated as citizens only of the states (i) where they are incorporated, and (ii) where they maintain their principal place of business. The identity of any or all of a corporation’s shareholders is irrelevant to the diversity analysis. By contrast, for all business entities that are not organized as corporations the citizenship of every member, shareholder, or other owner of any portion of the entity must be examined to determine whether complete diversity exists. For example, if even one of one hundred members in an LLC is not diverse from even one of a hundred partners of an adversary LLP, then diversity is destroyed irrespective of whether the non-diverse LLC member or limited partner had any connection with the facts giving rise to the dispute.

The current diversity regime thus sets a potential trap for plaintiffs, defendants, and even trial court judges every time litigation involves an unincorporated business entity. For example, the existence of a single, passive member of an LLC who was not even involved in the dispute or event being litigated can destroy diversity if he or she hails from the same state as one adverse party. Unfortunately, the LLC’s records may not even reveal the citizenship of every member, thus making it difficult if not impossible for any party to determine quickly (let alone with any assurance of accuracy) whether complete diversity exists prior to discovery. Yet because subject matter jurisdiction is not waivable and because federal courts must satisfy themselves sua sponte that they have subject matter jurisdiction over a matter, see Fed. R. Civ. P. 12(h)(3), this situation may be a ticking legal time bomb.

This problem affects plaintiffs and defendants alike. The uncertainty of whether a case can be filed in or removed to a federal forum not only increases the cost and complexity of litigation, it can completely undermine a fully-litigated case when it is discovered at the appellate stage that the trial court lacked jurisdiction in the first place. Given that litigants need absolute clarity in order to avoid litigating a case in federal court only to have it remanded on jurisdictional grounds after judgment, the diversity statute needs to be streamlined and simplified in order to apply the corporate citizenship test to business entities that are functionally equivalent to corporations.

Given the significant developments in the structure, recognition under the law, and usage of multiple non-corporate entities over the past five decades, no principled reason exists for continuing the divergent treatment of corporations and other business entities. Revising the
diversity jurisdiction statute, 28 U.S.C. § 1332, can eliminate these traps and correlate federal
court jurisdiction with modern business entity structures. These revisions, if enacted, will bridge
the “disconnect between the modern business realities” of unincorporated business entities “and
the formalistic rules” for determining their citizenship, simplifying the forum selection process
and avoiding the waste of judicial resources and time. Debra R. Cohen, Limited Liability
Company Citizenship: Reconsidering an Illogical and Inconsistent Choice, 90 MARQUETTE L.

Background

Through a judicially-created rule, federal courts sitting in diversity have long required complete
diversity between each and every plaintiff, on the one hand and each and every
defendant, on the other. See Strawbridge v. Curtis, 7 U.S. 267 (1806). Shortly after Strawbridge,
the Supreme Court declared that corporations were not citizens, “and, consequently, cannot sue
or be sued in the courts of the United States, unless the rights of the members, in this respect, can
be exercised in their corporate name.” Bank of the U.S. v. Deveaux, 9 U.S. 61 (1809). Because
corporations enjoyed the aggregate citizenship of their owners and members, they were able to
force litigants into state court if a single shareholder was nondiverse from a single plaintiff. See
Cohen, supra, p. 284 & n.95.

Although the Supreme Court later overruled Deveaux and declared that corporations were
legal entities separate and apart from their members and owners, see Louisville, Cincinnati &
Charleston R.R. v. Letson, 43 U.S. 497 (1844), it took Congress over a hundred years to codify
this rule. In 1958, Congress amended the federal diversity statute, 28 U.S.C. § 1332, to tie
corporate citizenship to the states where the entities are incorporated and where they maintain
their principal places of business. J.A. Olson Co. v. Winona, 818 F.2d 401, 404-05 (5th Cir.
1987), abrogated on other grounds by Hertz Corp. v. Friend, 559 U.S. 77 (2010); see also Case
Comment, Seventh Circuit Holds that the Term “Corporation” is Entirely State-Defined,
(2005). The 1958 amendment also was “intended to further the original purpose of diversity
jurisdiction . . . to provide to out-of-state litigants a forum free of local bias.” J.A. Olson, 818
F.2d at 406. Indeed, “the need for diversity jurisdiction is lessened when a foreign corporation
has substantial visibility in the community.” See id. at 404, 406.

This logic made sense in 1958. At the time, the primary unincorporated business
entities—partnerships—were merely contracts between individuals who both owned and
controlled the business. Corporations, by contrast, were legal fictions created by their states of
incorporation for the sole purpose of separating ownership from control. See Cohen, supra, p.
289. The 1958 amendment thus recognized the functional differences between corporations and
partnerships as they existed at the time and “highlighted the citizenship of the true litigants.” Id.
Those states that allowed the formation of partnerships, limited partnerships, limited liability
companies, and other business entities did not recognize those business forms as entities separate
and apart from their owners and members. For example, at the time of the first Uniform
Partnership Act, promulgated in 1914, partnerships were frequently treated as conglomerations
of the individual partners. As explained by the drafters of the 1994 revisions to the Uniform
Partnership Act (“RUPA”):
“The first essential change in UPA (1994) over the 1914 Act that must be discussed as a prelude to the rest of the revision concerns the nature of a partnership. There is age-long conflict in partnership law over the nature of the organization. Should a partnership be considered merely an aggregation of individuals or should it be regarded as an entity by itself? The answer to these questions considerably affects such matters as a partner's capacity to do business for the partnership, how property is to be held and treated in the partnership, and what constitutes dissolution of the partnership. The 1914 Act made no effort to settle the controversy by express language, and has rightly been characterized as a hybrid, encompassing aspects of both theories. . . . [the Revised Uniform Partnership Act] (1994) makes a very clear choice that settles the controversy. To quote Section 201: ‘A partnership is an entity.’ All outcomes in [the Revised Uniform Partnership Act] (1994) must be evaluated in light of that clearly articulated language.”

Summary of 1994 revisions to Uniform Partnership Act (“RUPA”).

In short, general partnerships are no longer viewed solely as aggregations of individuals. Thirty-seven states plus the District of Columbia have adopted the 1994 or 1997 version of the RUPA and its entity designation. Even those states that have not adopted RUPA (1994) frequently recognize partnerships as a distinct entity for at least some purposes. In addition, while not adopting RUPA, Louisiana recognizes a partnership as a “judicial person, distinct from its partners.” La. Civ. Code art. 2801. At least six other “non-RUPA (1994)” states recognize a partnership as a separate entity by statutes providing that partnerships can sue or be sued in the partnership name. And some states have recognized entity status for at least some purposes, as recognized by case law. See, e.g., Hanson v. St. Luke United Methodist Church, 704 N.E.2d 1020, 1026 (Ind. 1998) (explaining that a judgment by or against a partnership binds the partnership as if it were an entity and does not bind individual members unless they were named); Michigan Employment Sec. Com. v. Crane, 54 N.W.2d 616, 620 (Mich. 1952) (“The Michigan employment security act expressly recognizes that a partnership is an ‘employing unit’ within the meaning of the act.”); Philadelphia Tax Review Bd. v. Adams Ave. Assocs., 360 A.2d 817, 820 (Pa. Commw. Ct. 1976) (“[I]t does not follow that for purposes of taxation a partnership may not be taxed, or may not have a domicile for tax purposes, separate and distinct from that of the individuals who compose it. In other words, a partnership may be recognized as a legal entity.

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for certain purposes.""); Dept. of Revenue v. Mark, 483 N.W.2d 302, 304 (Wis. 1992) (“[T]he law recognizes a partnership as a separate legal entity for purposes of conveying real estate and for purposes of holding title.” (emphasis omitted)). In short, contrary to the situation that existed in 1958, the concept of the partnership as a separate legal entity is now well established.

Much else has changed since 1958 as well. The past five decades have seen a rise in so-called “hybrid” business forms such as LLCs, LPs, MLPs, PCs, LLPs, and multi-state general partnerships. For example, the federal Internal Revenue Service reports that in 1993, roughly 275,000 LPs and only 17,335 LLCs filed federal tax returns; by 2008, over 534,000 LPs and over 1,898,000 LLCs filed federal tax returns. Accordingly, the prospect of facing a limited partnership nearly doubled from 1993 to 2008, while the prospect of facing a limited liability company increased nearly one hundred and tenfold.

With the rise of these hybrid entities, “[e]volving organizational laws caused the distinction between business organizations to blur.” Cohen, supra, p. 289. Many states now recognize these other entities as existing separate and apart from their owners and members. See Christine M. Kailus, Diversity Jurisdiction and Unincorporated Businesses: Collapsing the Doctrinal Wall, 2007 UNIV. OF ILL. L.R. 1543, 1545-47 (Sept. 7, 2007). Similarly, the Uniform Limited Partnership Act (“ULPA”) also now recognizes that a “limited partnership is an entity distinct from its partners.” Uniform Limited Partnership Act § 104(a) (2001), NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, available at http://www.uniformlaws.org/shared/docs/limited%20partnership/ulpa_final_2001rev.pdf (last visited Apr. 30, 2014). Eighteen (18) states plus the District of Columbia have adopted the 2001 version of the ULPA. And likewise, the 2006 revisions to the Uniform Limited Liability Company Act of 1996 (“ULLCA”) recognizes that an LLC “is an entity distinct from its members.” Uniform Limited Liability Company Act § 104(a) (2006), NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, available at http://www.uniformlaws.org/shared/docs/limited%20liability%20company/ullca_final_06rev.pdf (last visited Apr. 30, 2014). Nine (9) states plus the District of Columbia have adopted the 2006 version of the ULLCA.

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The existing law concerning the status and determination of the citizenship of non-corporate entities for diversity jurisdiction purposes has not kept up with reality. The corporate landscape simply looks much different than it did in 1958, but Section 1332(c) has not been amended to acknowledge unincorporated entities as “citizens” for diversity purposes. Nor have courts been willing to impute citizenship status on these entities because they are “corporate-like,” as courts narrowly construe statutes conferring federal jurisdiction. See, e.g., Carden v. Arkoma Assocs., 494 U.S. 185 (1990); Northbrook Nat’l Ins. v. Brewer, 493 U.S. 6, 9 (1989) (“We must take the intent of Congress with regard to the filing of diversity cases in Federal District Courts to be that which its language clearly sets forth.”) (quoting Horton v. Liberty Mutual Insurance Co., 367 U.S. 348, 352 (1961)); Thompson v. Gaskill, 315 U.S. 442, 446 (1942) (“The policy of the statute conferring diversity jurisdiction upon the district courts calls for its strict construction.”).

The Supreme Court has explicitly held that due to the plain and limited language of Section 1332(c), the statute only applies to traditional corporations. See Carden, 494 U.S. at 195-96. Cf. Steelworkers v. R. H. Bouligny, Inc., 382 U.S. 145 (1965) (holding that unincorporated labor union was not itself a “citizen” for diversity jurisdiction purposes, but that citizenship was to be determined based upon the citizenship of each individual member of the unincorporated entity). In Carden, the trial court dismissed an action brought by a limited partnership on the ground that one of the plaintiff’s limited partners was a citizen of the same state as the defendants. The Court “firmly resist[s]” any judicial extension of “citizenship” status to entities other than corporations, and leaves any “further adjustments” to the status of business entities for diversity purposes in the hands of Congress. Carden, 494 U.S. at 189, 196.

Following Carden’s clear mandate, courts have routinely concluded that the citizenship of every member of unincorporated business entities must be diverse from all opposing parties before complete diversity of citizenship exists. In one of the earliest post-Carden decisions, the Seventh Circuit concluded that Carden “crystallized as a principle” that members of an entity are citizens for diversity purposes, at least until “Congress provides otherwise.” Cosgrove v. Bartolotta, 150 F.3d 729, 731 (7th Cir. 1998). Given the similarities between LLC’s and LP’s, the court applied Carden to LLC’s. Id.; see also Belleville Catering Co. v. Champaign Market Place L.L.C., 350 F.3d 691, 692 (7th Cir. 2003) (same). It does not matter that LP’s and LLCs “are functionally similar to corporations;” they are not entitled to corporate treatment for diversity purposes. See also Hoagland v. Sandberg, Phoenix & von Gontard, P.C., 385 F.3d 737, 739 (7th Cir. 2004). The Supreme Court drew a “bright line” in Carden between entities that are technically called “corporations” and all other types of entities, see id. at 741, such that judges need not “entangle themselves in functional inquiries into the differences among corporations,” see id. at 743.

Every court of appeals to address this question directly has followed the 7th Circuit in analogizing to Carden’s treatment of limited partnerships and requiring the examination of the citizenship of all owners/members of LLCs in determining whether diversity jurisdiction exists. See, e.g., Rolling Greens MHP, LP v. Comcast SCH Holdings LLC, 374 F.3d 1020 (11th Cir. 2004) (remanding appeal from grant of summary judgment to consider citizenship of every member of LP and LLC; noting unanimity among circuits regarding both LPs and LLCs and citing cases from 2d, 6th, 7th, 8th, and 9th Circuit Courts of Appeal); Johnson v. Smithkline Beecham Corp., 724 F.3d 337 (3d Cir. 2013); Zambelli Fireworks Mfg. Co. v. Wood, 592 F.3d
412 (3d Cir. 2010);  Delay v. Rosenthal Collins Group, Inc., 585 F.3d 1003 (6th Cir. 2009); Harvey v. Grey Wolf Drilling Co., 542 F.3d 1077 (5th Cir. 2008); Pramco LLC v. San Juan Bay Marina, Inc., 435 F.3d 51 (1st Cir. 2006); Johnson v. Columbia Properties Anchorage, LP, 437 F.3d 894 (9th Cir. 2006); Gen. Tech. Applications, Inc. v. Extro Ltda., 388 F.3d 114 (4th Cir. 2004); GMAC Commercial Credit LLC v. Dillard Dept. Stores, 357 F.3d 827 (8th Cir. 2004); Belleville Catering Co. v. Champaign Mkt. Place, LLC, 350 F.3d 691 (7th Cir. 2003); Handelsman v. Bedford Village Associates Ltd. Partnership, 213 F.3d 48 (2d Cir. 2000). Neither the D.C. Circuit Court of Appeals nor the 10th Circuit Court of Appeals has directly decided this issue, though both the District of D.C. and at least the District of Colorado have agreed with other circuits that the citizenship of an LLC is determined by the citizenship of each of its members. See, e.g., Makris v. Tindall, No. 13-00750, 2013 U.S. Dist. LEXIS 41397 (D. Colo. Mar. 25, 2013); Jackson v. HCA-HeathOne, LLC, No. 13-02615, 2013 U.S. Dist. LEXIS 146023 (D. Colo. Oct. 9, 2013); Shulman v. Voyou, LLC, 305 F. Supp. 2d 36 (D.D.C. 2004); Johnson-Brown v. 2200 M. St. LLC, 257 F. Supp. 2d 175 (D.D.C. 2003).

The courts have made clear that any change in how citizenship is to be determined for diversity jurisdiction purposes. Accordingly, we propose an amendment to 28 U.S.C. § 1332 to address these issues.

Proposed Rule Revision

Attached as Appendix 1 is a proposed revision to the diversity statute that serves primarily to ensure that the letter of the diversity statute mirrors its spirit. This idea is nothing new or radical. In 1965—almost fifty years ago—the American Law Institute proposed giving unincorporated business entities the same citizenship status as corporations for diversity purposes. See Diversity Jurisdiction Over Unincorporated Business Entities: The Real Party in Interest as a Jurisdictional Rule, 56 TEXAS L. REV. 243, 244 n.8 (1978) (citing ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, PART I, 59 (Sept. 25, 1965, Official Draft)). It is well past time that the diversity statute recognizes unincorporated business entities as what they effectively are—legal constructs, like corporations, with rights and duties separate and apart from the rights and duties of their members and owners.

Why the Federal Diversity Rule Should Be Amended

A. The current statute leads to unacceptable and readily avoidable wastes of time, money, and judicial resources.

Uncertainty as to whether a case belongs in federal court increases not only the “cost and complexity of litigation,” but also “the parties will often find themselves having to start their litigation over from the beginning.” Hoagland, 385 F.3d at 739-40. Both potential plaintiffs and defendants often have difficulty determining the non-management members of opposing party entities, particularly if such membership is not public information. As a result, they lack a good faith basis for pursuing (or challenging) the propriety of the federal forum. The resulting uncertainties have led appellate courts to criticize the efforts expended to address citizenship at the outset and on appeal. See, e.g., Smoot v. Mazda Motors of America, Inc. 469 F.3d 675, 677-78 (2006) (and cases cited therein) (criticizing jurisdictional statements of all parties on appeal and noting “the lawyers have wasted our time as well as their own and (depending on the fee
arrangements) their clients’ money. We have been plagued by the carelessness of a number of the lawyers practicing before the courts of this circuit with regard to the required contents of jurisdictional statements in diversity cases.”).

This uncertainty means that parties can fully litigate a case, only to have an appellate court determine that the district court lacked jurisdiction in the first instance. *GMAC Commercial Credit LLC v. Dillard Department Stores, Inc.*, 357 F.3d 827 (8th Cir. 2004), presents an example of this waste of judicial resources and the court’s inability effectively to address the waste. In that case, the LLC plaintiff sued the defendant in federal court on diversity grounds. Neither party challenged subject matter jurisdiction before the district court. The defendant won partial summary judgment and a jury verdict. *Id.* at 828. After obtaining new counsel, plaintiff moved to vacate the judgment award on the ground that diversity of citizenship did not exist and thus the court lacked subject matter jurisdiction from the outset. *Id.* Unable to determine, based on the record below, whether the citizenship of the plaintiff’s members in fact destroyed complete diversity, the Eight Circuit remanded for a discovery hearing on diversity. *Id.* at 829. Defendants also moved for attorneys fees because plaintiff—who chose the federal forum—never raised the diversity issue until appeal. *Id.* The appellate court left the decision of whether to award fees to the district court on remand. *Id.*

Sometimes even the type of entity involved can be unclear. *Tuck v. United Servs. Auto. Ass’n*, 859 F.2d 842 (10th Cir. 1988), involved an uninsured motorist who had killed Johnny Tuck in a collision. Tuck’s estate and parents sued United Services Automobile Association (“USAA”) to recover benefits under an uninsured motorist provision of Tuck’s insurance policy. *Id.* Believing that USAA was a corporation, the Tucks alleged that USAA was diverse from the Tucks, and the pretrial order incorporated the jurisdictional allegations. *Id.* at 844. The jury returned a verdict for the Tucks on all claims. *Id.* at 843. USAA filed a motion for judgment notwithstanding the verdict, or in the alternative, for a new trial. *Id.* The district court denied both motions but did reduce the Tucks’ actual damage award. *Id.* USAA appealed and “revealed, for the first time, that it was not a corporation, but rather an unincorporated association organized under the insurance laws of the state of Texas.” *Id.* USAA’s status as an association made it a citizen of every state in which its members were citizens, and in consequence, USAA argued, the court lacked subject matter jurisdiction. *Id.* at 844. Admonishing USAA, the court stated, “[t]his is not the first time that USAA has faced this problem.” *Id.* at 845 (citing *Baer v. United Servs. Auto. Ass’n*, 503 F.2d 393 (2d Cir. 1974)). To salvage the case and halt USAA’s attempted jettisoning of an unfavorable verdict, the court allowed the Tucks to amend their complaint on remand by dismissing all of the Oklahoma citizens who were “members” of USAA. *Id.* at 846. However, the court noted that even this dismissal plan might not work on the case before it as USAA had been sued as an entity, and not the individual members. Still, the appellate court remanded to allow the district court to determine if a jurisdictional basis could be identified. Otherwise, the jury verdict (even as reduced) could not stand. *Id.* at 846-67.

Two problems are highlighted by *Tuck*. First, under the current regime the distinction between a corporation and any other form of business entity drives whose “citizenship” determines the entity’s citizenship. Thus, mistakenly believing that an entity with a national presence and operations in multiple states is a corporation can result in plaintiffs, defendants, and trial courts failing to examine citizenship properly. Second, and perhaps more substantively
disturbing, Tuck highlights that once the proper analysis is applied some large unincorporated associations, with members in all 50 states, simply could not be haled into federal court (or seek relief in federal court) unless a federal question was presented. There is no practical reason for closing off access to federal courts in this manner either to plaintiffs who wish to bring a case in, or to non-corporate entity defendants who wish to remove a case to, federal courts.

Because federal courts are obligated to determine whether they may exercise subject matter jurisdiction regardless of whether the parties ever raise the issue, see Chapman v. Barney, 129 U.S. 677, 681 (1889), uncertainty as to forum can be an expensive and unexpected problem to address well into litigation, possibly requiring jurisdictional discovery. For example, one court addressed the LLC defendant’s citizenship sua sponte in order to “satisfy itself” that federal jurisdiction existed, even though neither litigant raised the question of whether any LLC members were citizens of the same state (and the complaint failed to allege facts regarding the citizenship of the LLC’s members). See Delay v. Rosenthal Collins Group, Inc., 585 F.3d 1003, 1004-05 (6th Cir. 2009). The court directed the defendant “to submit a jurisdictional statement identifying the citizenship of all of its members.” Id. at 1005.

In addition to the problems highlighted by Tuck, the problem of a case being reversed on appeal for lack of subject matter jurisdiction can wreak out-sized consequences upon plaintiffs. Should years pass and then a case be remanded as void ab initio due to a lack of subject matter jurisdiction, the plaintiff-litigant may discover that the statute of limitations has run during the time the matter was pending, although improperly, in federal court. Because states’ tolling statutes will vary from state to state, particularly with respect to an action that was void (as opposed to voidable or subject to an affirmative defense) from the outset, further uncertainty is injected into an already uncertain process.

While the Smoot and Tuck courts, and others, have been quick to criticize attorneys for failing to investigate sufficiently deeply, the criticism can gloss over the difficulty of the investigation. It is not enough to examine who the members were of the unincorporated association at the time it came into existence; citizenship is determined as of the time of filing. Thus, an individual member who has moved from a diverse state to a non-diverse state can destroy diversity, even if the unincorporated association is not aware of the move. And as more and more communications take place via cell phones (with “traveling” area codes) and internet communications (which do not necessarily reflect physical addresses at all), the ability to unearth this information, let alone to unearth it in a timely enough manner to gather the information to file or remove a lawsuit, presents substantial practical difficulties. These difficulties are highlighted by the increased reliance upon unincorporated entities as a means of doing business that are shown in the IRS filing statistics quoted supra.

Given that litigants need absolute clarity in order to avoid litigating a case in federal court only to have it remanded on jurisdictional grounds after judgment, the diversity statute needs to be streamlined and simplified in order to apply the corporate citizenship test to business entities that are functionally equivalent to corporations.
B. The proposed amendment provides a workable, bright line rule that courts have been applying for decades to corporations.

Currently, counsel for plaintiffs and for defendants can find themselves guessing about citizenship at critical filing or removal stages. Plaintiffs in non-federal question cases who choose to file their lawsuits in federal court must plead that diversity jurisdiction exists. This requires pleading the citizenship of the defendant. Should the defendant be an LLC or other unincorporated association, however, the information may not be available to the plaintiff. Information regarding the ownership of unincorporated entities like LLCs frequently is not a matter of public record. While the LLCs themselves should be able to identify their members, even they may have difficulty identifying the citizenship of every member on any given date. Cohen, supra, p. 303. Yet plaintiffs filing or defendants trying to remove, are forced to determine and plead citizenship under tight timeframes.

Further, the current rules, which ignore the reality of where an unincorporated association actually does business, can result in diversity citizenship, and thus removal, being available where the purposes of diversity jurisdiction are not met. In Johnson v. Smithkline Beecham Corp., 724 F.3d 337 (3d Cir. 2013), the Third Circuit granted interlocutory appeal after plaintiffs unsuccessfully tried to remand their personal injury lawsuit after the defendants, including two LLC’s, removed the action to federal court. Plaintiffs, who are citizens of Pennsylvania, argued that one LLC defendant was headquartered and largely managed in Pennsylvania. See id. at 342. The defendant’s sole member, however, was incorporated in and operated primarily out of Delaware. The Third Circuit concluded that, even though the LLC was based in the same state where plaintiffs were citizens, the district court properly exercised diversity jurisdiction. Id. at 346-48; see also Gen. Tech. Applications, Inc. v. Exro Ltda, 388 F.3d 114, 116 (4th Cir. 2004) (remanding case after defendants removed and won summary judgment, concluding that there was not complete diversity, and the case should proceed in state court).

C. The proposed change will bring cohesion between 28 U.S.C. §1332(c) and the Class Action Fairness Act.

Other changes to federal law have recognized the benefit of treating all unincorporated associations in the same manner as corporations. The Class Action Fairness Act of 2005 (“CAFA”) expressly defines the citizenship of “unincorporated association[s]” as limited to the state where the association has its principal place of business and the state under whose laws the association is organized. See 28 U.S.C. §1332(d)(10). While the statute does not clarify what entities are considered “unincorporated associations,” several courts have construed it to include any business entity that is not organized as a corporation. See, e.g., Ferrell v. Express Check Advance of SC LLC, 591 F.3d 698, 699 (4th Cir. 2010) (holding that a limited liability company is an “unincorporated association” for diversity purposes under CAFA); Bond v. Veolia Water Indianapolis, LLC, 571 F. Supp. 2d 905, 910 (S.D. Ind. 2008) (same). Indeed, Congress’ express purpose in adding subsection (d)(10) was to ensure that unincorporated entities were as protected from state-court bias in class actions as were incorporated entities. See Christine M. Kailus, Diversity Jurisdiction and Unincorporated Businesses: Collapsing the Doctrinal Wall, 2007 Univ. of Ill. L.R. 1543, 1554 (Sept. 7, 2007).
The CAFA citizenship test for unincorporated associations literally mirrors the test for corporations under the existing 28 U.S.C. §1332(c), but it applies only in the context of class action litigation. This disconnect means that an LLC, for example, is a legal fiction with “separate entity” status if the lawsuit is a class action; in a non-class suit, the LLC is merely the sum of its members. It begs the question whether, had the Supreme Court decided Carden after CAFA was passed rather than 15 years prior, the Court might have reached a different result in order to avoid interpreting the diversity statute in a manner that yields an absurd result. Regardless, the proposed revision will ensure uniform treatment of unincorporated associations regardless of whether the plaintiff sues solely on his or her own behalf or on behalf of a putative class.

D. The proposed change will not lead to additional administrative difficulties but will lessen existing administrative burdens.

The proposed change should not result in new administrative difficulties. Experience with the Class Action Fairness Act (28 U.S.C. §1332(d)(10)) has not led to difficulties in determining either the state under which entities are organized or where they have their principal places of business. To the extent issues may arise with respect to identifying a principal place of business, the experience regarding doing so for corporations, both that cited in and applying Hertz Corp. v. Friend, 559 U.S. 77 (2010), is available, as well as nearly a decade of experience under the Class Action Fairness Act. Moreover, removing the requirement of examining the citizenship of every member of unincorporated business associations can greatly simplify administrative burdens upon parties both filing and removing actions on the basis of diversity of citizenship.

E. The proposed change will not greatly increase filings in federal courts or removals to federal courts.

Criticism of the proposed change has focused upon whether a change is necessary and whether federal filings will greatly increase. The need and rationale for the change are set forth above in the “Background” section and sections A-D above. One case that goes to trial, only to be reversed due to a “hidden” lack of subject matter jurisdiction from the outset, represents a tremendous waste of judicial resources. The proposed change will allow lawyers and judges at the outset to achieve certainty about the citizenship of parties and then proceed accordingly.

The proposed change should not greatly increase the number of filings in federal courts or removals to federal court. Only situations where the citizenship of an uninvolved owner/shareholder is involved would have a different result. The proposed change only deals with citizenship of entities. The “complete diversity” requirement of Strawbridge v. Curtiss is retained. As a result, in situations where a member of an unincorporated association is an active participant in providing the services at issue (frequently professional services for various LLCs and LLPs), that individual may still be named as a defendant. If that naming destroys diversity because that individual is a citizen of the same state as the plaintiff, then the plaintiff’s choice of a state forum will remain. The only situation in which a plaintiff would lose the ability to keep a case in state court due to the proposed change would involve the fortuitous citizenship of an uninvolved member of an entity, and even that fortuitous citizenship must be different from that of the state in which the entity is organized or where the entity has its principal place of business.
While it is impossible to forecast the total number of “new” federal filings (including removed actions) that would become available, and thus might result, under the new proposal the impact should be minimal. Unincorporated associations with their principal place of business where they generally perform work (and thus impact potential plaintiffs), and which have as members citizens of that same state, will still have the same citizenship. The major change involves providing clarity concerning where to look – the now well-developed “principal place of business” and state of organization sites – and where not to look – eliminating the need to examine the citizenship of every record owner at the time the suit is filed.

A presumably accurate forecast of the proposed number of new filings and removals would require knowing or estimating the total number of cases currently being filed in state courts where (i) there is a lack of diversity solely because of the citizenship of a member of an unincorporated association and that member is a citizen of a state other than the principal place of business of the entity, and (ii) either the plaintiff would wish to file in federal court or the defendant would wish to remove (assuming that the forum state is not the defendant’s principal place of business). We are not aware of research from state court dockets that would reveal this type of information.

Removal experience under CAFA is instructive for some comparative purposes. From 2005 through 2008 the Federal Judicial Center published four annual interim reports on “The Impact of the Class Action Fairness Act of 2005 on the Federal Courts.” The final report of a two-phase study was published in April 2008, and concluded the statistical analysis of filings through June 2007 with prior years, including a year-by-year comparison with experience under CAFA and a comparison to the pre-CAFA year of 2001. This study was limited to class actions, and the authors note that while there was an increase in federal filings, “[m]uch of that increase was in federal question cases, especially labor class actions and class actions filed under federal consumer protection statutes.” Lee & Willging, “Impact” (April 2008) at 1. In fact, “about 86 percent of [of the increase in federal filings and removals from the pre-CAFA to post-CAFA periods studied] was accounted for by the increase in federal question class action filings and removals.” Lee & Willging, “Impact” (April 2008), at 3, n.2. This impact in federal question cases does not reflect an increase due to CAFA, and serves as a noteworthy reminder that increased federal filings pursuant to federal statutes providing federal jurisdiction will not be impacted by the current proposal to change the citizenship analysis for diversity jurisdiction. That is, increased filings under consumer protection statutes such as the Fair Debt Collection Practices Act, Fair Credit Reporting Act, and similar statutes will be unaffected.

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9 The “Judicial Caseload Indicators” for the twelve-month periods ending September 30 show that between September 30, 2014 and September 30, 2013, civil filings in United States District Courts increased 3.8 percent. The percent increase from 2010 to 2014 was 3.8 percent. http://www.uscourts.gov/Statistics/JudicialBusiness/2014/judicial-caseload-indicators.aspx#fn2

10 For purposes of this analysis this Report assumes that the jurisdictional amount can be satisfied at a pleading stage for a complaint or at the removal stage, if a defendant removes.

The April 2008 “Impact” study revealed two key points. First, there was an increase in class actions filed under CAFA’s expanded diversity jurisdictions. This was, of course, one of the express purposes of CAFA. The April 2008 “Impact” study notes that the number of cases varied widely jurisdiction to jurisdiction.

The “Impact” study also separately examined removed actions. As shown in the tables accompanying the study, “[a]lthough diversity class action removals, like filings, increased in the immediate post-CAFA period, the prevailing trend for such cases in both the pre-CAFA and post-CAFA periods is downward. . . . [D]iversity class action removals have been initiated in federal court in the last twelve months of the study period [2006-2007] at about the same rate as they were in the pre-CAFA period. CAFA appears to have temporarily increased the number of diversity class action removals to the federal courts, especially in comparison with the immediate pre-CAFA period, when removals of such cases were few. But in both the pre-CAFA and post-CAFA periods, the trend has been for fewer class actions to be removed to federal courts on the basis of diversity of citizenship jurisdiction.” Lee & Willging, “Impact” (April 2008), at 7. In short, following CAFA’s passage there was a temporary uptick in removals and then removals returned to pre-CAFA levels.

With the proposed change in diversity jurisdiction, one would not expect the type of increase in original filings created with CAFA. CAFA’s citizenship provisions were expressly crafted to increase diversity jurisdiction in a class action context and in response to concerns that a more uniform rule was needed. The diversity changes in the current proposal are more limited. Also significantly, the current proposal will still allow “local” disputes to be adjudicated “locally,” because where the unincorporated association has its principal place of business in a state and deals with others within that state, diversity jurisdiction will not exist. Similarly, if a member, shareholder, partner, or other stakeholder of an entity is non-diverse from a party on the other side of the case, and if that member or shareholder or partner or the like was sufficiently actively involved in the matter giving rise to the lawsuit, then naming the member, shareholder,

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12 The purpose section of CAFA expressly noted that: “Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are--

(A) keeping cases of national importance out of Federal court;

(B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and

(C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.”


13 A variety of reasons may be postulated for the return to pre-CAFA levels. Plaintiffs may have begun filing cases in federal court initially, thus obviating the need for removal. Or Plaintiffs desiring to litigate in state courts may have changed the mix of defendants named.
partner or the like would also defeat diversity. The only change occurs when a non-involved member, shareholder, partner, or the like happens to have the same citizenship as a party on the other side of the dispute.

Removal experience under the proposed statutory change may track that of CAFA. While there may be an initial increase in removals to federal court, the ability to craft a complaint within ethical bounds to still add non-diverse defendants and the fact that truly local disputes will likely remain local should avoid a long-term increase. The structure and purpose of CAFA would likely have resulted in a more significant prospect for removal, as one of the stated goals was to move multi-state actions filed in state courts to federal courts via the removal process.

**Summary of Potential Costs/Benefits**

Any analysis of the impact of the proposed change must not stop at attempting to “count new cases.” Under the present system, as shown by cases such as *Smoot, Tuck,* and *GMAC Commercial Credit LLC v. Dillard Department Stores* (all cited supra), the judicial resources that can be expended are huge when a case is improperly in federal court due to a misapprehension of the current jurisdictional rules. A mistake on the part of both parties can result in the appellate reversal of a case tried to a jury because lack of subject matter jurisdiction is an unwaivable defect. On the other side of the equation, one can predict that a substantial percentage of new cases that are filed or removed solely because of the new citizenship proposal for unincorporated entities will not result in the resources of a full jury trial being expended. In short, for every case that, like *Dillard,* results in an appellate reversal, multiple cases would have to be filed and resolved before the same level of resources expended is reached. One late reversal under the current system would take the same resources as multiple new filings made possible by the proposed change in the statute.

The current difference in treatment between corporations and unincorporated entities was defensible when (i) there were far few unincorporated entities being used, (ii) partnership and other unincorporated entity rules in the majority of states did not recognize the entity as distinct from its members, and (iii) entities could reasonably be expected to keep up with the citizenship of their individual members at all times. Today, every one of these considerations has changed. Unincorporated entities are chosen as the appropriate structure for businesses at an ever-increasing rate. The rules on the entity/partnership distinction have completely reversed, with the entity being recognized as separate from its individual members and capable of suing and being sued in model statutes enacted across the country. And increased communication to non-physical locations has increased substantially the difficulty of knowing “where” individual members are “citizens” in an increasingly mobile society. In short, the time to re-examine the citizenship rules has long since arrived.
Respectfully submitted,

Nancy Scott Degan  
Chair, ABA Section of Litigation  
August 2015
Appendix 1: Proposed Revision

Existing Provisions (No changes to § 1332(c)(1) and (2) are proposed except the addition of a semicolon at the end of (2) in lieu of a period.)

28 U.S.C. 1332(c)(1):

A corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of—

(A) every State and foreign state of which the insured is a citizen;

(B) every State and foreign state by which the insurer has been incorporated; and

(C) the State or foreign state where the insurer has its principal place of business;

and

28 U.S.C. 1332(c)(2):

The legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent; New Provisions

and

28 U.S.C. 1332(c)(3):

Any unincorporated association that has the capacity to sue or be sued as determined as set forth in Federal Rule of Civil Procedure 17(b) (including any amendments or revisions as may subsequently be made thereto), including without limitation an entity that is a general partnership, a limited partnership, a master limited partnership, a professional corporation, a limited company, a limited liability company, a professional limited liability company, a business trust, a union, or any other unincorporated association irrespective of name or designation, shall be deemed to be a citizen of every State and foreign state in or by which it has been organized and of the State or foreign state where it has its principal place of business without reference to the citizenship of each partner, shareholder, member, or beneficiary, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of—

(A) every State and foreign state of which the insured is a citizen;

(B) every State and foreign state by which the insurer has been incorporated; and

(C) the State or foreign state where the insurer has its principal place of business.
1. **Summary of Resolution(s).**

   The resolution requests that Congress change the definition of “citizenship” for purposes of 28 U.S.C. § 1332 to provide that all unincorporated business entities be treated in the same manner as corporations.

2. **Approval by Submitting Entity.**

   Approved by Section of Litigation Council on April 18, 2015.

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

   No.

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

   None.

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

   This is not a late report.

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

   Legislation has not yet been introduced.

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

   Coordinate concerning identification of appropriate contacts for planned submission to Congress once ABA Policy.

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

   None

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

   None.
10. Referrals.

   Business Law Section
   Judicial Division
   Standing Committee on the American Judicial System
   Tort Trial Insurance Practice Section

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

   Dennis Drasco
   Lum, Drasco & Positan LLC
   103 Eisenhower Parkway
   Roseland, NJ 07068
   973-228-6770
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   Gregory Hanthorn
   Jones Day
   1420 Peachtree Street NE, Suite 800
   Atlanta, GA 30309
   404-581-8425
   ghanthorn@jonesday.com

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

   Dennis Drasco and/or Greg Hanthorn, information above.
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EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution requests that Congress change the definition of “citizenship” for purposes of 28 U.S.C. § 1332 to provide that all unincorporated business entities be treated in the same manner as corporations.

2. Summary of the Issue that the Resolution Addresses

Currently, the definition of “citizenship” of unincorporated associations ignores that today (unlike when § 1332 was last amended in 1958) unincorporated associations are both widespread and generally recognized as separate entities capable of suing and being sued and distinct from their members and partners. Moreover, the current definition of “citizenship” can lead to waste of judicial time and effort, needless appellate review and even reversals even following jury verdicts and judgments, and related problems with determining the citizenship of unincorporated associations. Because unincorporated associations are currently treated as citizens of every state where any of their members, shareholders, partners, beneficiaries, etc., are citizens; there can be significant problems arising when determining whether to sue in federal court in the first instance and whether a case can be removed to federal court. Because the citizenship issue impacts subject matter jurisdiction, a wrong determination mandates a dismissal from the outset, no matter how long the proceedings have been pending or what stage has been reached. Subject matter jurisdiction issues are not waivable.

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

The proposed amendments to the statute will treat unincorporated associations in the same manner as corporations. For diversity of citizenship purposes, the association will be deemed to be a citizen of up to two places: (i) the state of organization and (ii) the association’s principal place of business. As with corporations, the citizenship of the individual members or partners would not be a factor.

4. Summary of Minority Views

The one potential, expected minority view is a concern that the amendment might result in more cases finding their way to federal courts. Yet, by replacing uncertainty with a more workable rule, the extreme judicial waste of cases being tried that would never have been filed in federal court can be substantially avoided. The avoidance of this waste alone may counterbalance any minimal increase in filings or removals. Moreover, the “complete diversity” rule will remain and is likely to lessen any potential, minimal increase in filings or removals.
RESOLVED, That the American Bar Association urges the federal government to adopt laws that protect patients and promote patient safety from defective medical products.

FURTHER RESOLVED, That the American Bar Association opposes legislation that limits and/or bans punitive damages for claims of patient harm allegedly caused by manufacturers of FDA-approved medical products or devices.
REPORT

For decades the ABA has participated in national discussions on the interrelationship between the healthcare professions and the legal system. The ABA has resolved to assure that patients continue to have access to the civil jury system in the nation’s courts and that they will also be awarded damages, as supported by evidence, without being subject to an arbitrary cap on actual or punitive damages.¹ This Resolution is consistent with and furthers these policies by opposing efforts to ban punitive damages for claims of patient harm allegedly caused by manufacturers of FDA-approved medical products or devices, as proposed by past, and likely to be reintroduced by future Congresses.²

The ABA House of Delegates first opposed caps on damages in 1978.³ Later, in 2006, there was discussion about proposed federal legislation to deny full compensation to individuals by imposition of arbitrary caps and to create a system of involuntary “health courts.” In response, the House passed a resolution that “[r]eaffirms opposition to legislation that places a dollar limit on recoverable damages that operates to deny full compensation to a plaintiff in a medical malpractice action, recognizes that the nature and extent of damages in a medical malpractice case are triable issues of fact (that may be decided by a jury) and should not be subject to formulas or standardized schedules, and opposes the creation of healthcare tribunals that would deny patients injured by medical negligence the right to request a trial by jury or the right to receive full compensation for their injuries.”⁴

On December 29, 2008, the ABA continued to advocate for patient rights and safety by sending letters to the House and Senate urging support for legislation to allow injured patients to hold negligent medical device manufacturers liable for damages for product related deaths and injuries in state courts under state laws.⁵

The Help Efficient, Accessible, Low-cost, Timely Healthcare (“HEALTH”) Act of 2011,⁶ was introduced in the 112th Congress, and had been introduced in previous Congresses in similar if not identical form, and given the ongoing controversy about health care reform can expected to be reintroduced in future Congresses. The HEALTH Act’s scope applies to the large realm of all healthcare related tort actions, not just medical negligence. It applies to any “health care lawsuit” which is broadly defined to include many claims against a number of institutions - not just providers - including hospitals and nursing homes, defective product claims against pharmaceutical companies and medical device corporations, and even bad faith claims against health insurers and HMOs. Additionally, “health care lawsuit” applies to any claim regarding the

¹ ABA Resolution 114 (Feb. 1986).
³ ABA Resolution 117 (Feb. 1978).
⁴ ABA Resolution 103 (Feb. 2006).
provision of health care goods or services “regardless of the theory of liability,” and thus, would apply to negligence and intentional tort causes of action.

The ABA continues to strongly advocate for patient’s safety and rights and allowing the jury system to promote and protect those rights.7 If adopted, the HEALTH’s Act provisions regarding its ban on punitive damages in defective product claims relating to FDA-approved products will run contrary to the American Bar Association’s longstanding policy to oppose caps on damages, including punitive damages which encourage responsible behavior by manufacturers of consumer products. This is because the HEALTH Act contains a complete ban on punitive damages for claims alleging a medical product caused the claimant's harm. The manufacturers or distributors of a medical product would receive that benefit of this ban on punitive damages if:

(1) that medical product “was subject to premarket approval, clearance, or licensure by the Food and Drug Administration with respect to the safety of the formulation or performance of the aspect of such medical product which caused the claimant's harm or the adequacy of the packaging or labeling of such medical product” and was “so approved, cleared, or licensed;” or
(2) where “such medical product is generally recognized among qualified experts as safe and effective with respect to the safety of the formulation or performance of the aspect of such medical product which caused the claimant's harm or the adequacy of the packaging or labeling of such medical product”8

The HEALTH Act caps punitive damages at $250,000 or twice the amount of compensatory damages – of which non-economic damages are also capped - whichever is greater.9 Therefore, while all defendants in “health care lawsuits” would get the benefit of the $250,000 cap on punitive damages, manufacturers and distributors of medical products would get the additional benefit of an almost complete ban on punitive damages in product liability cases involving their medical products in the event that their medical product received FDA-approval or was “generally recognized among qualified experts as safe and effective.” 10

Banning all punitive damages is poor legal policy and is also contrary to ABA’s existing policies. There is no justification to cap or limit punitive damages in any tort cases. Empirical studies have concluded that punitive damages are rarely awarded, are correlated to the plaintiff’s injuries and are reserved for the most egregious behavior.11 Additionally, there is no evidence

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8 H.R. 5, Section 106 (a)(i).
9 H.R. 5, Section 106 (b)(2). As early as 1995 the ABA opposed federal legislation that would have limited punitive damages to “sellers” of products absent conduct manifesting actual malice and with a punitive damages cap of $250,000. As here with the case of manufacturers, the ABA found that punitive damages in these cases promoted consumer safety. ABA Resolution 303 (Feb. 1995).
10 H.R. 5 allows for limited exception to ban on punitive damage awards primarily related to fraud in the FDA approval process. Sec. 106(c)(4).
that punitive damage awards are increasing, or that judges and juries are not fairly and properly awarding punitive damages.\textsuperscript{12}

Further, the deterrent effect and purpose of punitive damages is eliminated by capping or eliminating punitive damages.\textsuperscript{13} “Unless one wishes to ignore the literature, it is apparent that caps reduce the deterrent effect of the civil justice system, protect wrongdoers who cause harm, and transgress the most basic rights associated with civil justice, including the right to a jury trial.”\textsuperscript{14}

There is no justification to cap or limit punitive damages in tort cases, particularly in cases alleging defective consumer products. As a practical matter, not only are punitive damages only awarded in one percent of product liability actions in state courts,\textsuperscript{15} but furthermore, in the rare cases where punitive damages are awarded in product liability actions, their award serves an important deterrent role in ensuring that dangerous products are taken off the market. Research of punitive damages in product liability actions has shown that:

Punitive damages played a vital social policy role in discouraging firms from marketing dangerous products or failing to recall them. The vast majority of dangerous products have been recalled, modified, and redesigned by their manufacturers. Of the cases studied, as many as eighty-two percent of the defendants took some safety step to remedy the dangerous situation. Forty-three percent of the defendants took remedial steps prior to litigation. This is heartening but does not negate the need for punishment in situations in which firms had prior notice but did not correct the danger before injury ensued . . . In general, companies think twice about cutting corners on safety when faced with the prospect of indeterminate punitive damages.\textsuperscript{16}

The HEALTH Act’s ban on punitive damages for defective product claims caused by FDA-approved products evidences a misunderstanding of the role of punitive damages and product liability law. As an example, in claims alleging a manufacturing defect of an adulterated drug, the fact that the product design received FDA approval or is “generally recognized as safe” is entirely unrelated to the cause of action or whether corporate misconduct in the manufacturing defect would warrant a punitive damage award.

\textit{Monsters ”}, 47 \textsc{Rutgers L. Rev.} 975, 1009 (1995).
\textsuperscript{12} Theodore Eisenberg et al., \textit{Judges, Juries and Punitive Damages}, 3 \textsc{Journal of Empirical Legal Studies} 263, 293 (2006) (“We report evidence across 10 years and three major data sets that: (1) juries and judges award punitive damages in approximately the same ratio to compensatory damages, (2) little evidence of increasing levels of punitive awards exists, and (3) juries’ and judges’ tendencies to award punitive damages differs in bodily injury and no-bodily-injury cases.”)
\textsuperscript{13} Andrew Popper, \textit{Capping Incentives, Capping Innovation, Courting Disaster}, 60 \textsc{DePaul L. Rev.} 975, 997 (2011) (“It forces actors to consider the possibility of harm and injury associated with product or service failure. It pushes companies to optimize safety, within reasonable limits. This pressure is absent with a cap on liability.”)
\textsuperscript{14} \textit{Id.}
\textsuperscript{15} Only one percent of plaintiffs in product liability trials were awarded punitive damages in 2005. Thomas H. Cohen, \textit{Punitive Damage Awards in State Courts, 2005}, \textsc{Bureau of Justice Statistics}, (March 2011).
Moreover, adherence to government regulations is already relevant and considered in product liability cases. Under current tort law, any manufacturer in any industry, including a pharmaceutical or medical corporation, can defend an allegedly defective product by introducing evidence of its compliance with industry or government standards. However, mere compliance with an industry standard does not excuse what is otherwise culpable misconduct. The Restatement of Torts provides that:

a product's compliance with an applicable product safety statute or administrative regulation is properly considered in determining whether the product is defective with respect to the risks sought to be reduced by the statute or regulation, but such compliance does not preclude as a matter of law a finding of product defect.17

Similarly, there is no justification to assume that adherence to a government standard, such as FDA approval or clearance for a medical product, should completely eliminate the availability of punitive damages where there may otherwise be a finding of intentional or wrongful conduct that warrants an award of punitive damages. Indeed, in many product liability claims alleging a design defect or failure to warn defect in a medical product, the product was nearly always FDA-approved.

Certainly, defendants may continue to introduce evidence of their compliance with FDA rules and regulations as part of their defense, and judges and juries may consider such information in evaluating any award or amount of damages, but adherence to a government standard will not, nor should it, forgive a company of an award of punitive damages if that company is otherwise guilty of gross misconduct. This is especially true where the government’s approval process, itself, has been subject to widespread criticism.18

The consequences for specifically exempting FDA-approved products from punitive damages are particularly grave since these products inherently present the most serious risks of all consumer products and to the safety of patients. “While admittedly these products are socially useful, they also pose some of the greatest risks to human beings. Consider, for example, the widespread injuries that thousands of women suffered as a consequence of using the Dalkon Shield or DES, to name but two prescription products. Indeed, the level of potential risk from such products is one of the reasons they are so closely regulated.”19

There exist other examples of FDA-approved products where FDA’s regulatory review process proved inadequate in protecting the public from serious risks posed by a medical product.20 As summarized in a recent report from the Congressional Research Service:

Problems related to medical devices can have serious consequences for consumers. Defects in medical devices, such as artificial hips and pacemakers, have caused severe patient injuries and deaths. In 2006, FDA reported 116,086 device-related

20 Id. at 1348-49. The listed examples include Oraflex, Orcolon, Breast Implants, Aspirin warning labels, and Copper 7 IUD, among other medical products approved by the FDA.
injuries, 96,485 malfunctions, and 2,830 deaths; an analysis by the National Research Center for Women & Families claims there were 4,556 device-related deaths in 2009.  

Where there is corporate wrongdoing rising to the level of gross misconduct, an award of punitive damages should appropriately be considered and current ABA policy would support that submission to a jury. Yet, the HEALTH Act would forbid such an award in these cases.

In essence, a complete ban on punitive damages from government-approved products represents poor public policy and highlights a misunderstanding of the purpose of punitive damages and product liability laws. The consequences of banning punitive damages in medical product liability actions is particularly troubling given the risks of these particular consumer products and the history at the FDA to inadequately protect public health in its review process of particular medical products. In such case, punitive damages serve as an important deterrent against gross corporate misconduct and a safeguard to better ensure the safety of medical products on the market.

Furthermore, the HEALTH Act’s ban on punitive damages violates existing ABA policies regarding the availability of punitive damages in medical liability cases. The ABA has previously concluded that there is no justification to limit or ban punitive damages for specific sets of defendants. In the 1986 ABA Resolution, the ABA concluded that, “[n]o justification exists for exempting medical malpractice actions from the rules of punitive damages applied in tort litigation to deter gross misconduct.”

While the 1986 Resolution was focused on punitive damages award in medical malpractice actions against healthcare providers -- which as explained above are not the type of cases implicated by the HEALTH Act’s ban on punitive damages for FDA-approved products -- it is clear that the ABA’s policy implied application to apply to all tort and personal injury causes of action.

The 1986 Resolution relied upon the report of the Special Committee on Medical Professional Liability. This Special Committee Report recognized that the recommended policy against limits on punitive damages applies broadly, not just medical malpractice causes of action. The Special Committee found that:

The purpose of punitive damages is to deter gross wrongful conduct. There has been no justification shown for eliminating those damages when the gross misconduct occurs in the delivery of health care services, and there, this committee opposes treating medical malpractice defendant differently than any other wrongdoer accused of acts of gross misconduct. . . .

In passing the 1986 Resolution, the ABA has affirmed the purpose and intent of punitive damages and has shown its unwillingness to cap or eliminate the award of punitive damages. The

Special Committee Report stated, “This committee emphasizes that punitive or exemplary damages are reserved for the rare situation in which a physician – or any other defendant in a tort action – has committed willful wrongs of such a heinous nature that the punishment is appropriate.”

Additionally, the ABA has previously recognized that punitive damages are particularly important in the cases alleging corporate wrongdoing, since traditional criminal punishments for reprehensible conduct is not available in product liability claims. In the ABA’s 1987 Report of the Action Commission to Improve the Tort Liability System, the Commission found the following in making its recommendations:

From the standpoint of tort theory, punitive damages express the full measure of societal outrage and assure the appropriate deterrent effect in cases where a defendant’s conduct is outside the bounds of civilized behavior. Typically, there is no effective criminal remedy to complement civil redress. Hence, punitive damages traditionally have served the important function of ensuring a measure of punishment for essentially private unlawful conduct that is commensurate with the antisocial nature of the action.

The ABA’s prior position is well founded, but particularly for product liability claims. It is impossible for a corporation to face criminal prosecution, and there is not criminal remedy for most patients injured by a defective medical product. Indeed, for many of these cases an award of punitive damages may be the only means to punish a corporation for any willful misconduct. If anything, the availability of punitive damages in allegations of corporate wrongdoing deserves special protection, the exact opposite of the limits offered by the HEALTH Act.

While the ABA has previously recommended some types of reforms to punitive damage awards, none of those reforms are remotely correlated to the HEALTH Act’s ban on punitive damages. In the 1987 Report, the ABA recommended other reforms to punitive damage awards, such as altering the standard of proof in awarding punitive damages and implementing pre-trial procedures to weed out frivolous claims for punitive damages. However, the ABA has never endorsed – as discussed above previously, the ABA has in fact opposed - any proposal that limits or bans punitive damages.

Such statements readily acknowledge that questions of availability and amount of punitive damages properly rest with a jury under the normal judicial oversight of the judge. Bans on punitive damages, as proposed in the HEALTH Act, would take these decisions away from juries and judges, fundamentally altering the inherent purpose and effect of punitive damages in the American judicial system.

**Conclusion**

The ABA recognizes that availability of punitive damages serves the purpose of deterring gross wrongful conduct, regardless of the type of defendant or regulatory approval of their

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23 In 1985 then-ABA President William W. Falsgraf appointed this Commission, chaired by Robert B. McKay. It was charged with examining all aspects of the tort liability system.
25 See ABA Resolution 120D (Aug. 1987) implementing some of these recommendations.
product. Without question, eliminating punitive damages against pharmaceutical and medical device corporations in product liability claims would allow such corporations to avoid the deterrent purpose of punitive damages. Indeed, in cases such as medical devices, where patient safety is at stake, and when awards of punitive damages are rare for product liability cases, there is no justification for legislation to shield wrongful conduct or limit the jury’s and court’s ability to deter such conduct.

The Standing Committee on Medical Professional Liability requests the House of Delegates to adopt the resolution herein.

Respectfully submitted,

Howard Wall, Chair
Standing Committee on Medical Professional Liability
August 2015
GENERAL INFORMATION FORM

Submitting entity: Standing Committee on Medical Professional Liability
Submitted by: Howard Wall, Chair, Standing Committee on Medical Professional Liability

1. Summary of Recommendation.

The American Bar Association supports patient safety. The ABA further opposes any legislation limiting or banning punitive damages for claims of patient harm allegedly caused by manufacturers of FDA-approved medical devices.

2. Approval by Submitting Entity.

The proposed resolution has been approved by the Medical Professional Liability Standing Committee via electronic balloting on May 4, 2015.

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

Previous resolutions have dealt with different areas of broad policy against limiting punitive damages and on general support of legislation that protects patients. This resolution builds on existing ABA policy particularly 1978 and 2006 resolutions opposing limits on damages and fair compensation for persons in medical malpractice actions, as well as 1995 and 2003 policies regarding regulation of product liability law.

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

The proposed recommendation will supplement the following American Bar Association policies:


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

There are numerous advocates seeking national changes to torts involving medical device manufacturers. We strongly believe a form of H.R. 5 will be introduced in Congress and the ABA should be ready to oppose bans on punitive damages as to wrongful conduct of medical device manufacturers.

6. Status of Legislation. (If applicable.)

See #5 above.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.
The Standing Committee and interested sections will work closely with our Government Affairs Office to oppose legislation that may be introduced in the next Congress.

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

There are no direct or indirect costs to the Association anticipated as a result of its adoption of this Resolution as ABA policy.

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

Members of the Standing Committee represent all stakeholders in healthcare claims, as counsel for plaintiffs and defendants, including insurance companies. We are not aware of any potential conflicts of interest related to this Resolution.

10. **Referrals.**

Referral is being made to all Sections, Divisions, and interested Committees, especially:

- Health Law
- Litigation
- Tort Trial and Insurance Practice
- Commission on Law and Aging

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

Howard Wall, Chair  
Executive Vice President & Chief Administrative Officer  
Regional Care Hospital Partners, Inc.  
103 Continental Place, Suite 200  
Brentwood, Tennessee 37027  
Direct: 615-844-9871  
howard.wall@regionalcare.net

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

Laura Sharp  
The Sharp Firm  
1617 Northwood Road  
Austin, TX 78703
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

The American Bar Association supports patient safety. In so doing, it opposes efforts, by way of federal legislation, that would limit or ban punitive damages for claims of patient harm allegedly caused by manufacturers of FDA-approved medical devices.

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

In recent Congresses, as part of the ongoing debate over accessibility and cost of health care, bills have been proposed to place limits on what persons may recover in medical malpractice cases. Included have been provisions to limit punitive damages against manufacturers for medical products and devices that have received FDA approval. This is despite evidence that punitive damages promote patient safety as well as shortcomings in the FDA approval process. This resolution will allow the ABA to oppose such legislation, consistent with our other ABA approved policies on medical malpractice liability.

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

This Resolution will specifically oppose legislation that would limit or ban punitive damages for manufacturers of FDA approved medical devices.

4. **Summary of Minority Views**

No minority views or opposition have been identified at this time.
RESOLVED, That the American Bar Association House of Delegates concurs in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated August 2015 to the following ABA Standards and Rules of Procedure for Approval of Law Schools:

1. Definition (17) and Standard 106 [Separate Locations and Branch Campuses]
2. Standard 105 [Acquiescence for Major Change in Program or Structure] and Rule 29(a) [Application for Acquiescence in Major Change]
4. Standard 304 [Simulation Courses and Law Clinics]
5. Standard 305(e)(6) and Interpretation 305-3 [Field Placements and Other Study Outside the Classroom]
6. Interpretation 305-2 [Field Placements and Other Study Outside the Classroom]
7. Standard 311(a) and Interpretation 311-1 [Academic Program and Academic Calendar]
8. Standard 311(f) [Academic Program and Academic Calendar] and Standard 308(a) [Academic Standards]
9. Interpretation 311-4 [Academic Program and Academic Calendar]
10. Standard 502(b)(2) [Educational Requirements]
11. Interpretation 503-3 [Admission Test]
12. Standard 505(b) [Granting of J.D. Degree Credit for Prior Law Study]
13. Rule 27 [Application for Provisional or Full Approval] and Rule 28 [Reapplication for Provisional or Full Approval]
14. Rule 29(b-g) [Application for Acquiescence in Major Change]
15. Rule 30 [Major Changes Requiring a Reliable Plan]
1. DEFINITION (17) AND STANDARD 106

Definition (17)

“Separate location” means a physical location within the United States: (1) at which the law school offers J.D. degree courses, (2) where a student may earn more than sixteen credit hours of the school’s program of legal education, and (3) that is not in reasonable proximity to the law school’s main location.

Standard 106. SEPARATE LOCATIONS AND BRANCH CAMPUSSES

(a) A law school that offers a separate location shall provide:

(1) Full-time faculty adequate to support the curriculum offered at the separate location and who are reasonably accessible to students at the separate location;

(2) Library resources and staff that are adequate to support the curriculum offered at the separate location and that are reasonably accessible to the student body at the separate location;

(3) Academic advising, career services and other student support services that are adequate to support the student body at the separate location and that are reasonably equivalent to such services offered to similarly situated students at the law school’s main location;

(4) Access to co-curricular activities and other educational benefits adequate to support the student body at the separate location; and

(5) Physical facilities and technological capacities that are adequate to support the curriculum and the student body at the separate location.

(b) In addition to the requirements of section (a), a branch campus must:

(1) Establish a reliable plan that demonstrates that the branch campus is reasonably likely to be in substantial compliance with each of the Standards within three years of the effective date of acquiescence as required by Rule 22;

(2) Comply with instructional requirements and responsibilities as required by Standard 403(a) and Standard 404(a); and
(3) Offer reasonably comparable opportunities for access to the law school’s program of legal education, courses taught by full-time faculty, student services, co-curricular programs, and other educational benefits as required by Standard 311.

(c) A law school is not eligible to establish a separate location until at least four years after the law school is granted initial full approval.

Interpretation 106-1
“Separate location” and “branch campus” as used in this Standard are defined terms that apply only to locations at which a law school offers more than sixteen credits of the program of legal education.

Interpretation 106-1–106-2
A law school with more than one location may have one dean for all locations.

2. STANDARD 105 AND RULE 29(a)

Standard 105. ACQUIESCENCE FOR MAJOR CHANGE IN PROGRAM OR STRUCTURE

(a) Before a law school makes a major change in its program of legal education or organizational structure, it shall obtain the acquiescence of the Council for the change. A major change in program or structure that requires application for acquiescence includes:

(1) Acquiring another law school, program, or educational institution;

(2) Acquiring or merging with another university by the parent university where it appears that there may be substantial impact on the operation of the law school;

(3) Transferring all, or substantially all, of the program of legal education or assets of the approved law school to another law school or university;

(4) Merging or affiliating with one or more approved or unapproved law schools;

(5) Merging or affiliating with one or more universities;

(6) Materially modifying the law school’s legal status or institutional relationship with a parent institution;

(7) A change in control of the school resulting from a change in ownership of the school or a contractual arrangement;

(8) A change in the location of the school that could result in substantial changes in the faculty, administration, student body, or management of the school;
(9) Establishing a branch campus;

(10) Establishing a separate location;

(11) A significant change in the mission or objectives of the law school; and

(12) The addition of courses or programs since the most recent AC period, such as that represent a significant departure from existing offerings or method of delivery since the last most recent accreditation period site evaluation, including combined undergraduate and J.D. programs, such as 2/4, 4/2 programs, and programs leading to a J.D. and a first-degree program at foreign institution; instituting a new full-time or part-time division; or changing from a full-time to a part-time program or from a part-time to a full-time program;

(13) The addition of a permanent location at which the law school is conducting a teach-out for students at another law school that has ceased operating before all students have completed their program of study;

(14) Contracting with an educational entity that is not certified to participate in Title IV, HEA programs, that would permit a student to earn 25 percent or more of the course credits required for graduation from the approved law school;

(15) Establishing a new or different program leading to a degree other than the J.D. degree;

(16) A change in program length measurement from clock hours to credit hours; and

(17) A substantial increase in the number of clock or credit hours required for graduation.

(b) The Council shall grant acquiescence only if the law school demonstrates that the change will not detract from the law school’s ability to remain in compliance with the Standards.

Rule 29: Application for Acquiescence in Major Change

(a) Major changes requiring application for acquiescence include:

(1) Acquiring another law school, program, or educational institution;

(2) Acquiring or merging with another university by the parent university where it appears that there may be substantial impact on the operation of the law school;

(3) Transferring all, or substantially all, of the program of legal education or assets of the approved law school to another law school or university;

(4) Merging or affiliating with one or more approved or unapproved law schools;
(5) Merging or affiliating with one or more universities;

(6) Materially modifying the law school’s legal status or institutional relationship with a parent institution;

(7) A change in control of the law school resulting from a change in ownership of the law school or a contractual arrangement;

(8) A change in the location of the law school that could result in substantial changes in the faculty, administration, student body, or management of the law school;

(9) Establishing a branch campus;

(10) Establishing a separate location other than a branch campus;

(11) A significant change in the mission or objectives of the law school;

(12) The addition of courses or programs since the most recent AC period, such as that represent a significant departure from existing offerings or method of delivery since the last most recent accreditation period site evaluation, including combined undergraduate and J.D. programs, such as 2/4, 4/2 programs, and programs leading to a J.D. and a first-degree program at foreign institution; instituting a new full-time or part-time division; or changing from a full-time to a part-time program or from a part-time to a full-time program;

(13) The addition of a permanent location at which the law school is conducting a teach-out for students at another law school that has ceased operating before all students have completed their program of study;

(14) Contracting with an educational entity that is not certified to participate in Title IV, HEA programs, that would permit a student to earn 25 percent or more of the course credits required for graduation from the approved law school;

(15) Establishing a new or different program leading to a degree other than the J.D. degree;

(16) A change in program length measurement from clock hours to credit hours; and

(17) A substantial increase in the number of clock or credit hours required for graduation.

3. STANDARD 205 AND STANDARD 206

Standard 205. NON-DISCRIMINATION AND EQUALITY OF OPPORTUNITY
(a) A law school shall not use admission policies or take other action to preclude admission of applicants or retention of students on the basis of race, color, religion, national origin, gender, gender identity, sexual orientation, age, or disability, or any other characteristic not relevant to the applicant’s capability to satisfactorily complete the school’s program of legal education.

(b) A law school shall foster and maintain equality of opportunity for students, faculty, and staff, without discrimination or segregation on the basis of race, color, religion, national origin, gender, gender identity, sexual orientation, age, disability, or any other characteristic not relevant to the law school’s capability to operate in compliance with the Standards and carry out its program of legal education.

(c) This Standard does not prevent a law school from having a religious affiliation or purpose and adopting and applying policies of admission of students and employment of faculty and staff that directly relate to this affiliation or purpose so long as (1) notice of these policies has been given to applicants, students, faculty, and staff before their affiliation with the law school, and (2) the religious affiliation, purpose, or policies do not contravene any other Standard, including Standard 405(b) concerning academic freedom. These policies may provide a preference for persons adhering to the religious affiliation or purpose of the law school, but may not be applied to use admission policies or take other action to preclude admission of applicants or retention of students on the basis of race, color, religion, national origin, gender, gender identity, sexual orientation, age, or disability, or any other characteristic not relevant to the applicant’s or student’s capability to satisfactorily complete the school’s program of legal education. This Standard permits religious affiliation or purpose policies as to admission, retention, and employment only to the extent that these policies are protected by the United States Constitution. It is administered as though the First Amendment of the United States Constitution governs its application.

(d) Non-discrimination and equality of opportunity in legal education includes equal employment opportunity. A law school shall communicate to every employer to whom it furnishes assistance and facilities for interviewing and other placement services the school’s firm expectation that the employer will observe the principles of non-discrimination and equality of opportunity on the basis of race, color, religion, national origin, gender, gender identity, sexual orientation, age, or disability, or any other characteristic not relevant to the student’s capability in regard to hiring, promotion, retention and conditions of employment.

Interpretation 205-1
A law school may not require applicants, students, faculty or employees to disclose their sexual orientation, although they may provide opportunities for them to do so voluntarily.

Interpretation 205-2
So long as a school complies with Standard 205(c), the prohibition concerning sexual orientation does not require a religiously affiliated school to act inconsistently with the essential elements of its religious values and beliefs. For example, Standard 205(c) does not require a school to recognize or support organizations whose purposes or objectives with respect to sexual orientation conflict with the essential elements of the religious values and beliefs held by the school.
Interpretation 205-3
Standard 205(d) applies to all employers, including government agencies, to which a school furnishes assistance and facilities for interviewing and other placement services. However, this Standard does not require a law school to implement its terms by excluding any employer unless that employer discriminates unlawfully.

Interpretation 205-4
The denial by a law school of admission to a qualified applicant is treated as made upon the basis of race, color, religion, national origin, gender, gender identity, sexual orientation, age, or disability, or any other characteristic not relevant to the applicant’s capability to satisfactorily complete the school’s program of legal education if the basis of denial relied upon is an admission qualification of the school that is intended to prevent the admission of applicants on the basis of race, color, religion, national origin, gender, gender identity, sexual orientation, age, or disability, or any other characteristic not relevant to the applicant’s capability to satisfactorily complete the school’s program of legal education though not purporting to do so.

Interpretation 205-5
The denial by a law school of employment to a qualified individual is treated as made upon the basis of race, color, religion, national origin, gender, gender identity, sexual orientation, age, or disability, or any other characteristic not relevant to the law school’s capability to operate in compliance with the Standards and carry out its program of education if the basis of denial relied upon is an employment policy of the school that is intended to prevent the employment of individuals on the basis of race, color, religion, national origin, gender, gender identity, sexual orientation, age, or disability, or any other characteristic not relevant to the law school’s capability to operate in compliance with the Standards and carry out its program of legal education though not purporting to do so.

Standard 206. DIVERSITY AND INCLUSION

(a) Consistent with sound legal education policy and the Standards, a law school shall provide an environment in which diversity and inclusion are welcomed and embraced. A law school shall demonstrate a commitment to diversity and inclusion by concrete action by providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.

(b) Consistent with sound educational policy and the Standards, a law school shall demonstrate by concrete action a commitment to diversity and inclusion by having a faculty and staff that are diverse with respect to gender, race, and ethnicity.

Interpretation 206-1
The requirement of a constitutional provision or statute that purports to prohibit consideration of gender, race, ethnicity, or national origin in admissions or employment decisions is not a justification for a school’s non-compliance with Standard 206. A law school that is subject to such constitutional or statutory provisions would have to demonstrate the commitment required
by Standard 206 by means other than those prohibited by the applicable constitutional or statutory provisions.

Interpretation 206-2
In addition to providing full opportunities for the study of law and the entry into the legal profession by members of underrepresented groups, the enrollment of a diverse student body. Creating a diverse and inclusive law school environment promotes cross-cultural understanding, helps break down racial, ethnic, and gender, and other stereotypes, and enables students to better understand persons of different backgrounds. It also enables faculty and staff to carry out the law school’s program of education in a setting that invites open and constructive dialogue among individuals who are diverse with respect to characteristics that include, without limitation, race, color, religion, national origin, gender, gender identity, sexual orientation, age, and disability. The forms of concrete action required by a law school to satisfy the obligations of this Standard are not specified. If consistent with applicable law, a law school may use race and ethnicity in its admission process to promote diversity and inclusion. The determination of a law school’s satisfaction of such obligations is based on the totality of the law school's actions and the results achieved. The commitment to providing full educational opportunities for members of underrepresented groups typically includes a special concern for determining the potential of these applicants through the admission process, special recruitment efforts, and programs that assist in meeting the academic and financial needs of many of these students and that create a favorable environment for students from underrepresented groups.

Interpretation 206-3
While the forms of concrete action to demonstrate a law school’s commitment to diversity and inclusion under this Standard may vary, indicators that constitute concrete action include, without limitation: recruitment, hiring and retention efforts for students, faculty and staff; law school programming and curricula; dissemination of information regarding opportunities for underrepresented groups; commitment of scholarship and other resources; periodic assessment of conditions and progress toward diversity and inclusion at a law school; designated diversity groups and personnel; mentoring opportunities; and pro bono and externship opportunities. The determination of a law school’s satisfaction of its obligations under this Standard is based on the totality of the law school’s actions and the results achieved.

4. STANDARD 304

Standard 304. SIMULATION COURSES AND LAW CLINICS

(a) A simulation course provides substantial experience not involving an actual client, that (1) is reasonably similar to the experience of a lawyer advising or representing a client or engaging in other lawyering tasks in a set of facts and circumstances devised or adopted by a faculty member, and (2) includes the following:

(i) direct supervision of the student's performance by the faculty member;
(ii) opportunities for performance, feedback from a faculty member, and self-evaluation; and

(iii) a classroom instructional component.

(b) A law clinic provides substantial lawyering experience that (1) involves advising or representing one or more actual clients or serving as a third-party neutral, and (2) includes the following:

(i) advising or representing a client;

(ii) direct supervision of the student’s performance by a faculty member;

(iii) opportunities for performance, feedback from a faculty member, and self-evaluation; and

(iv) a classroom instructional component.

5. STANDARD 305(e)(6) AND INTERPRETATION 305-3

Standard 305. FIELD PLACEMENTS AND OTHER STUDY OUTSIDE THE CLASSROOM

(a) A law school may grant credit toward the J.D. degree for courses that involve student participation in studies or activities in a format that does not involve attendance at regularly scheduled class sessions, including courses approved as part of a field placement program, moot court, law review, and directed research.

(b) Credit granted for such a course shall be commensurate with the time and effort required and the anticipated quality of the educational experience of the student.

(c) Each student’s educational achievement in such a course shall be evaluated by a faculty member. When appropriate a school may use faculty members from other law schools to supervise or assist in the supervision or review of a field placement program.

(d) The studies or activities shall be approved in advance and periodically reviewed following the school’s established procedures for approval of the curriculum.

(e) A field placement program shall include:

(1) a clear statement of its goals and methods, and a demonstrated relationship between those goals and methods and the program in operation;
(2) adequate instructional resources, including faculty teaching in and supervising the
program who devote the requisite time and attention to satisfy program goals and are
sufficiently available to students;

(3) a clearly articulated method of evaluating each student’s academic performance
involving both a faculty member and the site supervisor;

(4) a method for selecting, training, evaluating, and communicating with site supervisors;

(5) for field placements that award three or more credit hours, regular contact between
the faculty supervisor or law school administrator and the site supervisor to assure the
quality of the student educational experience, including the appropriateness of the
supervision and the student work;

(6) a requirement that each student has successfully completed sufficient prerequisites or
receives sufficient training to assure the quality of the student educational experience in
the field placement program; instruction equivalent to 28 credit hours toward the J.D.
degree before participation in the field placement program; and

(7) opportunities for student reflection on their field placement experience, through a
seminar, regularly scheduled tutorials, or other means of guided reflection. Where a
student may earn three or more credit hours in a field placement program, the opportunity
for student reflection must be provided contemporaneously.

(f) A law school that has a field placement program shall develop, publish, and communicate to
students and site supervisors a statement that describes the educational objectives of the program.

Interpretation 305-1
Regular contact may be achieved through in-person visits or other methods of communication
that will assure the quality of the student educational experience.

Interpretation 305-2
A law school may not grant credit to a student for participation in a field placement program for
which the student receives compensation. This Interpretation does not preclude reimbursement
of reasonable out-of-pocket expenses related to the field placement.

Interpretation 305-3
To qualify as an experiential course under Standard 303, a field placement must also comply
with the requirements set out in Standard 303(a)(3).

6. INTERPRETATION 305-2

Interpretation 305-2
A law school may not grant credit to a student for participation in a field placement program for
which the student receives compensation. A law school that grants credit for a field placement
for which a student receives compensation must demonstrate sufficient control of the student experience to ensure that the requirements of the Standard are met. The law school must maintain records to document the steps taken to ensure compliance with the Standard. This Interpretation does not preclude reimbursement of reasonable out-of-pocket expenses related to the field placement.

7. STANDARD 311(a) AND INTERPRETATION 311-1,
8. STANDARD 311(f) AND STANDARD 308(a), and
9. INTERPRETATION 311-4

Standard 311. ACADEMIC PROGRAM AND ACADEMIC CALENDAR

(a) A law school shall have an academic year of not fewer than 140 days on which classes and examinations are regularly scheduled in the law school, extending into not fewer than eight calendar months. The law school shall provide adequate time for reading periods and breaks, but such time does not count toward the 140-day academic year requirement.

(b) A law school shall require, as a condition for graduation, successful completion of a course of study of not fewer than 83 credit hours. At least 64 of these credit hours shall be in courses that require attendance in regularly scheduled classroom sessions or direct faculty instruction.

(e) A law school shall require that the course of study for the J.D. degree be completed no earlier than 24 months and, except in extraordinary circumstances, no later than 84 months after a student has commenced law study at the law school or a law school from which the school has accepted transfer credit.

(d) A law school shall not permit a student to be enrolled at any time in coursework that exceeds 20 percent of the total credit hours required by that school for graduation.

(f) Credit for a J.D. degree shall only be given for course work taken after the student has matriculated in a law school. A law school may not grant credit toward the J.D. degree for work taken in a pre-admission program.

(g) A law school shall adopt, publish, and adhere to a written policy requiring regular class attendance. [MOVED TO STANDARD 308(a)]

Interpretation 311-1
A law school may not count more than five class days each week toward the 140-day requirement.

Interpretation 311-2-1
(a) In calculating the 64 credit hours of regularly scheduled classroom sessions or direct faculty instruction for the purpose of Standard 311(b) (a), the credit hours may include:
   (1) Credit hours earned by attendance in regularly scheduled classroom sessions or direct
(b) In calculating the 64 credit hours of regularly scheduled classroom sessions or direct faculty instruction for the purpose of Standard 311(b), (a), the credit hours shall not include any other coursework, including, but not limited to:

1. Credit hours earned through field placements and other study outside of the classroom in compliance with Standard 305;
2. Credit hours earned in another department, school, or college of the university with which the law school is affiliated, or at another institution of higher learning;
3. Credit hours earned for participation in co-curricular activities such as law review, moot court, and trial competition; and
4. Credit hours earned by participation in studies or activities in a country outside the United States in compliance with Standard 307 for studies or activities that are not law-related.

Interpretation 311-3

Whenever a student is permitted on the basis of extraordinary circumstances to exceed the 84-month program limitation in Standard 311(c), (b), the law school shall place in the student’s file a statement signed by an appropriate law school official explaining the extraordinary circumstances leading the law school to permit an exception to this limitation. Such extraordinary circumstances, for example, might include an interruption of a student’s legal education because of an illness, family exigency, or military service.

Interpretation 311-4

For purposes of Standard 311(c), the time for determining the commencement of law study is ordinarily the time when a student commences law study at any institution. For example, if a law school accepts transfer credit from another institution the time begins when the student commenced study at the law school from which the transfer credit is accepted. If a law school accepts a student grants credit for prior law study who has completed law studies at a law school outside the United States as permitted under Standard 505(c), only the time commensurate with the amount of credit given counts toward the length of study requirements of Standard 311(c). For example, if a student has studied for three years at a law school outside the United States and is granted one year of credit toward the J.D. degree, the amount of time that counts toward the 84 month requirement is one year. The student has 72 months in which to complete law school in the United States.

Standard 308. ACADEMIC STANDARDS

(a) A law school shall adopt, publish, and adhere to sound academic standards, including those for regular class attendance, good standing, academic integrity, graduation, and dismissal.
(b) A law school shall adopt, publish, and adhere to written due process policies with regard to taking any action that adversely affects the good standing or graduation of a student.

10. STANDARD 502(b)(2)

Standard 502. EDUCATIONAL REQUIREMENTS

(a) A law school shall require for admission to its J.D. degree program a bachelor’s degree that has been awarded by an institution that is accredited by an accrediting agency recognized by the United States Department of Education.

(b) Notwithstanding subsection (a), a law school may also admit to its J.D. degree program:

1) an applicant who has completed three-fourths of the credits leading to a bachelor's degree as part of a bachelor's degree/J.D. degree program if the institution is accredited by an accrediting agency recognized by the United States Department of Education; and

2) a graduate of an institution outside the United States if the law school assures that the quality of the program of legal education of that institution is equivalent to that of institutions accredited by an accrediting agency recognized by the United States Department of Education.

(c) In an extraordinary case, a law school may admit to its J.D. degree program an applicant who does not satisfy the requirements of subsections (a) or (b) if the applicant’s experience, ability, and other qualifications clearly demonstrate an aptitude for the study of law. For every such admission, a statement of the considerations that led to the decision shall be placed in the admittee’s file.

(d) Within a reasonable time after a student registers, a law school shall have on file the student’s official transcripts verifying all academic credits undertaken and degree(s) conferred.

Interpretation 502-1
Official transcript means: 1) a paper or electronic transcript certified by the issuing institution and delivered directly to the law school; or 2) a paper or electronic transcript verified by a third-party credential assembly service and delivered directly to the law school. With respect to electronic copies, it is sufficient for transcripts to be maintained at the law school or off-site by a third-party provider as long as the law school has access to the documents on demand.

Interpretation 502-2
The official transcripts for any student admitted as a transfer student shall include verification of any academic credits undertaken at any other law school attended.
11. INTERPRETATION 503-3

Interpretation 503-3
(a) It is not a violation of this Standard for a law school to admit no more than 10% of an entering class without requiring the LSAT. Applicants admitted under this Interpretation must meet the following conditions:

(1) Students in an undergraduate program of the same institution as the J.D. program; and/or

(2) Students seeking the J.D. degree in combination with a degree in a different discipline. (b) Applicants admitted under subsection (a) must meet the following conditions:

(a) Scored at or above the 85th percentile on the ACT, or SAT, for purposes of subsection (a)(1), or for purposes of subsection (a)(2), scored at or above the 85th percentile on the GRE or GMAT; and

(b) Ranked in the top 10% of their undergraduate class through six semesters of academic work, or achieved a cumulative GPA of 3.5 or above through six semesters of academic work.

12. STANDARD 505(b)

Standard 505. GRANTING OF J.D. DEGREE CREDIT FOR PRIOR LAW STUDY

(a) A law school may admit a student and grant credit for courses completed at another law school approved by the Council if the courses were undertaken as a J.D. degree student.

(b) A law school may admit a student and grant credit for courses completed at a law school in the United States that is not approved by the Council if the unapproved law school has been granted the power to confer the J.D. degree by the appropriate governmental authority in the unapproved law school’s jurisdiction, or if graduates of the unapproved law school are permitted to sit for the bar examination in the jurisdiction in which the unapproved law school is located, provided that:

(1) the courses were undertaken as a J.D. degree student; and

(2) the law school would have granted credit toward satisfaction of J.D. degree requirements if earned at the admitting school.

(c) A law school may admit a student and grant credit for courses completed at a law school outside the United States if the admitting law school would have granted credit towards satisfaction of J.D. degree requirements if earned at the admitting school.
(d) A law school may grant credit toward a J.D. degree to a graduate of a law school in a country outside the United States for credit hours earned in an LL.M. or other post-J.D. program it offers if:

(1) that study led to successful completion of a J.D. degree course or courses while the student was enrolled in a post-J.D. degree law program; and

(2) the law school has a grading system for LL.M. students in J.D. courses that is comparable to the grading system for J.D. degree students in the course.

(e) A law school that grants credit as provided in Standard 505(a) through (d) may award a J.D. degree to a student who successfully completes a course of study that satisfies the requirements of Standard 311 and that meets all of the school’s requirements for the awarding of the J.D. degree.

(f) Credit hours granted pursuant to subsection (b) through (d) shall not, individually or in combination, exceed one-third of the total required by the admitting school for its J.D. degree.

13. RULE 27 AND RULE 28

Rule 27: Application for Provisional or Full Approval

(a) A law school seeking provisional or full approval shall file with the Managing Director a written notice of intent to seek approval, submit its application to the Managing Director after the beginning of fall term classes but no later than October 15 in the academic year in which the law school is seeking approval.

(1) The notice shall be filed no later than March 15th in the academic year prior to the academic year in which the law school will apply for approval and shall indicate the law school’s preference for a fall or spring site evaluation visit. If the law school is seeking a site evaluation in the fall academic term it shall also file with the Managing Director, during the month of March of the preceding academic year, a written notice of its intent to do so.

(2) Upon receipt of written notice of a law school’s intent to seek provisional or full approval, the Managing Director shall arrange for a site evaluation as provided under Rule 5.

(3) A law school may not apply for provisional approval until it has completed the first full academic year of operating a full-time program of legal education.

(2)(4) A provisionally approved law school may apply for full approval no earlier than two years after the date that provisional approval was granted.
Upon notice to the Managing Director of its intent to seek provisional approval, a law school seeking provisional approval shall comply with Standard 102(f) regarding communication of its status.

(b) The application for provisional or full approval is due at least eight weeks prior to the scheduled site evaluation visit and must contain:

1. A letter from the dean certifying that the law school has completed all of the requirements for seeking provisional or full approval or that the law school seeks a variance from specific requirements of the Standards and that the law school has obtained the concurrence of the president in the application;

2. All completed forms and questionnaires, as adopted by the Council;

3. In the case of a law school seeking provisional approval, a copy of a feasibility study that evaluates the nature of the educational program and goals of the law school, the profile of the students who are likely to apply, and the resources necessary to create and sustain the law school, including relation to the resources of a parent institution, if any;

4. A copy of the self-study;

5. Financial operating statements and balance sheets for the last three fiscal years, or such lesser time as the institution has been in existence. If the applicant is not a publicly owned institution, the statements and balance sheets must be certified;

6. Appropriate documents detailing the law school and parent institution’s ownership interest in any land or physical facilities used by the law school;

7. A request that the Managing Director schedule a site evaluation at the law school’s expense; and,

8. Payment to the Section of any required fee, the application fee.

(c) A law school may not apply for provisional approval until it has completed the first full academic year of its program.

(d) A law school must demonstrate that it or the university of which it is a part is legally authorized under applicable state law to provide a program of education beyond the secondary level.

(e) A law school shall disclose whether an accrediting agency recognized by the United States Secretary of Education has denied an application for accreditation filed by the law school, revoked the accreditation of the law school, or placed the law school on probation. If the law school is part of a university, then the law school shall further disclose whether an accrediting agency recognized by the United States Secretary of Education has taken any of the actions enumerated above with respect to the university or any program offered by the university. As part of such
disclosure, the law school shall provide the Managing Director with information concerning the basis for the action of the accrediting agency.

(f) When a law school submits a completed application for provisional or full approval, the Managing Director shall arrange for a site evaluation as provided under Rule 5.

Rule 28: Reapplication for Provisional or Full Approval

(a) If the Council denies an application for provisional or full approval or withdraws provisional or full approval, or if a law school withdraws an application for provisional or full approval, a law school shall not reapply until it is able to certify that it has addressed the reasons for the denial, removal, or withdrawal, explain how it has done so, and is able to demonstrate that it is operating in compliance with the Standards.

(b) Any new notice and reapplication must be filed within the schedule prescribed by Rule 27(a).

14. RULE 29(b-g)

Rule 29: Application for Acquiescence in Major Change

(b) An application for acquiescence in a major change shall consist of the following:

(1) All completed forms and questionnaires, as adopted by the Council;

(2) A letter from the dean certifying that the law school has completed all of the requirements for requesting acquiescence in a major change and that the law school has obtained the concurrence of the president in the application;

(3) A copy of the law school’s most recent self-study or an updated self-study if the most recent self-study is more than three years old where the application is for acquiescence in a major change described in Rule 29(a)(1) through 29(a)(13);

(4) A description of the proposed change and a detailed analysis of the effect of the proposed change on the law school’s compliance with the Standards;

(5) Payment to the Section of the application fee.

(c) The Managing Director shall appoint a fact finder in connection with an application for acquiescence in a major change, except that no fact finder is required if the Managing Director and the Chair of the Accreditation Committee determine that the application does not require additional information to assist Accreditation Committee and Council determination of the question of acquiescence.

(d) In recommending or granting acquiescence in a major change under Rules 29(a)(1) through 29(a)(9), the Committee or Council may shall appoint a fact finder subsequent to the effective
date of acquiescence, as provided in Rule 30(e). The Committee or Council also may appoint a fact finder subsequent to the effective date of acquiescence in a major change under Rules 29(a)(10) through 29(a)(17) for purposes of determining whether the law school remains in compliance with the Standards. In recommending or granting acquiescence under Rule 29(a)(10) in a separate location at which the law school offers more than 50% of the law school’s program of legal education, however, the Committee or Council shall appoint a fact finder to conduct a visit within six months of the effective date of acquiescence or in the first academic term subsequent to acquiescence in which students are enrolled at the separate location.

(e) In addition to satisfying the requirements of Rule 29(b), an application for acquiescence shall contain information sufficient to allow the Accreditation Committee to determine whether the major change is so significant as to constitute the creation of a new or different law school. If the Accreditation Committee determines that the major change constitutes the creation of a new or different law school, then it shall recommend to the Council that the school apply for provisional approval under the provisions of Standard 102 and Rule 27. Factors that shall be considered in making the determination of whether the major change is so significant as to constitute the creation of a new or different law school include, without limitation:

(1) the financial resources available to the law school;

(2) a significant change, present or planned, in the governance of the law school;

(3) the overall composition of the faculty and staff at the law school;

(4) the educational program offered by the law school; and

(5) the location or physical facilities of the law school.

(f) A law school’s approval status remains unchanged following acquiescence in any major change.

(g) A law school’s request for acquiescence in the proposed major change in organizational structure shall be considered under the provisions of Rule 30, and will become effective upon the decision of the Council. The decision of the Council may not be retroactive.

15. RULE 30

Rule 30: Major Changes Requiring a Reliable Plan

(a) In addition to satisfying the requirements of Rule 29(b), an application for acquiescence under 29(a)(1) through Rule 29(a)(9) shall include a reliable plan.

(b) The reliable plan in connection with the establishment of a branch campus under Rule 29(a)(9) shall contain information sufficient to allow the Accreditation Committee and the Council to determine that:
(1) The proposed branch campus has achieved substantial compliance with the Standards and is reasonably likely to achieve full compliance with each of the Standards within three years of the effective date of acquiescence;

(2) The proposed branch campus will meet the requirements of Standard 106 applicable to separate locations and branch campuses.

c) The reliable plan regarding a matter involving a substantial change in ownership, governance, control, assets, or finances of the law school, under Rule 29(a)(1) through 29(a)(7) shall contain information sufficient to allow the Accreditation Committee and the Council to determine whether the law school is reasonably likely to be in full compliance with each of the Standards as of the effective date of acquiescence.

d) The reliable plan regarding a change in location of the law school that could result in substantial changes in the faculty, administration, student body, or management of the law school under Rule 29(a)(8) shall contain information sufficient to allow the Accreditation Committee and the Council to determine whether the law school is reasonably likely to be in full compliance with each of the Standards within one year of the effective date of acquiescence.

e) In a case where the Council has acquiesced in a major change subject to (a), the Council shall appoint a fact finder subsequent to the effective date of acquiescence, as provided in (f), (g), or (h), or (i).

(f) In the case of the establishment of a branch campus under Rule 29(a)(9), the fact finding visit required in accordance with (e) shall be conducted appointed within six months of the effective date of acquiescence or in the first academic term subsequent to acquiescence in which students are enrolled at the branch campus to verify that the branch campus satisfies the requisites of (b)(2).

(g) In a case involving a substantial change in ownership, control, assets, or finances of the law school under Rule 29(a)(1) through 29(a)(7), the fact finding visit required in accordance with (e) shall be conducted appointed within six months of the effective date of acquiescence to verify that the law school is in compliance with the Standards.

(h) In a case involving a substantial change in location of the law school that could result in substantial changes in the faculty, administration, student body, or management of the law school, under Rule 29(a)(8), the fact finding visit required in accordance with (e) shall be conducted appointed within one year of acquiescence to verify that the law school is in compliance with the Standards.
REPORT

The Council of the Section of Legal Education and Admissions to the Bar (Council) submits to the House of Delegates (HOD) for its concurrence, the attached changes to the *ABA Standards and Rules of Procedure for Approval of Law Schools.*

The revisions were approved by the Council at its meetings in March and June 2015 to be circulated for Notice and Comment. A public hearing was held on April 30, 2015, and another hearing is scheduled for July 16, 2015. The Council approved the majority of the revisions at its meeting in June 2015 and is expected to approve the remaining revisions at its meeting on July 30-August 1, 2015.

In August 2014, the Council approved and the HOD concurred in a comprehensive set of changes to the *ABA Standards and Rules of Procedure for Approval of Law Schools.* The HOD referred Interpretation 305-2 back to the Council for further consideration.

Following the completion of the comprehensive review, the Council asked the Standards Review Committee (SRC) to continue to discuss two issues that had been part of the comprehensive review: Standard 206 on Diversity and Inclusion, and Interpretation 305-2, which prohibits granting credit for participation in a field placement program for which a student receives compensation. The Council also requested that the SRC continue to review the Standards to identify technical corrections and modifications that may be needed following the comprehensive review and to recommend possible courses of action. In addition, the Council circulated a request for ideas and suggestions regarding issues the SRC might consider during the academic year.

The majority of the proposed amendments are technical corrections or clarifications of changes made in the comprehensive review.

The proposed change to Interpretation 305-2 responds to the request of the House of Delegates at the August 2014 meeting to reconsider the Council’s action on that Interpretation.

The following explanations detail the revisions to each of the Standards and Rules of Procedure approved by the Council:

1. DEFINITION (17) AND STANDARD 106

Under the proposed change, the definition of “separate location” is changed from one at which “the law school offers more than sixteen credit hours” to one at which “a student may earn more than sixteen credit hours.”

In the 2013-2014 Standards, a “satellite campus” was defined in Standard 106(15) as one “at which a student could take the equivalent of 16 or more semester credit hours.” Standard 105 required schools to provide a certain level of support for satellite campuses including library resources, academic advising, full-time faculty, etc.
During the comprehensive review of the Standards, the term “satellite campus” was eliminated and replaced with the term “separate location.” In the 2014-2015 Standards, a “separate location” is defined as one at which the law school “offers more than sixteen credit hours” of the program of legal education.

Following the comprehensive review, law schools that offered courses at separate locations voiced concern about the revision. If the school offered a number of courses at the location that totaled more than sixteen credits, new Standard 106 required that they provide the level of support required for a separate location even if a student was not permitted to earn more than sixteen credit hours at that location. The proposed change returns the situation to that found before the comprehensive revision, and requires that the school provide the level of support required for a separate location only if a student may earn more than sixteen credit hours.

Interpretation 106-1, which repeated the definition of “separate location” found in the Definitions section, is deleted. Interpretation 106-2 is renumbered to be Interpretation 106-1.

2. STANDARD 105 AND RULE 29(a)

In the 2013-2014 Standards and Rules, Interpretation 105-1 included the following in the list of major changes that require acquiescence: [the same items were included in Rule 21(a)(1) – (3) and Rule 20(a)(13) of the 2013-2014 Standards and Rules]

(1) Instituting a new full-time or part-time division;
(2) Changing from a full-time to a part-time program or from a part-time to a full-time program;
(3) Establishing a two-year undergraduate/four year law school or similar program;
……
(19) The addition of courses or programs that represent a significant departure from existing offerings or method of delivery since the last accreditation period.

In the comprehensive review those subsections were combined in Standard 105 and in Rule 29 to state:

(12) The addition of courses or programs since the most recent AC period, such as that represent a significant departure from existing offerings or method of delivery since the last most recent accreditation period including combined undergraduate and J.D. programs, such as 2/4, 4/2 programs, and programs leading to a J.D. and a first-degree program at foreign institution; instituting a new full-time or part-time division; or changing from a full-time to a part-time program or from a part-time to a full-time program;

Some of the additional language that was added has caused confusion. The proposed change clarifies the language and complies with the Department of Education requirements.
3. STANDARD 205 AND STANDARD 206

Following the completion of the comprehensive review in August 2014, the Council asked the SRC to continue to discuss Standard 205 Nondiscrimination and Equality of Opportunity and Standard 206 Diversity and Inclusion.

In response to statements offered at an information session held by the SRC and comments received during the Notice and Comment period, the Council proposes to expand the list of categories covered under Standard 205 to include “gender identity” and “any other characteristic not relevant to the applicant’s ability to satisfactorily complete the school’s program of legal education.”

The ABA has explicitly recognized the importance of equality with respect to sexual orientation and gender identity. These changes will bring Standard 205 into conformity with current ABA goals and policies.

The inclusion of the “catch-all” category is intended to ensure that law schools do not consider that they are limited to the stated groups in maintaining equality of opportunity in their programs.

The Council recommends two changes to Standard 206. First, the Council recommends that Standard 206 itself not include a list of those groups to which it applies, but focus on the broader purpose of the Standard, which is to promote cross-cultural understanding, help break down stereotypes, and enable students to understand persons of different backgrounds. The specific categories are now included in Interpretation 206-2, and have been changed from “gender, race, and ethnicity” to “race, color, religion, national origin, gender, gender identity, sexual orientation, age, and disability.” The Council believes that all of these categories fall into the reason for which Standard 206 was created. The Interpretation also has listed the groups “without limitation” so that law schools do not consider that they are limited to the stated groups in applying the Standard.

A new Interpretation provides examples of the types of concrete action a law school can take to demonstrate a commitment to diversity and inclusion.

4. STANDARD 304

Subsequent to the comprehensive revision to the Standards, several faculty teaching mediation clinics submitted comments that the new definition of a “law clinic” excluded work done by their students serving as mediators, a lawyering role that does not involve advising or representing one or more clients. The change addresses that issue. The language of “serving as a third-party neutral” is used in Rule 2.4 of the ABA Model Rules of Professional Conduct to describe lawyering work as mediators. In mediation clinics, students serve as third-party neutrals for real parties who are either proceeding pro se or with the assistance of counsel. This is real lawyering work and involves actual individuals. Like other law clinics under the new definition, these mediation clinics provide students with substantial lawyering experience in a real life context.
5. STANDARD 305(e)(6) AND INTERPRETATION 305-3

Prior to the comprehensive revisions, Standard 305(e)(6) allowed a student to participate in a field placement after successfully completing one academic year toward the J.D. degree. Under the revisions to the Standards, Standard 305(e)(6) was changed to require 28 units of instruction prior to participation. Under the former Standard, students who had completed one year of part-time instruction were entitled to enroll in field placements. Under the current Standard, part-time students with one year of instruction are not entitled to participate.

The change in language from “one academic year” to “28 units” was designed, in part, to comport with Standard 306 on Distance Education, which required – pre and post comprehensive revisions – 28 units prior to enrolling in distance education courses. Additionally, there was some concern expressed whether part-time students who had completed only one year of education would be able to participate meaningfully in a field placement program. However, it is unclear whether the change in language was actually intended as a substantive change to the field placement program to prohibit first year part-time students from participating or whether it was intended only as a change in language – that one academic year equals 28 units of instruction in the full time program.

Following the adoption of Standard 306(e)(6), the Council received comments from law schools with part-time programs. They argued for a return to the former rule, especially in light of the greater emphasis on experiential learning. In addition, some of those who commented suggested that emphasis should be placed on the extent of preparation for the field placement program rather than on the number of credits taken prior to participation in a field placement program.

The Council recommends that students may participate in field placement programs if the student has successfully completed sufficient prerequisites or receives sufficient training to assure the quality of the student educational experience in the field placement program.

The Council recommends the addition of Interpretation 305-3 to make clear that field placement programs must comply with the requirements of Standard 303(a)(3) in order to qualify as an experiential course under Standard 303.

6. INTERPRETATION 305-2

In August 2014, when the House of Delegates reviewed the proposed comprehensive set of changes to the *ABA Standards and Rules of Procedure for Approval of Law Schools*, it referred Interpretation 305-2 back to the Council for further consideration.

While the Standards Review Committee was considering the Interpretation and during the Notice and Comment period, the Council received a number of comments for and against a change in this Interpretation. Some of those who commented expressed the belief that some law schools do not provide adequate supervision of students participating in field placement programs. The Council discussed possibly reviewing Standard 305 to determine if any changes are needed in the Standard but decided that the current Standard already includes many safeguards to assure
adequate supervision. The Council also noted that enforcement of Standard 305 is increasingly important with the new requirement of 6 hours of experiential learning.

The Council concluded that if a law school properly monitors the operation of a field placement program and is in compliance with all of the requirements of Standard 305, the question of whether or not a student may receive both compensation and credit for the experience should be determined by the law school. Rather than completely eliminating the Interpretation, the Council proposes that a law school be given the option of granting credit for a field placement experience where compensation is provided only if it is able to demonstrate that sufficient control was maintained in these instances such that all of the requirements of Standard 305 were met. In order to meet that requirement, law schools granting credit where compensation is provided must maintain separate records of these instances for examination by site visitors.

7. STANDARD 311(a) AND INTERPRETATION 311-1

Subsequent to the comprehensive revision of the Standards and Rules, the Council requested the Standards Review Committee reexamine Standard 311 (Academic Program and Academic Calendar) to see if the requirements regarding the academic calendar could be streamlined.

Standard 311 contains four specific requirements that impact the nature and length of the academic program: a) 140 days of regular instruction including examinations; b) 83 credits of minimum instruction to earn the JD; c) the limitation that a degree may not be earned earlier than 24 months or later than 84 months; and d) limitation prohibiting a law school from allowing a student to be enrolled at any time in more than 20% of total credit hours required for graduation.

The Council recognizes that it is important to maintain requirements to ensure that the required minimum program of study provides a rigorous program of legal education. The Council also understands that students must have the opportunity for adequate time for study and reflection. The Council determined that those requirements can be met by maintaining three of the four requirements set out in Standard 311. The Council concluded that there was no need to prescribe a minimum of 140 days of instruction, given that the other three requirements offer sufficient protection to ensure an academic calendar that is of sufficient length and breadth, and given the newly stated requirements found in Standard 310 regarding credit hours. Removal of the 140 days of instruction requirement does not change the amount of work that a student must do to earn a degree, but does remove a vestigial requirement that may hamper law schools’ abilities to be innovative in how their J.D. programs are structured and delivered. Therefore, the Council recommended the elimination of Standard 311(a) and Interpretation 311-1 and the re-lettering of the remaining sections to address the elimination.

8. STANDARD 311(f) AND STANDARD 308(a)

Standard 311(f) focuses on the law school’s obligation to adopt, publish, and adhere to a written policy requiring regular attendance. The Council proposed the retention of this Standard, but that
it should be moved to Standard 308(a), which contains similar obligations for other academic standards.

9. INTERPRETATION 311-4

Under Standard 505(c), a law school may admit a student and grant credit for courses completed at a law school outside the United States if the admitting law school would have granted credit towards satisfaction of J.D. degree requirements if the courses had been completed at the admitting school. Pursuant to Standard 505(f), a student admitted under 505(c) may receive up to one-third of the total number of credits required by the admitting school for the J.D. degree.

Students admitted under 505(c) must, of course, complete all of the requirements for the J.D. degree at the admitting law school. Since they are earning up to one year’s credit, they may need to spend at least two years at the admitting law school. For a student from a law school outside the U.S., that might mean that they have already studied for three to five years abroad. If the course of study for the J.D. degree is considered to have started when the student began studies at the foreign law school, the student will have a limited amount of time to complete studies at the admitting ABA-approved law school.

Current Interpretation 311-4 was intended to explain that the time for determining the commencement of law studies under Standard 311(c) is different for students accepted with credits for prior law study from a foreign institution. It states that only the time commensurate with the amount of credit given counts toward the length of study requirements of Standard 311(c).

As written, current Interpretation 311-4 is not clear. The proposed change clarifies the ambiguities and simplifies the Interpretation. The proposed change limits the Interpretation to an explanation of how Standard 311(c) applies when credit is given for prior law study outside the United States and attempts to further clarify the interplay between 505 and 311. An example is provided to further clarify how the Interpretation works.

10. STANDARD 502(b)(2)

Standard 502(b)(2) is changed to remove the word “legal.” The Standard speaks to the requirements for education received by a student prior to attending law school, and the phrase “program of legal education” should have been “program of education.”

11. INTERPRETATION 503-3

Based on the experience of granting variances to Standard 503, the Council approved Interpretation 503-3 in August 2014. Since adoption of the new Interpretation, the Council has received numerous requests for expansion of the exception codified in Interpretation 503-3. The current Interpretation limits its application to students from an undergraduate program of the
same institution as the law school in certain circumstances or to students in joint degree programs. The Council is persuaded that the original limitations in Interpretation 503-3 are not necessary to assure that law schools admit only students they understand are capable of completing their program and being admitted to the bar. The proposed changes broaden the application of the Interpretation, benefitting law schools, some applicants, and without harm to the integrity of the Standards.

12. STANDARD 505(b)

Prior to the comprehensive review, Standard 506(a) had permitted ABA-approved law schools to admit students with advanced standing and allow credits for studies at law schools not approved by the ABA if the unapproved law school had been granted the power to confer the J.D. degree by the appropriate governmental authority in the unapproved school’s jurisdiction, or if graduates of the unapproved school were permitted to sit for the bar examination in that jurisdiction. Following the comprehensive review, Standard 505 stated that credits could be transferred only if graduates of the unapproved law school were permitted to sit for the bar examination in that jurisdiction; the section regarding transfer of credits from unapproved law schools that had been granted the power to confer the J.D. degree by the appropriate governmental authority had been removed.

The change made to this section could be detrimental to students enrolled in some unapproved schools who seek to transfer to ABA-approved law schools. In some jurisdictions, the authority to start a law school is granted by an agency that has no authority to grant graduates of the school permission to sit for the bar examination in that jurisdiction. Indeed, some law schools have started with permission from a state agency so that they can obtain provisional accreditation and their graduates be permitted to sit for the bar examination in that jurisdiction. If ABA-approved law schools can accept credits only from those unapproved schools whose graduates have been granted permission to take the bar examination in their jurisdiction, students enrolled in unapproved law schools during that period between the granting of authority by a state agency and the granting of approval to take the bar examination, if separate operations, would be unable to transfer. The proposal to amend Standard 505 restores the ability of students to seek to transfer credit if they are enrolled in an unapproved law school that has been granted the power to confer the J.D. degree by the appropriate governmental authority in the unapproved school’s jurisdiction.

13. RULE 27 AND RULE 28

Under the Rules of Procedure, a law school seeking provisional or full approval may request a site evaluation in the spring semester by filing an application no later than October 15 of the preceding fall semester. This timetable provides insufficient time to appoint a site evaluation team and arrange for a visit by the spring semester. The proposed changes to Rules 27 and 28 would require that a law school seeking approval file a written notice of intent to seek approval no later than March 15th in the academic year prior to the academic year in which the law school will apply for approval and indicate the semester in which it would prefer to have a visit.
14. RULE 29(b-g)

Subsequent to the adoption of the revised Rules of Procedure, it came to the attention of the Standards Review Committee that newly adopted Rule 29, which addresses Major Changes, does not include language that is required by the Department of Education.

The revisions to Rule 29(d) comply with U.S. Department of Education requirements regarding the timing of fact finding visits to law schools following acquiescence in certain types of major changes.

New Rule 29(e) restores the language of former Rule 20(b)(1) – (2) regarding applications for a major change that may result in the creation of a new or different law school.

New Rule 29(g) restores the language of former Rule 20(d), which was inadvertently omitted during the drafting of Rule 29.

15. RULE 30

The revision to Rule 30 were made in order to ensure compliance with the U.S. Department of Education regulation 34 CFR 602.24 regarding the timing of fact finding visits to law schools following acquiescence in certain types of major changes.

Respectfully submitted,

Associate Dean and Professor Joan S. Howland, Chair
Council of the Section of Legal Education and Admissions to the Bar
August 2015
1. **Summary of Resolution(s).**

RESOLVED, That the American Bar Association House of Delegates concurs in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated August 2015 to the following *ABA Standards and Rules of Procedure for Approval of Law Schools*:

1. Definition (17) and Standard 106 [ Separate Locations and Branch Campuses ]
2. Standard 105 [ Acquiescence for Major Change in Program or Structure ] and Rule 29(a) [ Application for Acquiescence in Major Change ]
4. Standard 304 [ Simulation Courses and Law Clinics ]
5. Standard 305(e)(6) and Interpretation 305-3 [ Field Placements and Other Study Outside the Classroom ]
6. Interpretation 305-2 [ Field Placements and Other Study Outside the Classroom ]
7. Standard 311(a) and Interpretation 311-1 [ Academic Program and Academic Calendar ]
8. Standard 311(f) [ Academic Program and Academic Calendar ] and Standard 308(a) [ Academic Standards ]
9. Interpretation 311-4 [ Academic Program and Academic Calendar ]
10. Standard 502(b)(2) [ Educational Requirements ]
11. Interpretation 503-3 [ Admission Test ]
12. Standard 505(b) [ Granting of J.D. Degree Credit for Prior Law Study ]
13. Rule 27 [ Application for Provisional or Full Approval ] and Rule 28 [ Reapplication for Provisional or Full Approval ]
14. Rule 29(b-g) [ Application for Acquiescence in Major Change ]
15. Rule 30 [ Major Changes Requiring a Reliable Plan ]

2. **Approval by Submitting Entity.**

The revisions were approved by the Council at its meetings in March and June 2015 to be circulated for Notice and Comment. A public hearing was held on April 30, 2015, and another hearing is scheduled for July 16, 2015. The Council approved the majority of the revisions at its meeting in June 2015 and is expected to approve the remaining revisions at its meeting on July 30-August 1, 2015.
3. Has this or a similar resolution been submitted to the House or Board previously?

In August 2014, when the House of Delegates reviewed the proposed comprehensive set of changes to the *ABA Standards and Rules of Procedure for Approval of Law Schools*, it referred Interpretation 305-2 back to the Council for further consideration. The proposed change to Interpretation 305-2 responds to the request of the House of Delegates at the August 2014 meeting to reconsider the Council’s action on that Interpretation.

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

The revisions modify the existing *ABA Standards and Rules of Procedure for Approval of Law Schools*.

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

Not applicable.

6. Status of Legislation. (If applicable)

Not applicable.

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

The Council will notify ABA-approved law schools and other interested entities of the approved changes to the *ABA Standards and Rules of Procedure for Approval of Law Schools*. The Council and the Managing Director’s Office will prepare guidance memoranda and training materials regarding the revised Standards.

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

Not applicable

9. Disclosure of Interest. (If applicable)

Not applicable

10. Referrals.

The revisions were posted on the Section’s website and circulated for Notice and Comment to the following interested persons and entities: ABA Standing and Special Committees, Task Forces, and Commission Chairs; ABA Section Directors and Delegates; Conference of Chief Justices; National Conference of Bar Presidents; National Association of Bar Executives; Law Student Division; SBA Presidents; National Conference of Bar Examiners;
University Presidents; Deans and Associate Deans; Deans of Unapproved Law Schools; and Section Affiliated Organizations.

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

   Barry A. Currier, Managing Director  
   American Bar Association  
   Section of Legal Education and Admissions to the Bar  
   321 N. Clark St., 21st floor  
   Chicago, IL 60654-7598  
   Ph: (312) 988-6744 / Cell: (310) 400-2702  
   Email: barry.currier@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.)

   The Honorable Christine M. Durham  
   Justice  
   Supreme Court of Utah  
   Scott Matheson Courthouse  
   450 South State Street  
   Salt Lake City, UT 84114  
   Ph: 801-238-7945 / Cell: 801-550-0161  
   Email: jdurham@email.utcourts.gov

   The Honorable Ruth V. McGregor  
   7601 North Central Ave., Unit 23  
   Phoenix, AZ 85020  
   Ph: (602) 395-3394 / Cell: (602) 370-4029  
   Email: ruthvmcgregor@gmail.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

RESOLVED, That the American Bar Association House of Delegates concurs in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated August 2015 to the following ABA Standards and Rules of Procedure for Approval of Law Schools:

1. Definition (17) and Standard 106 [Separate Locations and Branch Campuses]
2. Standard 105 [Acquiescence for Major Change in Program or Structure] and Rule 29(a) [Application for Acquiescence in Major Change]
4. Standard 304 [Simulation Courses and Law Clinics]
5. Standard 305(e)(6) and Interpretation 305-3 [Field Placements and Other Study Outside the Classroom]
6. Interpretation 305-2 [Field Placements and Other Study Outside the Classroom]
7. Standard 311(a) and Interpretation 311-1 [Academic Program and Academic Calendar]
8. Standard 311(f) [Academic Program and Academic Calendar] and Standard 308(a) [Academic Standards]
9. Interpretation 311-4 [Academic Program and Academic Calendar]
10. Standard 502(b)(2) [Educational Requirements]
11. Interpretation 503-3 [Admission Test]
12. Standard 505(b) [Granting of J.D. Degree Credit for Prior Law Study]
13. Rule 27 [Application for Provisional or Full Approval] and Rule 28 [Reapplication for Provisional or Full Approval]
14. Rule 29(b-g) [Application for Acquiescence in Major Change]
15. Rule 30 [Major Changes Requiring a Reliable Plan]

2. Summary of the Issue that the Resolution Addresses

In August 2014, the Council approved and the HOD concurred in a comprehensive set of changes to the ABA Standards and Rules of Procedure for Approval of Law Schools. The HOD referred Interpretation 305-2 back to the Council for further consideration.

Following the completion of the comprehensive review, the Council asked the Standards Review Committee (SRC) to continue to discuss two issues that had been part of the comprehensive review: Standard 206 on Diversity and Inclusion, and Interpretation 305-2, which prohibits granting credit for participation in a field placement program for which a student receives compensation. The Council also requested that the SRC continue to review the Standards to identify technical corrections and modifications that may be needed following the comprehensive review and to recommend possible courses of action.

In addition, the Council circulated a request for ideas and suggestions regarding issues the SRC might consider during the academic year.
The majority of the proposed amendments are technical corrections or clarifications of changes made in the comprehensive review.

The proposed change to Interpretation 305-2 responds to the request of the House of Delegates at the August 2014 meeting to reconsider the Council’s action on that Interpretation.

The proposed changes to Standard 205 bring the Standard into conformity with current ABA goals and policies by explicitly recognizing the importance of equality with respect to sexual orientation and gender identity.

The proposed changes to Standard 206 focus on the broader purpose of the Standard, which is to promote cross-cultural understanding, help break down stereotypes, and enable students to understand persons of different backgrounds.

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

The proposals amend the 2015-2016 ABA Standards and Rules of Procedure for Approval of Law School.

4. Summary of Minority Views

None of which the Council is aware.
RESOLVED, That the American Bar Association encourages the Council of the Section of Legal Education and Admissions to the Bar to mandate through the ABA Standards for the Approval of Law Schools enhanced financial counseling for students (prospective and current) on student loans and repayment programs.

FURTHER RESOLVED, That the American Bar Association urges all participants in the student loan business and process, including law schools, to develop and publish easily understood versions of the terms of various loan and repayment programs.

FURTHER RESOLVED, That the American Bar Association encourages the Council of the Section of Legal Education and Admissions to the Bar to return to collecting expenditure, revenue, and financial aid data annually for each law school.

FURTHER RESOLVED, That the American Bar Association encourages the Council of the Section of Legal Education and Admissions to the Bar to make public the information on legal education it currently maintains and information it collects going forward.

FURTHER RESOLVED, That the American Bar Association encourages law schools to be innovative in developing ways to balance responsible curricula, cost effectiveness, and new revenue streams.
I. The Task Force and Its Charge

The Task Force on the Financing of Legal Education was created by American Bar Association (ABA) President James Silkenat on May 6, 2014, in the wake of the Report of American Bar Association Task Force on the Future of Legal Education. Among the earlier Task Force’s recommendations was the establishment of a task force to “examine and recommend reforms concerning the price and financing of law school education,” an issue not addressed in detail by that Task Force.¹

This is a critical time for legal education as schools face declining enrollments and revenues, and their students face increasing tuition and debt along with a job market that has seen only modest recovery. Then ABA President James Silkenat charged this Task Force with addressing these timely and important issues, and its work has been encouraged and supported by his successor as ABA President – William Hubbard. The Task Force undertook this work with an acute awareness of the significance of the legal profession to individual clients as well as to the larger society.

The Task Force on the Financing of Legal Education has now completed its work, which this report sets out. The report’s recommendations and conclusions begin on page 36 of this document. These recommendations and conclusions are further reflected in the resolutions that the Task Force is proposing to the American Bar Association House of Delegates for its consideration at the 2015 ABA Annual Meeting in August in Chicago, Illinois. The resolutions proposed, along with the recommendations and conclusions in the report, are supported and explained by the detailed sections of this report. Those sections examine matters related to the cost of legal education for students and how law schools operate and are financed.

Dennis W. Archer, a former president of the American Bar Association, chaired the Task Force on the Financing of Legal Education and was joined by fourteen distinguished members, including lawyers, deans, young lawyers, and others active in business and consulting related to financing legal education.² Dr. Stephen Daniels, Senior Research Professor at the American Bar

² The Members of the Task Force are:
   DENNIS W. ARCHER, Chairman Emeritus, Dickinson Wright, Detroit MI [Chair]
   LUKE BIERMAN, Dean & Professor of Law, Elon University School of Law, Greensboro NC
   CHRISTOPHER P. CHAPMAN, President & CEO, Access Group, West Chester PA
   WILLIAM J. CURRY, Partner, Sullivan & Worcester, Boston MA
   HEATHER JARVIS, Student Loan Advisor, askheatherjarvis.com, Wilmington NC
   HON. GOODWIN H. LIU, Justice, California Supreme Court, San Francisco CA
   RACHEL F. MORAN, Dean and Michael J. Connell Distinguished Professor of Law, UCLA School of Law, Los Angeles CA
   LUCIAN T. PERA, Partner, Adams and Reese LLP, Memphis TN
   ERIKA D. ROBINSON, Associate, Gregory, Doyle, Calhoun & Rogers, Smyrna GA
Foundation, served as Consultant to the Task Force. Barry Currier, Managing Director of Accreditation and Legal Education at the ABA, provided staff support.

The Task Force held four meetings and additional conference calls over the last year as it completed its work. Two of those meetings were two-day public hearings, one at the 2014 American Bar Association Annual Meeting in Boston, Massachusetts, and the other at the 2015 American Bar Association Midyear Meeting in Houston, Texas. In seeking a broad array of viewpoints, the Task Force sent letters of invitation to a wide range of interested parties who might have insights and opinions on the issues the Task Force was considering. Among the invitees were the President of the United States, who had made a statement on the structure of law school programs and the expense of law school; student leaders of the American Bar Association Law Student Division, who offered testimony to the Task Force; members of the United States Supreme Court; state Supreme Court justices; and leaders of the bar and bar organizations, including the American Bar Association.

Further, the Task Force heard from law school deans and faculty members, and received testimony from writers and commentators on the state of legal education. The Task Force expresses thanks to the many who took time to prepare written comments and to testify before it. Its work is better for their ideas, observations, and data. Additionally, since the Task Force was to conduct as much research as possible on the issues at the heart of its charge, Managing Director Currier provided to the Task Force Consultant access on a confidential basis to material not publicly available from the annual questionnaires submitted to the ABA Section of Legal Education by ABA-approved law schools.

The Task Force’s charge included a broad range of issues and key among them were: the cost of legal education for students; the financing of and business models for law schools; student loans and educational debt; and law school practices regarding tuition discounting, merit-based grants/scholarships, and need-based grants/scholarships. Dollars and cents are the clear focus of these issues and their connections to the current criticisms of and challenges facing legal education – both those from within legal education and those from without – are also clear.

Among the prominent dollars and cents concerns the Task Force heard about at its public meetings were claims about: the current availability of loans contributing to the increasing price of legal education; the heavy debt burden for students making law school inaccessible and

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JOSEPH K. WEST, President & CEO, Minority Corporate Counsel Association, Washington DC
ROBERT M. WILCOX, Dean & Professor of Law, University of South Carolina School of Law, Columbia SC

3 See Brian Tamanaha, Failing Law Schools (Chicago: University of Chicago Press, 2012)
affecting career and life choices; and tuition discounting based on merit which tends to benefit those students who are more likely to have financial resources entering law school or better economic outcomes after graduation. The Task Force also heard much about the perverse effects of law school ranking schemes, with the race for higher rankings contributing to the increasing price of legal education. The Task Force heard about certain proposals for change such as imposing caps on student loans or even eliminating the current federal student loan program altogether (as one presenter argued). These are all relevant issues for continued discussion and inquiry.

It is important to note that many of the most critical commentaries and most drastic solutions proposed came at the nadir of the recent economic downturn, when anxieties about the job market ran high and the realities showed fewer opportunities for new law school graduates and lay-offs for recent graduates. Since then there have been important market corrections, many of which are still underway. As this report will later show, law school enrollments have significantly declined, the rate of increase for tuition has slowed, and the amount of tuition discounting has increased. Some even see glimpses of improvement in the job market. Noting this timing is not meant as a way to minimize the challenges facing legal education, but as a caution against responding too reflexively.

The Task Force’s charge also included deeper and even more fundamental concerns – the challenges posed by such dollars and cents issues to the unique role the legal profession plays in our political system and in maintaining and fostering the rule of law. As the preamble to the ABA’s Model Rules of Professional Conduct begins, “A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.” Without a robust system of legal education that is open to and accessible by all segments of American society, the profession withers and looks less and less like society itself. Consequently, its ability to play its unique role becomes increasingly problematic.

The opening line of Alfred Reed’s now almost century-old, groundbreaking study of legal education still resonates today regarding the broader importance of legal education beyond any private gain on the part of an individual law student: “Our contemporary American system of legal education, although it contains elements of great value, is generally recognized to be defective in many ways. Efforts to improve it cannot accomplish their full purpose unless certain fundamental considerations are borne in mind.” He continues:

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Foremost among these determining factors is the position that lawyers occupy in the state. Whatever incidental purposes are cherished by particular law schools, the main end of legal education is to qualify students to engage in the professional practice of the law. This is a public function, in a sense that the practice of other professions … is not. Practicing lawyers do not merely render to the community a social service, which the community is interested in having them render well. They are part of the governing mechanism of the state. Their functions are in a broad sense political … [and spring] … fundamentally from the fact, early discovered, that private individuals cannot secure justice without the aid of a special professional order to represent and advise them. To this end lawyers are instituted, as a body of public servants, essential to the maintenance of private rights.8

This same idea of the practice of law as a public good is echoed in the report of the Task Force on the Future of Legal Education: “Society has a deep interest in the competence of lawyers, in their availability to serve society and clients, in the broad public role they can play, and in their professional values. This concern reflects the centrality of lawyers in the effective functioning of ordered society.”9

In light of the role played by the legal profession, Reed was also concerned with access to legal education – and especially with the basic principle that now underlies our contemporary efforts to diversify legal education and the legal profession. While perhaps a man of his times, his guiding idea is clear: “Humanitarian and political considerations unite in leading us to approve of efforts to widen the circle of those who are able to study law. The organization of educational machinery especially designed to abolish economic handicaps – intended to place the poor boy (sic), so far as possible, on equal footing with the rich – constitutes one of America’s fundamental ideals. It is particularly important that the opportunity to exercise an essentially governmental function should be open to the mass of our citizens.”10 Today we would say the young person (or, indeed, any person seeking a legal education) of any color or background.

Reed’s views are echoed by a contemporary statement, this one from U.S. Supreme Court Justice Sandra Day O’Connor’s opinion for the Court in Grutter v. Bollinger. Justice O’Connor said:

[U]niversities, and in particular law schools, represent the training ground for a large number of our Nation’s leaders. Sweatt v. Painter, 339 U.S. 629, 634 (1950) (describing law school as a “proving ground for learning and practice”) … In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. As we have recognized, law schools “cannot be effective in isolation from the individuals and

8 Id.
9 Report and Recommendations, supra note 1 at 6.
10 Id. at 398.
institutions with which law interacts. See *Sweatt v. Painter*, *supra*, at 634. Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.11

This statement, like Reed’s, with its pointed emphasis on the fundamental significance of access tells us why the subject of the Task Force’s work is so important.

In addressing contemporary concerns, no matter how urgent they may seem, we cannot and should not lose sight of the fundamentals. If we do, they may be undermined in dealing with more immediate issues, even with the best of intentions. This Task Force has a special obligation to set a tone for acting and doing so responsibly. Financing legal education, like financing higher education generally, does not admit to simple definitions of a problem or to simple solutions. One law school dean when asked by a Task Force member what’s the problem facing legal education could only answer, after thinking for a minute, “it’s a nuanced question.” Real change is needed and will require a concerted effort. Acting responsibly means recognizing the complexities of the legal (and higher) education enterprise and the nuance and then moving forward with this in mind.

The next section will summarize in outline form the Task Force’s main findings. The following section will describe those findings in detail. After that will be a consideration of some matters of context shaping the issues, possible solutions, and the interpretation of the findings. The concluding section will present a summary and recommendations – short-term and longer-term, some of which form the basis for the resolutions the Task Force is presenting to the House of Delegates.

II. Outline of the Task Force’s Main Findings

This section describes the data that the Task Force gathered to inform its work, the limits of those data, and the key findings that emerged from the analyses. These findings focus on enrollments, the job market, tuition increases, increased reliance on tuition discounting, student borrowing and debt, and law school expenditures.

1. Bringing Information to Bear

Because of the importance of the issues at the heart of this Task Force’s charges – and in light of the lament of the Task Force on the Future of Legal Education at not being able to conduct the kind of research needed12 – the members approached those issues with the idea of bringing to bear what research they could. This was also an idea urged on the Task Force by some of those who testified before it. One long-time observer who is very concerned about the

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12 *Report and Recommendations*, *supra* note 1 at 3.
financing of legal education told the Task Force at one its meetings that so much of the debate is emotional and based on inaccurate information that even basic information is needed. Another concerned observer said that one important thing the Task Force could do is to “shed light” on the issues by gathering data and sharing it, especially mining the available data.

The Task Force invited a number of commentators to present their research findings and/or submit written materials. Among other things, the Task Force received information related to tuition increases, student debt, employment prospects, curricular innovations, and factors that may drive costs. In addition, the Task Force consultant conducted a substantial amount of research and analysis using the available materials related to the Task Force’s charges. The Task Force took seriously the idea that mining and analyzing the available data was itself an important service that would help move the discussion forward in constructive ways as well as inform the Task Force’s work.

The Task Force discovered how frustrating this effort could be. It found that systematic and reliable information needed to assess the claims and criticisms about the financing of legal education – or to just to get a good working sense of what is going on in legal education – is scarce. One Task Force member even called the situation appalling given the importance of the issues to be addressed. In light of the Task Force’s timetable and resources, exploiting the best available information was the only practical course. Most (but not all) of what the Task Force utilized is from the American Bar Association’s Section of Legal Education and Admissions to the Bar, which operates the ABA law school accreditation process separately and independently of the ABA itself. The primary data come from the annual surveys accredited schools are required to complete. These data, of course, are collected and managed for the purpose of operating an effective accreditation process and do not have as a primary goal the gathering of information necessary to conduct an effective institutional research program about legal education. Some of the detailed material presented to the Task Force orally or in writing relied on publicly available ABA information.

Much of this information is not in easily useable form and requires a substantial investment of time to categorize for any kind of analysis. Additionally, the material collected by the ABA has changed over time and some important material is no longer collected (such as data on school expenditures, the amount of grants/scholarship monies, and their allocation for need v. merit, among others). At best only a partial picture of the current state of affairs is possible, but given the importance of the issues this is valuable in moving forward.

2. The Outline

The outline of findings below is divided into six broad areas with more statements about key findings within each area. Some of the findings may seem obvious. Nonetheless it is important to document them as a part of the context needed to move forward on financing legal education. Again, the next section will provide the details.
A. Enrollment

Enrollments are declining. Between AY2009-10 (AY means Academic Year) and AY2014-15, 30% fewer people entered a private law school; and 18% fewer entered a public law school. With fewer people attending law school there are fewer tuition dollars to help run a school’s operations.

Overall, minority enrollment (in raw numbers) has not yet declined in the face of the overall enrollment decline. There are signs that enrollment is declining for some classifications within the category. Regardless of the current numbers, people of color remain significantly under-represented in law school and in the legal profession.

B. Jobs and the Future

The near-term job market for new law school graduates appears far from robust, although some see signs of at least modest improvement. For the public law school class of 2013, 63% landed a permanent, full-time, bar passage-required job; for the private law school class of 2013 the figure was 57%.

Despite the cost, the best available evidence suggests a significant lifetime income premium for those with a law degree compared to those with a bachelor’s degree.

C. Tuition

Law schools are JD tuition-dependent for their revenues, and some are heavily – if not exclusively – tuition-dependent. Looking at all law schools, the average was 69% of revenue in AY2012-13, with 25% of schools receiving at least 88% of their revenue from tuition.

Inflation-adjusted tuition has consistently increased over time. This is true whether viewed in terms of an inflation adjustment made on the basis of the cost of doing business or the price to the consumer. Using the higher education price index (referred to as HEPI) private law school tuition increased 29% between AY1999-00 and AY2014-15, and public law school in-state tuition increased 104%. Using the familiar consumer price index (referred to as CPI) the increases were 46% and 132%, respectively. Importantly, one must keep in mind that the increases in public law school tuition, in all likelihood, reflected declines in state funding during this period.

13 The Commonfund Institute has created the specialized price index designed for higher education’s cost of doing business – the Higher Education Price Index (HEPI). HEPI is built around the major cost drivers for higher education. Since there does not appear to be a price index specifically for legal education, the Commonfund’s HEPI is the most appropriate alternative for use when looking at the cost of doing business. The CPI remains the best calculator to use in terms of the consumer buying the service. See https://www.commonfund.org/CommonfundInstitute/HEPI/Pages/default.aspx.
D. Discounting and Net Tuition

Stated tuition price is not, however, the whole story. Tuition discounting through grants and scholarships occurs, is widespread, and is generally increasing. For private schools, the net tuition in AY1999-00 meant a discount of 16% in inflation-adjusted dollars (CPI). In AY2013-14 the discount had increased to 25%. For public schools the discount in AY1999-00 was 22% and it increased to 28%.

With increased discounting, fewer students are paying full tuition. The percentage paying full tuition in private law schools declined from 57% in AY1999-00 to 38% in AY2013-14. For public law schools the figures are 58% and 40%.

With respect to the allocation of discounts, more money goes to pure merit (i.e., solely on LSAT scores) than to pure, demonstrated financial need. While money for pure need has not disappeared, the trend is less money being deployed for this purpose and more going to pure merit and to need plus other factors. Generally speaking, compared to private schools, public law schools devote a larger percent of their grant/scholarship monies to need and need plus other factors and less to pure merit.

While the percentage of students paying full tuition has decreased and the discount rate increased, inflation-adjusted net tuition itself has not always followed suit. Full tuition prices have increased at a greater rate than discounts. In inflation-adjusted dollars (CPI) private law school students saw net tuition increase 29% from 1999-00 to 2013-14. Most of this increase, however, came between AY1999-00 and AY2009-10 – a 28% increase. Public law school students saw net tuition increase by 102% between AY1999-00 and AY2009-10, when net tuition increased by 84%.

E. Student Borrowing and Debt

Despite the deeper discounting and the smaller percentage of students paying full tuition, most students still borrow to help finance their legal educations – almost 90%.

Because law schools are tuition-dependent for revenue and nearly all students use student loans to pay tuition, law schools are also student loan-dependent for revenue.

The amount borrowed by students has increased substantially in recent years even after adjusting for inflation, reflecting the inflation-adjusted increase in tuition and the accessibility of loan funds. Using inflation-adjusted (CPI) 2014$, the average debt for private law school students increased from $102,000 in AY2005-06 to $127,000 in AY2012-13; for public law school students the figures are $66,000 and $88,000.

The current student loan programs assist students in financing their education and provide repayment options and plans that assure broad access to legal training. True need-based programs that could enhance access because they do not require repayment are, of course, another matter.
Greater loan accessibility has come as the federal government became the lender for graduate school and professional school students through Grad Plus, which offers both high approval rates due to minimal credit underwriting requirements and a variety of borrower-friendly repayment programs, some of which take income into account.

Among those federal loan repayment programs is the Public Service Loan Forgiveness program for graduates who go into lower-paying public service positions. For law graduates this program is especially important in supporting not only access to legal education but also access to justice itself.

Greater loan accessibility and variety put a premium on financial counseling. Evidence suggests that students do not always take advantage of the services law schools offer for financial counseling related to borrowing and long-term debt, and that some of the students who do take advantage of these services are not that satisfied with them.

F. Increasing Law School Expenditures as the Cost Driver

An immediate driver for tuition increases is the inflation-adjusted increase in law school expenditures per full-time equivalent (FTE) student. Three areas of expenditure stand out and together they account for one-half of the total per FTE: instructional salaries, administrative salaries, and grants/scholarships. All increased, but the greatest percentage increase came in grants/scholarships to use in discounting tuition. Between AY2004-05 and AY2012-13 the average increase for public law school grants/scholarships expenditures was 99%, while for private law schools the average increase was 44%.

III. Matters of Context Shaping the Issues, Possible Solutions, and the Interpretation of the Findings

In pursuing its work the Task Force confronted a number of broad factors that will shape and influence any efforts moving forward.

1. The Higher Education Context

Institutionally, law schools are deeply rooted in higher education and share not only a number of higher education’s challenges but many of its key characteristics as well. Cost, student debt, teaching loads, scholarly research, diversity, discounting, rankings, and value – matters on the list of challenges facing legal education – are all on the list of challenges facing higher education generally. Perhaps one of the most important general challenges is one shared by all public institutions of higher learning, including law schools – the drastic cuts in state support. A 2012 report from the College Board noted, “state appropriations are a major source of revenue for public colleges and universities. Over the decade 1988-99 to 2008-09, the average share of

revenues coming from state and local appropriations decreased and the average share of revenues coming from net tuition increased for all types of public institutions.”15 State colleges and universities – including their law schools – are finding it harder to remain the site of accessible higher education.

In short, many of the most important criticisms of and challenges facing law schools are not entirely unique to legal education. As one dean told the Task Force, “law schools are just the canary in the coal mine,” and this speaks to the depth of the challenges. Some challenges cannot be adequately defined and addressed by a set of assumptions based on a law-school-only perspective.

This is reinforced by the fact that most law schools (over 90%) are not independent and are instead a part of larger educational institutions. This often limits what they can do on their own. Their relationships with larger institutions are complex and varied, with some schools having little autonomy and others more. Improvements in the financing of legal education must take these relationships into account.

2. The Law School Context

Law schools in the United States are very different from each other, and, consequently, one-size-fits-all solutions may not be constructive. The most obvious difference, but not the only important one, is between public and private schools. The differences in their operating models and sources of revenues can have profound effects on tuition, discounting, student borrowing, and expenditures.

The issue of financing legal education cannot easily be separated from what law schools do, how they structure their curricula, and how curricula may be changing in the face of the shrinking market for students and changes in the legal profession itself. Curricular choices and innovation have budgetary consequences – again, the largest proportion of law school expenditures goes to instructional salaries. Ideally, these inter-connected matters would be examined in an integrated fashion in an effort to find cost-effective ways to innovate. The details of curricular issues, however, were not within this Task Force’s purview, and time and resource constraints prevented the Task Force from expanding the scope of its work.

In testimony and materials reviewed by the Task Force, the issue of law school rankings arose repeatedly. Law school deans acknowledged that pressure to climb the rankings can shape decisions about student financial aid, faculty hiring, and myriad other dimensions of law schools in subtle and not-so-subtle ways. A 2010 ABA special committee reported that the U.S. News and World Report ranking methodology tends to increase the cost of legal education for students, to discourage the award of financial aid based upon need, and to reduce incentives to enhance diversity in the legal profession.16 While acknowledging the pressure exerted by rankings, the


Task Force was not presented with any realistic solution for eliminating the rankings. To the extent such rankings produce incomplete or irrelevant information, the antidote would appear to be the provision of more and better information in the marketplace for students to consider in choosing whether and where to attend law school and how to pay for it.

3. A Dynamic Environment

The Task Force addressed its charge in the midst of a dynamic environment, and this is an especially important matter of context. Schools are looking hard at their curricula and innovations are being planned and/or instituted to meet increasingly important challenges. It is also an environment in which market forces are very much at work and they are starting to exact an unpleasant toll on some schools. As noted, enrollments (and hence revenues) are down in recent years for many schools, and for some significantly so. In the wake of these declines, some schools are facing extinction. Two schools are merging and an independent school recently merged with a university. Another university-based law school was recently purchased outright by a different university that had long been in the market for a law school.

At the same time, schools are trying different ways of delivering the services they provide. William Mitchell College of Law is instituting a hybrid program allowing students to take more classes online. The University of New Hampshire School of Law has an honors program based around a two-year practicum that is designed to give students intensive, hands-on training. The University of Denver’s Sturm College of Law is offering a broader program that allows any student “to spend a full year of their law school career in real or simulated legal practice” and guarantees every student “dynamic, hands-on client interactions outside of the classroom via clinics and externships.”

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22 See the University of New Hampshire School of Law’s Daniel Webster Scholar Honors Program, https://law.unh.edu/academics/jd-degree/daniel-webster-scholars.
23 See the University of Denver Sturm College of Law’s Experiential Advantage program, https://www.law.du.edu/index.php/experiential-advantage. The Task Force Consultant spent one year as a visiting professor at the Sturm College of Law, and subsequently assisted (on a volunteer basis) with an internal student survey related to the Experiential Advantage program.
A number of schools have instituted so-called three-plus-three programs that allow qualified students to complete their undergraduate and law degrees in six years instead of seven. The program at the Sturm College of Law even includes an option allowing highly qualified high school seniors to apply for its three-plus-three program as they apply to the university for undergraduate admission. In addition, a number of schools without their own law schools are entering into three-plus-three agreements with nearby law schools. LeMoyne College in Syracuse, New York, for instance, has three-plus-three agreements with law schools at Syracuse University and at Fordham University.

Schools are revising their third-year curricula to better prepare their graduates to compete in a changing employment market. One school has revised its third year to allow for a form of specialization. New York University School of Law has a series of “Faculty-designed Professional Pathways [that] guide students in a focused area of study and skill development in particular areas of law, the bulk of which they will pursue during their 3L year. Pathways are designed to help students who have developed interest in a particular career area and make them highly competitive in the job market for that field.” And the Elon University School of Law now requires its JD students to complete full-time, course connected residencies-in-practice as part of a highly experiential curriculum that is two and one-half years long and 20% less expensive than the average cost of a private law school. Among the best-known third-year innovations is Washington and Lee’s, which is an entirely experiential program. Praised for its innovative nature, the program, however, has not prevented serious enrollment and employment declines along with budgetary deficits. To address these challenges, the law school recently announced a rescue plan – the School of Law Strategic Transition Plan – to return it to a sound footing.

Not to be overlooked are schools that have long built their curricula around what are now seen as innovations. Northeastern University School of Law has its long-standing, individualized

24 University of Denver, Sturm College of Law, Six-Year Bachelor/JD Program, https://www.law.du.edu/index.php/admissions/learn/6-year-bachelor-jd-program.
co-op approach, and Baylor University Law School has its even longer-standing Practice Court Program, required of all third-year students.  

Northwestern University School of Law has its Accelerated JD program in which students “complete the same number of credit hours as traditional three-year JD students in five semesters over the course of two calendar years,” and, a number of prominent individuals have called for a true two-year degree, which requires fewer credit hours. Among them are Northwestern Law School Dean Daniel Rodriguez and New York Law School Professor Samuel Estreicher as well as President Barack Obama.

In addition, new schools with differing missions are still opening. For example, the new University of North Texas/Dallas College of Law seeks to provide a low-cost legal education geared to practice-related competencies, with a teaching-focused faculty, and an emphasis on diversity. Belmont University, located in Nashville, Tennessee, has a different vision for its new law school as a part of university that “brings together the best of liberal arts and professional education in a Christian community of learning and service.”

This is not an exhaustive list, but just examples. They – and others – are important because, in many respects, they are natural experiments in which different kinds of schools are trying to devise ways of responding to changes in the world around them. In short, they are market-driven experiments that can include important curricular and pedagogical innovations. They must be watched closely and analyzed, since they are likely to have much to add to the discussion of financing legal education and its relationship to curriculum. They are the incubators of new directions and an exacting market proving ground. Moving forward such experiments may well be the source of possible solutions and models, allowing others to see what can be done, how, and with what success. They can also show what may not work, and this is equally important. Recognizing this diversity of approaches, the Task Force looked skeptically upon inflexible mandates or one-size-fits-all solutions that would constrain innovation and experimentation at a time when they are most needed.

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31 Northeastern University School of Law, “Experiential Learning/Co-op.”  

32 Baylor University Law School, “Curriculum Information: Third Year,”  

33 Northwestern University School of Law, “Accelerated JD,”  

http://www.nytimes.com/2013/01/18/opinion/practicing-law-should-not-mean-living-in-bankruptcy.html?_r=2&.


37 Belmont University, “Belmont Vision Statement,”  
4. The Scarcity of Data

As noted earlier, the scarcity of systematic, reliable, and detailed information needed to address the issues at hand is a particular frustration. In light of the Task Force’s timetable and resources, exploiting the best available information was the only practical course. At best only a partial picture of the current state of affairs is possible, but even this – as the observer noted earlier told the Task Force – is important and valuable.

IV. Detailed Overview of Specific Findings

This section presents the details for the findings outlined above in section II and will follow the same organization. Unless otherwise noted, the information underlying the more specific findings in the next section come from ABA sources, and multiple sources were often utilized in reaching a single finding. Some of this information is publicly available from individual law school annual informational (or 509) disclosures available on the ABA website and the Law School Admission Council website’s Official Guide Archives.\(^\text{38}\) Most data-driven discussions of legal education also draw from these sources. Additionally, some of the information comes from ABA Takeoff Reports, which are reports derived from annual questionnaires that ABA-approved law schools are required to file as part of the ABA law school accreditation process. Much of this information is not publicly available. In recognition of the fact that not all law schools are the same, the discussion of the specific findings will regularly distinguish between private and public schools.

Because of the differences within each type – public or private – the discussion will in some instances make further distinctions among groups of schools within each. This is important because there are key differences among schools that are relevant to the issues surrounding the financing of legal education. Rather than relying on any existing scheme, we have divided schools (public and private together) into five groups based upon the average of a school’s median LSAT (Law School Admission Test) score for full-time students for the years 2000 to 2010.\(^\text{39}\) The groups will be designated simply as G1 through G5, with G1 schools having the lowest LSAT scores and G5 schools the highest.

To briefly illustrate the differences among the groups, G1 schools (public or private) tend to have the lowest tuition, to admit the largest percentage of applicants, and to have lower employment rates for their graduates. In contrast, G5 schools (public or private) tend to have the highest tuition, to admit the lowest percentage of applicants, and to have the highest employment


\(^{39}\) The cut-offs for the five groups are: Group 1 — <152.0; Group 2 — 152.0-154.39; Group 3 — 154.4-157.5; Group 4 — 157.6-161.5; Group 5 — >161.5. The number of schools per group changed marginally over time as new schools came on line. For 2010, the numbers — going from Group 1 to Group 5 — are: 41, 40, 39, 41, and 35. Not included are the three law schools in Puerto Rico and the Judge Advocate General’s school. See Stephen Daniels, “Exploring Longitudinal Patterns in LSSSE Data,” presentation at the LSSSE Symposium, St. Louis University Law School, November 6-7, 2014. The number of G5 schools was too small to include them in the analysis of the LSSSE data.
rates for their graduates. More differences among the groups will become evident as the discussion proceeds, and they are important for understanding the current state of affairs. These differences are among the kinds of information that should be more widely available to prospective law students in making a decision on whether to attend law school and, if so, which school to attend.

1. Declining Enrollments Overall

There are preliminary matters that must be noted before directly addressing the financing of legal education. The first is declining enrollment. Fewer people are attending law school generating fewer tuition dollars to run a school’s operations. As Figure 1 below shows, enrollments have declined in the last few years, and especially so for private schools. As we will see later, these schools have higher tuition rates than the in-state tuition rates for public law schools. Comparing AY2014-15 to AY2009-10 (AY means academic year), the decline in Figure 1 for private schools equals a 19% difference in total enrollment. Most important is the decline in new students (designated as 1Ls in Figure 1) entering law school in those academic years – 30% fewer people were starting in a private law school in AY2014-15 compared to AY2009-10. For public schools the overall decline in enrollment between AY2009-10 and AY2014-15 was 13%, with an 18% decline in 1Ls.

Figure 1. Declines in Law School Enrollment
Among the five different groups of public schools (G1 to G5), the greatest declines in total enrollment were for G4 and G5 schools, the schools with higher full tuition price: down 15% and down 10%, respectively. Declines were lower in the other three groups, but substantial nonetheless. In contrast, among the five private school groups, G4 and G5 schools had the lowest enrollment declines: down 15% and down 5%, respectively. Declines were higher in the other three groups. As we will see later, the private G4 and G5 schools tend to offer the most in financial aid and hence the best discounts from stated tuition among all schools. Discounting will be discussed in detail later.

The question that this Task Force could not answer, but that must be answered, is what role increasing tuition – along with other factors including financial aid, debt, and job prospects – plays in students’ decisions to attend law school, not to attend, or to attend one school rather than another. And there is the subsidiary question of what may happen to diversity and whether law school will be accessible to the socio-economically disadvantaged of any color or background. Affordability is an important, much discussed, but elusive concept when talking about the cost of any kind of professional training. Answering the question about the role of increasing tuition – in combination with those other factors – will help us understand the practical, real-world meaning of affordability and what may be done to enhance it.

One takeaway, however, is that to the extent affordability and, as discussed below, weakness in the job market present a major concern to students considering law school, demand for legal education appears to adjust in response. This, in turn, has prompted some law schools to downsize, close, or merge with other entities, while spurring others to cut costs, reduce tuition, or innovate toward greater efficiency. The ordinary operation of market pressures should induce a measure of caution in considering any regulatory responses to problems in the financing of legal education.

Minority enrollments have not declined in the face of the overall enrollment decline – yet. Yet – because there are signs that it could. Figure 2 shows that the number of law students in public and in private schools identifying themselves as being among one of the minority categories tracked by the ABA has not declined along with the overall enrollment decline (the higher numbers for private law schools in Figure 2 simply reflect the fact that more students attend private schools than public schools). The percentage of all students in public law schools identifying as minority has increased from 21% in AY1994-05 to 27% in AY2013-14. However, the percentage increase in the number of minority students has slowed for public schools in recent years. From AY2004-05 to 2009-10 the number increased by 9%, but from 2009-10 to AY2014-15 it increased by only 3%.

The pattern for private law schools is similar in that the percentage of students identifying as minority has increased – from 19% in AY1994-95 to 30% in AY2014-15.

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40 The figures used here are for all minority categories tracked by the ABA and the discussion here goes beyond 2009. Evidence provided to the Task Force shows statistics essentially the same as those used here; see Michael Simkovic, “Financing a Legal Education,” presentation to the Task Force, August 9, 2014, 20.

41 Some of this may be a result of bans on affirmative action in a number of states.

42 The latter figure may reflect, in part, declines in non-minority students as a part of the overall enrollment decline in private schools.
However, unlike the situation for public law schools, the percentage increase in the number of minority law students in private law schools has not declined, but has stayed relatively stable at 11%-12% in recent years. While these trends appear relatively benign, there still is cause for concern. As one recent commentator noted, the increasing percentages in minority enrollment “is due mostly to deep declines in white law students, and black and Hispanics remain profoundly underrepresented in legal education and the profession.”

Regardless of the current picture of minority enrollment, the concern is whether the trends identified will or can lead to law school student bodies or a legal profession that more closely reflects American society at large. Both now reflect a substantial under-representation of people of color. ABA demographic statistics show a profession that is overwhelmingly White/non-Hispanic – well over 80%. U.S. Census figures show the percent of the population

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that is White/non-Hispanic at about 63%. By mid-century that percentage is projected to drop below 50%. And, those same ABA demographic figures show a noticeable gender imbalance with the percentage of females in the profession being well below 50%. Again, the question of what role cost may be playing in driving law school enrollments down is one this Task Force could not answer, but answering is especially important for understanding the future of diversity in legal education and in the legal profession.

The commentator quoted above raises another level of concern regarding minority enrollment in the face of the overall enrollment challenges faced by law schools. His concern is that some schools may be using increased minority enrollment as a “survival strategy” that has potentially disturbing consequences. He found that schools with the lowest median LSAT scores were the ones increasing minority enrollment, especially African-American and Hispanic students. He sees this as a “critical component of the enrollment management calculus for [such] schools … and could very well have saved some of these schools – at least for now.” Enrollments for white and Asian students, in contrast, went down or stayed stable in these schools. At the other end of the spectrum, the percentages of white and Asian students increased at schools with higher LSAT scores, while the percentages of African-American and Hispanics students decreased. The conclusion is blunt: “Put simply, black and Hispanic students have increased their proportions among law schools considered least prestigious while essentially being shut out of the schools considered most prestigious. White and Asian students, on the other hand, have reaped the benefits of the increasingly competitive admissions climate.” Such a trend will have a potentially negative affect on career opportunities for many students of color.

2. The Weak Job Market

The job market for new law school graduates is far from robust, although some see signs of at least modest improvement. The most recent ABA reports on employment show only a very slight increase in the already unexceptional percentage of graduates landing a permanent, full-time, bar passage-required job (the job for which every law school designs its curriculum). For the public law school class of 2013, the figure was 63%; for the class of 2012, 64%; and for the class of 2011, 62%. For the private law school class of 2013, the figure was 57%; for the class of 2012, 56%; and for the class of 2011, 55%. Unfortunately, comparable figures are not

47 Taylor, supra note 43 at 30.
48 For all material and quotations in this paragraph, see id. at 30-31. This a somewhat different concern then one voiced in a 2009 study that looked at the prospect of black and Mexican-American students making up a smaller percentage of the law school population. That study reported a decline in the number of black law students from 3,432 in 1993 to 3,392 in 2008, and a decline in the number of Mexican-American law school students from 710 in 1993 to 673 in 2008. See Conrad Johnson, “A Disturbing Trend in Law School Diversity,” 2009, Lawyering in the Digital Age, Columbia Law School, http://blogs.law.columbia.edu/salt/.
available for earlier years. The ABA instituted more detailed and stringent reporting requirements for schools in light of concerns about the clarity of some earlier categories.

Figures 3a and 3b show employment figures for the five private school groups and for the five public school groups, respectively. Again, the figures report on the percentage of graduates landing a permanent, full-time, bar passage-required job. The idea here is to present an added level of detail about employment rates and in doing so to illustrate the difference among groups of schools (and why such information is useful, especially for prospective law students). For the public schools and for the private schools, the highest employment rates for the years 2011, 2012, and 2013 for such jobs were for G5 schools. G1 schools – public and private – had the lowest employment rates. Noticeably, the rates for the private G1 schools actually declined from 2011 to 2013, and the rate declined for public G1 schools from 2012 to 2013.

**Figure 3a. Percentage of Private Law School Graduates by Group Employed Full-Time Bar Pass Required**
A similar analysis can be done using figures for graduates with full-time, permanent positions classified as JD-advantage: “A position in this category is one for which the employer sought an individual with a JD, and perhaps even required a JD, or for which the JD provided a demonstrable advantage in obtaining or performing the job, but itself does not require bar passage or an active law license or involve practicing law.”

For private law schools, the highest percentages of graduates landing these kinds of positions increased from 2011 to 2013 for each group of schools, but the percentages were not high. In 2013, they ranged from a high of 13% for G2 schools (also the highest in 2011 – 11%) to a low of 6% for G5 schools (also the lowest in 2011 – 5%).

For public law schools the picture with respect to JD-advantage placements is essentially the same – an increase from 2011 to 2013, except for G5 schools. For them the percentage remained unchanged – 8%. For the other groups the percentage of graduates landing such positions ranged between 9% and 10% and between 11% and 13% in 2013.

Despite the cost, the best available evidence suggests a significant lifetime income premium for those with a law degree compared to those with a bachelor’s degree. This holds for those who graduate in a down job market and for those whose earnings place them at the 25th

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percentiles of the income distribution. Debt, however, can diminish the degree of premium for all law school graduates and so remains a factor to contend with. Still, even with the focus on debt by many commentators, the question is ultimately one of long-term value – and that value is significant.

3. Tuition Dependency

Law schools are tuition-dependent for their revenues, and some are heavily – if not exclusively – tuition-dependent. This is the final preliminary matter. Looking at all law schools, the average was 69% of revenue in AY2012-13 (the last year for which information is available), with 25% of schools receiving at least 88% of their revenue from tuition.

There are important differences among schools in the degree of dependence. Schools with the lower tuitions (which are those in the lower groupings for both public and private schools) are more tuition-dependent, and those with higher tuitions (which are those in the higher groupings) are less dependent. Private G1 schools are by far the most tuition-dependent (the same schools noted above for their low employment rates). In AY2012-13 the average was 95% of revenue. Clearly, anything that disrupts the flow of tuition dollars could put some schools in a very precarious position, and private G1 schools had some of the greater declines in enrollment (and these are the schools, as noted above, trying to increase minority enrollment).

Tuition is at the heart of the concern surrounding the financing of legal education, and even viewed in terms of inflation-adjusted dollars tuition has consistently increased over time. This is true whether viewed in terms of an inflation adjustment made on the basis of the cost of doing business (using the higher education price index, referred to as HEPI), or the price to the consumer (using the consumer price index, referred to as CPI).52

Using inflation-adjusted dollars is important because it shows how much costs have increased beyond what may be expected because of inflation alone. Using nominal dollars – not adjusting for increases due to inflation alone – gives a distorted view of changes over time that can adversely affect responses to those changes. Figures 4a and 4b show the difference the inflation adjustment can make. The two figures present material on trends in law school tuition for private schools and for public schools using three different measures. The first uses nominal dollars for both sets of schools and shows truly dramatic increases for both. For private schools, tuition increased by 109% between AY1999-00 and AY2014-15, and it increased by 231% for public schools (in-state tuition).

52 See supra note 13 on the use of HEPI and CPI.
The second measure – the middle bars in each figure – uses the consumer price index with 1983 dollars as its base (using an older year as a starting point works well for examining
trends over an extended period of time). This measure speaks to the consumer’s cost and ability to pay for the service. If CPI tuition increases it means that the consumer’s ability to pay for the service is not keeping up and the service functionally is costing more than in the past.

What is important in Figures 4a and 4b is the amount of change over time in tuition, keeping in mind that those increases are not because of inflation. The figures show that CPI tuition did not increase as sharply as nominal tuition, but the increases are still quite substantial. CPI tuition increased 46% for private schools between AY1999-00 and AY2014-15, and 132% for public schools. Even taking consumer inflation into account, tuition has become much more expensive. By way of perspective, inflation-adjusted per capita income in the United States actually declined by 6% between 1999 and 2013 (with a noticeable drop between 2008 and 2009).

The third measure – the far right-hand bars in each figure – uses the higher education price index with 1983 as it base. This measure speaks to the schools’ cost of doing business and takes into consideration inflation in the key cost factors for higher education. If HEPI tuition increases it means tuition is increasing faster than inflation in those cost factors. The figures show that HEPI tuition did not increase as sharply as either nominal tuition or CPI tuition, but it still increases markedly. HEPI tuition for private schools increased by 29% between AY1999-00 and AY2014-15, and increased by 104% for public schools (again, decreases in state funding need to be kept in mind). And in light of CPI tuition and per capita income, this only reinforces the concern that law school – public or private – has become increasingly expensive.

Generally speaking and using either version of inflation-adjustment, private and public school tuition increases going from G1 schools to G5 schools. G1 schools have the lowest tuitions and G5 schools have the highest. All groups of schools have steadily increasing inflation-adjusted tuition over time, as the consumer’s ability to pay has not kept pace.

4. Discounting and Full Tuition Price

Full price tuition, however, is not the whole story. Tuition discounting occurs, is widespread, and is generally increasing for both private and public schools. A school’s net tuition is the figure that counts – it is a concise figure that allows for schools to be compared in a meaningful way with regard to the price for their service. School-level net tuition takes into consideration the typical amount of grants/scholarships (financial aid that requires no repayment) as well as the percentage of students receiving grants/scholarships money and the percentage still paying full price. Figures 5a and 5b use the same three measures in Figures 4a and 4b to show...
trends in net tuition and they show net tuition increasing for both private and public schools. But care must be taken in interpreting the increases. Even though net tuition (using net 1983 CPI) increased between AY1999-00 and AY2013-14 – 29% for private schools and 94% for public schools – there is something else important going on.55

The increase itself will be addressed later. What is important here is net tuition’s percentage of the stated tuition because it allows us to easily calculate a figure that demonstrates the magnitude of the discount (simply subtract from 100% the net tuition’s percentage of sticker price).56 The magnitude of discounting has been increasing, meaning that discounts have become deeper. For private schools, the net tuition in AY1990-00 meant a discount of 16% in inflation-adjusted dollars (CPI). In AY2013-14 the discount had increased to 25%. For public schools the discount in AY1999-00 was 22% and it increased to 28%. One dean testifying before the Task Force said his school’s discount rate was about 10-15% when started his deanship and is now at 40%.

Generally speaking, the discounts have been greater for private schools because of their higher tuitions. For each of the five groups of private schools the trend over time has been one of deeper discounts. The deepest discount for private schools in 2013-14 was for G4 schools – a 31% discount. The smallest discount for private schools in 2013-14 was for G1 schools at 21% – again, the schools most tuition-dependent, with the lowest employment rates, and some of the greater enrollment declines. For public schools, G3 schools had the deepest discount in 2013-14 – 29%.

First, subtract the median award from the sticker price and multiple that figure by the percentage of full-time students receiving free money.
Second, multiply the sticker price by the percentage of students paying sticker price. Finally, to get a school’s overall net price add together the figures from the first two steps.

55 It is especially important to note, again, that the increases in public in-state tuition – even net tuition – came as state governments were cutting their appropriations to institutions of higher education. See Ma and Baum, supra note 15. If net 1983 HEPI is used the increases are 15% and 80%, respectively.

56 For example, take a sticker price of $500 and a net tuition of $350 – the net tuition is 70% of the sticker price, and subtracting 70% from 100% yields a discount of 30%; alternatively the formula can be (sticker – net)/sticker.
Figure 5a. Trends in Private School Net Tuition: Average for Nominal$ and Inflation-Adjusted$

Table data:

<table>
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<th>Year</th>
<th>Net Nominal</th>
<th>Net 1983 CPI</th>
<th>Net 1983 HEPI</th>
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</thead>
<tbody>
<tr>
<td>1999-00</td>
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<td>10532</td>
<td>9334</td>
</tr>
<tr>
<td>2004-05</td>
<td>22910</td>
<td>12083</td>
<td>9888</td>
</tr>
<tr>
<td>2009-10</td>
<td>29430</td>
<td>13457</td>
<td>10537</td>
</tr>
<tr>
<td>2013-14</td>
<td>32000</td>
<td>13577</td>
<td>10745</td>
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</tbody>
</table>

Figure 5b. Trends in Public School In-State Net Tuition: Average for Nominal$ and Inflation-Adjusted$

Table data:

<table>
<thead>
<tr>
<th>Year</th>
<th>Net Nominal</th>
<th>Net 1983 CPI</th>
<th>Net 1983 HEPI</th>
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<td>1999-2000</td>
<td>6110</td>
<td>3646</td>
<td>3231</td>
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<td>5180</td>
<td>4239</td>
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<tr>
<td>2009-10</td>
<td>14655</td>
<td>6701</td>
<td>5247</td>
</tr>
<tr>
<td>2013-14</td>
<td>17362</td>
<td>7366</td>
<td>5830</td>
</tr>
</tbody>
</table>
With increased discounting, fewer students in both public and private schools are paying full tuition than in the recent past. As Figure 6 shows, that percentage steadily declined for private schools from 57% in AY1999-00 to 38% in AY2013-14. Looking more closely, the percentage of students paying full price declined in each of the five private school groups. Generally speaking, G4 and G5 schools – which had the highest full tuition prices – had lower percentages of student paying full price, and those in the other groups somewhat higher percentages. For public schools Figure 6 again shows a steadily declining percentage of students paying full price –58% in AY1999-00 to 40% in AY2013-14. Again, those schools in the higher groups with the higher tuitions have lower percentages of students paying full price.

**Figure 6. Trends in Percent of Students Paying Full Tuition**

While the percentage of students paying full price has decreased and the discount rate increased, inflation-adjusted net tuition itself has not always followed suit. Figures 5a and 5b above presented inflation-adjusted figures for CPI net tuition and they show that the actual amount of money schools expect students to pay, in many situations, has still increased. Simply put, stated tuition prices have increased at a greater rate than discounts.

In inflation-adjusted dollars (CPI) private law school students saw their schools’ net tuition increase 29% from 1999-00 to 2013-14. Most of this increase, however, came between AY1999-00 and AY2009-10 – a 28% increase. There was very little change from 2009 to 2014 (a mere 1%). Generally speaking, the patterns for net tuition follow the grouping of private law schools. G1 schools are the least expensive having the lowest inflation-adjusted net tuition at each point in time. G5 schools are the most expensive having the highest at each point in time. For G3 and G4 schools net tuition actually declined slightly between 2009-10 and 2013-14 (-2%
and –1%, respectively), and for the other three groups the increase was 4% or less. Whether this may reflect a permanent bend in the cost curve remains to be seen.

For public law schools inflation-adjusted (CPI) net tuition is lower, but it increased more dramatically than net tuition for private schools (again, importantly, this reflects the declines in state appropriations). Public law school students saw their schools’ net tuition increase by 102% between AY1999-00 and AY2013-14. Again, the greatest increase came between AY1999-00 and AY2009-10, when net tuition increased by 84%. As was the case with the private schools, G1 public schools were consistently the least expensive having the lowest net tuition at each point in time. G5 public schools were the most expensive having the highest net tuition. No public law school group saw a decline in net tuition.

With respect to discounting, more money goes to pure merit (i.e., for LSAT scores and no consideration of other factors) than to pure need (i.e., need demonstrated by financial aid materials submitted by the student with no consideration of other factors). While money for pure need has not disappeared, the trend is less money being used for this purpose and more going to pure merit and to a third, mixed category of need plus other factors (such as prior public service activities or an interest in such work).

Using the only data available, Figures 7a and 7b show this pattern quite clearly in comparing AY2004-05 and AY2009-10 (the ABA stopped collecting this information in 2011). Both public and private schools devoted less to need in AY2009-10 than in AY2004-05 and more to merit, but there were important differences as well. Most obviously, the two figures show that private schools devote a much larger share of grant/scholarship money to merit. And public schools devote larger shares to need and need plus other factors.
Figure 7a. Distribution of Grant/Scholarship Monies by Private Law Schools: Need, Merit, Need-Plus

AY2004-05 | AY2009-10
---|---
% to Need | 20% | 15%
% to Merit | 60% | 64%
% to Need-Plus | 20% | 21%

Figure 7b. Distribution of Grant/Scholarship Monies by Public Law Schools: Need, Merit, Need-Plus

AY2004-05 | AY2009-10
---|---
% to Need | 29% | 21%
% to Merit | 37% | 42%
% to Need-Plus | 34% | 37%
Although the patterns are not always entirely clear, G5 schools – both public and private – devoted less grant/scholarship money to pure merit and more to pure need and to need-plus. Again, these are the schools with the highest tuitions. In 2009-10, private G5 schools devoted between 27% and 37% to each of the need categories. For the other private school groups pure merit was much more important, ranging from 83% of grant/scholarship money for G1 schools to 67% for G4 schools. For the public schools, the 2009-10 pattern for pure merit is quite clear – the percentage of money devoted to merit consistently declines from 75% in G1 schools to 27% in G5 schools. Need-plus consistently increases from 10% in G1 schools to 49% in G4 schools and then drops to 37% in G5 schools (G5 schools had the largest percentage devoted to pure need at 35%).

Figure 8 looks at grant/scholarship money in a different way. Figures 7a and 7b show the percentage allocation among the three categories – merit, need, and need-plus – for the two points in time. Figure 8 shows the inflation-adjusted (CPI) percent increase from AY2004-05 to AY2009-10 in the amount of money devoted to each of those three categories for both types of schools. Schools are clearly investing more money in grants/scholarships. For private schools, the total amount of money devoted to grants/scholarships increased by 43%, but with a mere 2% increase in money for pure need. The substantial increases went to merit and especially to need-plus. For public schools, the total amount of money devoted to grants/scholarships also increased – by 49%. Again, pure need saw less of an increase while the other two categories saw substantial increases. The Task Force heard testimony from law school deans that is consistent with this finding. One noted that pursuing the best students in a competitive market leads his school and others to offer the most money to high-achieving students rather than those with the most need. Another spoke of a “merit scholarship arms race.”
5. Student Borrowing Increasing

Despite the increases in grant/scholarship money, the deeper discounting, and the smaller percentage of students paying full price, most students still borrow to help finance their legal educations. The average student debt by school in 2014 dollars is in excess of $127,000 for private schools and in excess of $88,000 for public schools (the ABA collects information on the average student debt by school, not the average individual student debt). In the face of these levels of debt, evidence presented to the Task Force indicates that law students rarely default on their student loans – a 2-year cohort default rate below 2%. This is lower than the rate for masters/doctoral/professional students generally and a rate lower than for bachelor degree students and below. A recent survey suggests that most practicing attorneys feel their incomes have justified the cost of their legal education and that most law students see good value in their legal education even with the money borrowed.

The amount borrowed in inflation-adjusted dollars has increased. That increase in student borrowing reflects the growth in tuition even adjusting for inflation and the accessibility of loan funds. As Figure 9 shows, these figures represent an increase over the amount of student debt by school in the recent past. In inflation-adjusted dollars, private school debt increased by 25%

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57 See Simkovic, supra note 40 at 44. The 2-year cohort default rate the percentage of borrowers who enter repayment during a federal fiscal year and default prior to the end of the next one to two fiscal years; cf. a lifetime cohort default rate, which measure the lifetime default of a given cohort.

between AY2005-06 (the first year for which data are available) and AY2012-13 (the most recent year for which data are available), and public school debt increased by 34%. Periodic surveys of individual students by the U.S. Department of Education show that individual law student debt – adjusting for inflation – increased by 56% from 2004 to 2012. Cumulative debt – undergraduate plus law school – increased by 44%.

And, figures from the annual Law Student Survey of Student Engagement (LSSSE) show that few 3rd and 4th year students, perhaps less than 15%, expect to graduate with no law school debt.

While the amount borrowed is higher in private schools because of the higher tuitions, the inflation-adjusted amount borrowed increased more for public law schools as their tuitions increased (again, perhaps a result of tuition increases that came in the wake of reduced state support). The greatest increase for public schools came between 2009-10 and 2012-13 – a 21% increase compared to a 15% increase for all private schools. And during this time period, for both public and private schools the increases in borrowing were the greatest for students in G1 schools (22% increase for G1 private and 30% for G1 public), but these were still the schools with the lowest amount borrowed and the lowest tuitions.

Figure 9. Trends in Student Debt in Inflation-Adjusted Dollars (2014$)

While the amount borrowed is higher in private schools because of the higher tuitions, the inflation-adjusted amount borrowed increased more for public law schools as their tuitions increased (again, perhaps a result of tuition increases that came in the wake of reduced state support). The greatest increase for public schools came between 2009-10 and 2012-13 – a 21% increase compared to a 15% increase for all private schools. And during this time period, for both public and private schools the increases in borrowing were the greatest for students in G1 schools (22% increase for G1 private and 30% for G1 public), but these were still the schools with the lowest amount borrowed and the lowest tuitions.


60 See Daniels, supra note 39, using data from a sample of 59 schools that participated consistently in LSSSE between 2005 and 2013, and all respondents within that sample of 59 schools – a total of 134,000-plus respondents.
With programs first instituted in 2006-07, the federal government has become the lender for graduate school and professional school through Grad Plus. Students can borrow the full cost of attendance – tuition plus a school’s stated living expenses. There are a variety of borrower-friendly repayment programs, some of which take income into account. The details of the various options, however, can be complex. The complexities are so great that the Young Lawyers Division presented a resolution and report to the House of Delegates at the 2015 ABA Midyear Meeting – which was adopted – calling for “comprehensive debt counseling and debt management education” on the part of law schools and bar associations.61

Access Group62 staffs a free loan repayment assistance call center available to law students and graduates and has recently published a comprehensive guide to the various programs – Federal Student Loans: Repayment 101.63 The current student loan programs assist students in financing their education and provide repayment options and plans that assure broad access to legal training. True need-based programs that could enhance access because they do not require repayment are, of course, another matter.

Among those federal loan programs is the Public Service Loan Forgiveness Program for graduates who go into lower-paying public service positions. For aspiring law students and graduates this program supports not only access to legal education but also access to justice itself. This program “is intended to encourage individuals to enter and continue to work full-time in public service jobs. Under this program, borrowers may qualify for forgiveness of the remaining balance of their Direct Loans after they have made 120 [ten years’ worth of] qualifying payments on those loans while employed full time by certain public service employers.”64

Echoing the concerns of the Young Lawyers Division, evidence suggests that students do not always take advantage of the services law schools offer for financial counseling and that some of the students who do are not satisfied with the service. This is particularly important in light of the potential consequences of incurring long-term debt as a means of paying for one’s legal education. Annual LSSSE surveys from AY2004-05, AY2009-10, and AY2012-13 show that about one-fifth of 3rd and 4th year students in a sample of 59 schools did not even use the services available (this sample did not include any G5 schools). Of those who did use the

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61 American Bar Association Young Lawyers Division, Report to the House of Delegates, Resolution 106, 2015 Midyear Meeting, Houston, TX.
62 “Founded in 1983, Access Group is a nonprofit membership organization comprised of 197 nonprofit and State-affiliated ABA-approved law schools. Access Group works to further access, affordability and the value of legal education through research, policy advocacy, and direct member and student educational services.” https://www.accessgroup.org/about-us. Christopher Chapman, president and CEO of Access Group, is a member of this Task Force.
63 Also available at: https://www.accessgroup.org/federal-student-loans-repayment-101. See the Access Group’s website for other user-friendly tools explaining the federal loan programs that include calculators to estimate the cost of borrowing and payments under the various options: https://www.accessgroup.org.
services in those years, the surveys show that around one-third in each year said they were unsatisfied or very unsatisfied with the services.65

Increased student borrowing can be seen in another way, one that speaks to the importance of tuition as a source of revenue for law schools and to the importance of loans to pay that tuition. While a crude measure, it still sends an important message about schools’ – not just students’ – reliance on loans. Looking at the most recent figures – for AY2012-13 (well after the federal loan programs were firmly established) – as a percentage of all tuition collected, loans accounted for 123% for public schools and 86% for private schools. The figure can exceed 100% because the current federal loan programs allow students to borrow for living expenses as well as tuition. The higher percentage for public schools may reflect, along with more loan accessibility, sharper tuition increases that outpaced discounting. The percentage of tuition and living expenses that is covered by student loans increases going from G1 schools to G5 schools. The pattern holds for both public and private schools, with G1 schools having the highest percentage and G5 schools the lowest. In other words, both private and public G1 schools are not only the most tuition-dependent schools, but the most loan-dependent as well.

6. Increasing Law School Expenditures as the Cost Driver

Tuition has increased more than would be expected simply because of the effects of inflation on the cost of doing business for law schools. The immediate driver for the inflation-adjusted increase is the growth in law school expenditures.

The most appropriate way to look at expenditures is to normalize them using inflation-adjusted (HEPI) expenditure per full-time equivalent (FTE) enrollment, since raw expenditures will be higher or lower due to higher or lower enrollments. Doing so shows that total inflation-adjusted expenditures per FTE have increased for both public and private schools, but more so in public schools. The greatest increase for public schools came between AY2004-05 and AY2009-10 – at 20%, with an additional 8% increase between AY2009-10 and AY2012-13. For private schools the increase was 11% for each time period (11% plus another 11%).

Figures 10a and 10b break down total expenditures and report on the three areas of expenditure that accounted for the largest proportions of the total in each of the time periods covered by the figures: instructional salaries (which would take into account faculty/student ratio and teaching load), administrative salaries, and grants/scholarships in each time period.66 Since the figures for instructional salaries cannot be disaggregated (they include all instructors and not just full-time, tenure-line faculty), no conclusions can or should be drawn from them regarding

66 Data are available for fringe benefits only for 2012-13. They make up 10% of budget for private law schools and 11% for public law schools.
full-time, tenure-line faculty salaries as a significant cause. Detailed data on these professors’ salaries are not available. On the other hand, student/faculty ratios have decreased, meaning more instructors per student – something generally seen as good, but that increase costs.

Together instructional salaries, administrative salaries, and grants/scholarships consistently made up one-half of the total inflation-adjusted expenditures for both public and private schools. Generally speaking, instructional salaries and administrative salaries each made up a larger proportion of total expenditures in public schools compared to private schools and grant/scholarship money a smaller proportion.

The percentage of total expenditures for each of these three areas did not change significantly for private law schools, as Figure 10a shows – with only a slight decrease for instructional salaries and a slight increase for grant/scholarship money. For public law schools, Figure 10b shows a somewhat greater and consistent decrease in the percentage of total expenditures going to instructional salaries and a consistent increase of total expenditures going to grant/scholarship money. With few exceptions, for both public and private schools inflation-adjusted total expenditures per FTE were highest for G4 and G5 schools (the schools with higher tuitions).

Figure 10a. Trends in Major Areas of Private Law School Expenditure: Inflation-Adjusted (HEPI) per FTE

<table>
<thead>
<tr>
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<th>% Instructional Salaries</th>
<th>% Administrative Salaries</th>
<th>% Grants, etc.</th>
</tr>
</thead>
<tbody>
<tr>
<td>AY2004-05</td>
<td>22%</td>
<td>11%</td>
<td>15%</td>
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<td>AY2009-10</td>
<td>21%</td>
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<td>18%</td>
</tr>
<tr>
<td>AY2012-13</td>
<td>21%</td>
<td>11%</td>
<td>18%</td>
</tr>
</tbody>
</table>

67 Although there have been anecdotal reports of high salaries for a small number of full-time, tenure-line law professors at some schools, evidence presented to the Task Force using Bureau of Labor Statistics data on salaries show that inflation-adjusted median salaries for post-secondary law instructors (a category that includes law professors as well those teaching in other venues) have not increased; see Simkovic, supra note 40 at 27.

68 See Simkovic, supra note 40 at 24.
The amount of inflation-adjusted expenditure per FTE has increased for both public and private schools, 30% and 23%, respectively as Figure 11 shows. The greatest increases in the amount of inflation-adjusted expenditure per FTE were for grant/scholarship money, especially for public law schools. Among public schools the smallest increase in grants/scholarships was 45% for G3 schools, the largest 77% for G4 schools. But in terms of absolute spending, G5 schools spent the most on grant/scholarship money. For private schools, G4 schools spent the most on grant/scholarship money. The next largest increase in expenditure was for administrative salaries for both public and private schools.
The best available data on expenditures per FTE are for AY2012-13. A statistical analysis, which includes all areas of expenditure per FTE that accounted for at least 5% of total expenditures per FTE for both public and private schools, allows for at least a sense of the relative importance of each area for the total. Such an analysis (stepwise regression) shows how much of the variance in expenditures per FTE among schools is explained by any factor while controlling for the effect of other factors. In doing so, this method can tell us whether adding the effects of additional variable actually helps to explain more of the variance in total expenditure.

For public schools, the analysis shows the most important areas to be, in order, instructional salaries (again which take into account teaching load and faculty ratio), grant/scholarship money, and administrative salaries. Instructional salaries alone explain 68% of the variance among schools in total expenditures per FTE for all public schools. Adding grant/scholarship money explains a total of 86% of the variance, and adding administrative salaries brings the amount explained to 89%. For private schools the order is different – instructional salaries alone explain 84% of the variance, adding administrative salaries explains 87%, and adding grant/scholarship money explains 89%. In short, to effect meaningful change in total expenditures it would be necessary to make changes in one or more of these three areas. Doing so would obviously involve hard, and potentially painful, choices.

Figure 11. Percent Increase in Major Areas of Expenditure: Inflation-Adjusted (HEPI) FTE (AY2004-05 to AY2012-13)
V. Conclusion and Recommendations

1. Summary

As noted at the start of this report the charge of the Task Force on the Financing of Legal Education includes a broad range of issues. Key among them are: the cost of legal education for students; the financing of and business model for law schools; student loans and educational debt; and law school practices regarding tuition discounting, merit-based grants/scholarships, and need-based grants/scholarships. These are important matters that cannot be ignored and that charge covers not only the examination of these issues but also, where possible, the development of constructive recommendations – some of which would be resolutions to the American Bar Association’s House of Delegates.

Through its hearings, meetings, and research efforts the Task Force has examined these and related issues. Its findings are clear. Tuition costs have increased beyond what would be expected from inflation, whether viewed in terms of an inflation adjustment made on the basis of the cost of doing business or the price to the consumer. (Again, for public schools we must keep in mind the decreases in state support.) Full tuition prices are not, however, the whole story. Tuition discounting may mitigate those increases. Discounting does occur, it is widespread, and it is increasing. This means fewer students are paying full tuition, with increasing monies going to students for merit rather than need.

Despite the increasing use of discounting, students are still paying more because inflation-adjusted net tuition (tuition taking the discount into account) has still been growing. Simply put, full tuition prices have increased at a greater rate than discounts. As a result, most students still borrow to help finance their legal education. And, the amount borrowed in inflation-adjusted dollars is increasing. That increase reflects the growth in inflation-adjusted net tuition and the accessibility of loan funds.

The current student loan programs assist students in financing their education and provide repayment options and plans that assure broad access to legal training. The federal government has become the lender for graduate school and professional school students through Grad Plus, which offers a variety of borrower-friendly repayment programs, some of which take income into account. Still, deciphering and successfully navigating those programs is a daunting process that can undermine a student’s ability to take advantage of the benefits available.

The implications of these findings may lead people to gravitate toward some of the changes proposed to the Task Force by those who appeared before it. Among them are capping law student loans, requiring law schools to have “skin in the game” by being responsible for loan repayment in certain situations, and even scrapping the current federal student loan program altogether (as one presenter urged). The hope with such proposals is that a kind of fiscal tough love will force schools to become more financially responsible and reduce cost. Proposals such as these deserve careful and serious analysis. But such analyses were beyond the time and resources of the Task Force, if for no other reason than the fact that these proposals involve the cost and financing of higher education more generally and not just legal education. Other
proposed changes go in a different direction, like cutting the cost to the student by allowing a true two-year program with reduced credit hour requirements or by three-plus-three programs that allow students to enroll in law school after three years of college.

The implications of the Task Force’s findings strongly suggest, moving forward, the need to look beyond the usual changes proffered and to reconsider law school business models themselves in light of their relationship to the curriculum, its cost, its increasing reliance on discounting, its even heavier reliance on student loans for revenue, and the resultant student debt. In reality, there seems to be little need to impose the kind of tough love some want because the market is already doing it – in some instances brutally. Enrollments are declining and not just marginally. With those declines come the declines in the tuition dollars that fuel law school operations, and this is occurring at a time of more limited job prospects for many graduates. Some may not be surprised if schools seen as marginal by the “cognoscenti” start to teeter on the edge, but schools of all kinds are facing the challenge and many are grappling with the possible ways forward. Such a reconsideration will need to be a broad one including stakeholders in legal education, in the profession, and beyond.

A start on this reconsideration has already begun with the natural experiments already underway, and experimentation should be encouraged and fostered. As noted earlier, these are market-driven experiments that can include important curricular and pedagogical innovations. They are the incubators of new directions and an exacting market proving ground. Moving forward such experiments may well be the source of practical solutions and models, allowing others to see what can be done, how, and with what success. They can also show what may not work, and this is equally important.

The experiments must be watched closely and analyzed if they are to play a constructive role. Analyzing and evaluating these experiments must be done independently and outside of the ABA, and this might mean the development of one or more ongoing entities to research, share information, and regularly report on legal education. Importantly, the experiments, analyses, and evaluations must not lose track of the unique role played by the legal profession and the importance of access and diversity to that role.

2. Recommendations

From its work, the Task Force sees short-term and longer-term strategies moving forward.

A. Short-Term

Short-term strategies address more immediate issues. The first ones deal with the federal loan programs, which are the key to access to legal education.

It is obviously important that students who borrow student loans to fund their legal education be informed consumers. The United States Department of Education requires accrediting agencies it recognizes to require institutions that they accredit provide debt
counseling at the outset of the program and again at graduation. The Council of the ABA Section of Legal Education and Admissions to the Bar, which is the recognized accreditor of J.D. programs, requires that counseling in its Standards (see ABA Standard 507). The Task Force understands that the counseling required is the minimum required by the rules.

In light of the complexities in the federal student loan program, the responsibilities students accept in borrowing for their education, and the amount of borrowing that students do to fund their legal educations, the Task Force recommends that the ABA encourage the Council to develop and adopt Standards requiring more of accredited law schools than the minimum debt counseling required by the U.S. Department of Education’s requirements. An enhanced standard could require more of schools at the stage that students are applying for admission to law school, and ongoing efforts throughout a student’s law school career.

Further, given the complexities of the loans and the various repayment programs that are in effect, the Task Force urges all actors in the student loan business, including law schools, to produce “plain English” versions of the terms and conditions of these programs in a user-friendly format.

Finally, the report has considered the importance of the Public Service Loan Forgiveness (PSLF) program as a means of encouraging and supporting students who elect to work in the public interest sector after graduation. There is no need for the Task Force to recommend a resolution on this matter. There is existing ABA policy supporting these PSLF programs. The Task Force does encourage others – bar associations and educators – to continue to this program, as well. This is an important access to justice issue.

The second set of short-term recommendations deal with information related to the financing of legal education. In light of the Task Force’s concern with the scarcity of data and in the interest of transparency, accountability, and better understanding of the state of legal education and its challenges, the Task Force recommends that the American Bar Association Section of Legal Education and Admissions to the Bar, which collects and is the custodian of law school accreditation-related data, make that data public, and do so in an easily available spreadsheet format.

To further these purposes, the Task Force also recommends that the ABA Section of Legal Education and Admissions to the Bar return to annually collecting for each law school expenditure data – at the least for institutional salaries, administrative salaries, grants/scholarships, operational expenses like information technology and libraries, and where relevant university charges. The Task Force also recommends a return to collecting information on revenues – at the least JD tuition, non-JD tuition, gifts, endowment income, and where relevant state and/or local government contributions. The Task Force further recommends a return to collecting information on the amount and percentage of financial aid distributed by law schools based on need, merit, and a combination of both criteria.
B. Longer-Term

The longer-term strategies look to the reconsideration of law school business models and experimentation. The Task Force strongly encourages experimentation by law schools. Schools that undertake experimentation are the incubators of new directions that operate in an exacting market proving ground. The Task Force further recommends that schools seek appropriate variances from the Council and Section when needed and that the Council and Section give such requests serious and open-minded consideration.

Experimentation requires analysis and evaluation and the Task Force recommends the independent analysis and evaluation of these experiments by entities and researchers outside of the ABA. This may include the development of one or more ongoing entities to conduct research, share information, and regularly report on legal education. This research, among other things, should focus on what role increasing tuition – along with other factors including financial aid, debt, and job prospects – plays in students’ decisions to attend law school, not to attend, or to attend one school rather another. This research should also include special attention to diversity. The kind of research outlined here can provide a real-world meaning of affordability and what may be done to enhance it.

3. Outline of Recommendations Related to Proposed Resolutions

A. Proposed resolutions on debt counseling:

Encourage the Council of the ABA Section of Legal Education to mandate more than the minimum debt counseling now required by U.S. Department of Education regulation.

Encourage the development and publication of “plain English” disclosures about student loans and repayment options in a user-friendly format.

B. Proposed resolutions on data collection:

Encourage the ABA Section of Legal Education and Admissions to the Bar to make public the information on legal education it currently maintains and collects going forward (including the information below).

Encourage the ABA Section of Legal Education to return to annually collecting:

- Expenditure data for each law school;
- Revenue data for each law school; and
- Information on the amount and percentage of financial aid distributed by law schools based on need, merit, and a combination of both criteria.
C. Proposed resolution on innovation:

The ABA Section of Legal Education and Admissions to the Bar should strongly encourage experimentation by law schools in finding new ways to balance sound curriculum, cost-effectiveness, and new revenue streams.

The ABA Section of Legal Education and Admissions to the Bar should strongly encourage schools to seek appropriate variances from the Council/Section when needed and that the Council/Section should give such requests serious and open-minded consideration.

The ABA Section of Legal Education and Admissions to the Bar should strongly encourage the independent analysis and evaluation of these experiments and this may include the development of one or more ongoing entities to research, share information, and regularly report on legal education.

If such research entities are established, they should pursue research on why students are or are not choosing to attend law school, with a special emphasis on diversity, to help assess the importance of cost, debt, tuition discounting, job prospects on those decisions, and with a special emphasis on diversity.

The Task Force’s findings and conclusions paint a sobering picture and much to the Task Force’s frustration offer no easy answers for the challenges facing legal education. Hopefully, the Task Force has added useful information to help focus and improve the discussion of issues at the heart of legal education’s and the legal profession’s future.

Respectfully submitted,

Dennis W. Archer, Chair
Task Force on the Financing of Legal Education
August 2015
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GENERAL INFORMATION FORM

Submitting Entity: American Bar Association
Task Force on the Financing of Legal Education

Submitted By: Dennis W. Archer, Chair

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

   The Task Force on the Financing of Legal Education offers five resolutions. In light of the complexities in the federal student loan program, the responsibilities students accept in borrowing for their education, and the amount of borrowing that students do to fund their legal educations the first two resolutions deal with loans and repayment programs. One encourages the Council of the Section of Legal Education and Admissions to the Bar to mandate -- through the ABA Standards for the Approval of Law Schools -- enhanced financial counseling for students (prospective and current). The other – in the interest of fuller disclosure – urges the development and dissemination of easily understood (“plain English”) versions of the various loan and repayment programs. This is addressed to all participants in the student loan business and process, including law schools.

   The second two resolutions deal with information gathering and dissemination relevant to the financing of legal education. They address the scarcity of needed information and serve the interests of transparency, accountability, and better understanding of the state of legal education and its challenges. One (the third of the five resolutions) simply encourages the Council of the Section of Legal Education and Admissions to the Bar to return to collecting expenditure, revenue, and financial aid data annually for each law school. This information was collected in the past. The other (the fourth of five resolutions) encourages the Council of the Section of Legal Education and Admissions to the Bar to make public, in an easily available spreadsheet format, the information on legal education it currently maintains and collects going forward.

   The fifth and final resolution strongly encourages experimentation by law schools in finding innovative ways to balance sound curriculum, cost-effectiveness, and new revenue streams. Schools are the incubators of new directions and an exacting market proving ground.

2. **Approval by Submitting Entity.**

   The Task Force approved the resolutions and report at its meeting on April 20 and a series of follow-up email exchanges.
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?

There are two Association policies/positions related to the Task Force work. Neither would be affected by this Resolution. The first is ABA policy supporting the existing federal Public Service Loan Forgiveness Program, which has been in place for nearly a decade. The second is a resolution passed in February 2015 (Resolution 106) encouraging schools and bar associations to increase the amount of loan counseling and debt management services available to students and young lawyers. This Resolution is addressed to the Council of the Section of Legal Education and Admissions to the Bar and encourages it to adopt new Standards or additional language in the Standards to impose a greater obligation on law schools to provide these programs.

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

Not applicable.

6. Status of Legislation. (If applicable)

Not applicable.

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

The Task Force will forward its report to the Council of the Section of Legal Education and Admissions to the Bar and request an opportunity to appear before the Council to present the recommendations the Resolution makes that are relevant to the Council’s work.

The Task Force will publish and circulate the report widely and, through this effort, bring the recommendations in the resolution to the attention of law schools and participants in the student loan business, who are the other parties to whom the Resolution is addressed.

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

There are minimal costs, both direct and indirect, in following up on the recommendations made in the Resolution. There will be some staff time from those who work in the Section of Legal Education and Admissions to the Bar and in the Media and Communications group related to the distribution of the Task Force report. There is no plan to publish hard copies of the report. It will be available on the americanbar.org website and linked to in a number of places.
9. **Disclosure of Interest.** (If applicable)
   
   Not applicable.

10. **Referrals.**

    The report and Resolution will be referred to ABA Sections, Committee, Forums, and any other relevant group for comments and feedback. The report will be widely distributed to the press and groups/entities within the legal education community.

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

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    American Bar Association
    Section of Legal Education and Admissions to the Bar
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    Chicago, IL 60654-7598
    Ph: (312) 988-6744 / Cell: (310) 400-2702
    Email: barry.currier@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.)

    Dennis W. Archer
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EXECUTIVE SUMMARY

1. Summary of the Resolution(s)

The Task Force on the Financing of Legal Education offers five resolutions. In light of the complexities in the federal student loan program, the responsibilities students accept in borrowing for their education, and the amount of borrowing that students do to fund their legal educations the first two resolutions deal with loans and repayment programs. One encourages the Council of the Section of Legal Education and Admissions to the Bar to mandate -- through the ABA Standards for the Approval of Law Schools -- enhanced financial counseling for students (prospective and current). The other – in the interest of fuller disclosure – urges the development and dissemination of easily understood (“plain English”) versions of the various loan and repayment programs. This is addressed to all participants in the student loan business and process, including law schools.

The second two resolutions deal with information gathering and dissemination relevant to the financing of legal education. They address the scarcity of needed information and serve the interests of transparency, accountability, and better understanding of the state of legal education and its challenges. One (the third of the five resolutions) simply encourages the Council of the Section of Legal Education and Admissions to the Bar to return to collecting expenditure, revenue, and financial aid data annually for each law school. This information was collected in the past. The other (the fourth of five resolutions) encourages the Council of the Section of Legal Education and Admissions to the Bar to make public, in an easily available spreadsheet format, the information on legal education it currently maintains and collects going forward.

The fifth and final resolution strongly encourages experimentation by law schools in finding innovative ways to balance sound curriculum, cost-effectiveness, and new revenue streams. Schools are the incubators of new directions and an exacting market proving ground.

2. Summary of the Issue that the Resolution Addresses

The Task Force on the Financing of Legal Education’s charge included a broad range of issues, key among them were: the cost of legal education for students; the financing of and business models for law schools; student loans and educational debt; and law school practices regarding tuition discounting, merit-based grants/scholarships, and need-based grants/scholarships. Dollars and cents are the clear focus of these issues and their connections to the current criticisms of and challenges facing legal education—both those from within legal education and those from without—are also clear.
3. Please Explain How the Proposed Policy Position will address the issue

The Resolution addresses three primary conclusions of the report: (1) for students, the report recommends increased and required counseling and education related to student debt for law school and plain English versions of complex documents to promote wise borrowing; (2) the lack of consistent and sufficient data to permit careful and in-depth study of the financing of law schools will be addressed by encouraging the collection of more data and the public reporting of data; and (3) the need for law schools to be more innovative in program changes and improvements related to the cost of legal education is addressed by encouraging schools to develop new programs and by encouraging the Council of the Section of Legal Education to be receptive to them.

4. Summary of Minority Views

There are two separate statements filed with the report from Task Force members. They generally agree with the recommendations of the report but offer some clarification and elaboration on some of the matters the report addresses.
RESOLVED, That the American Bar Association urges federal, state, tribal, and territorial courts and legislative bodies to adopt rules or enact legislation to establish a privilege for confidential communications between a client and a lawyer referral service, ensuring that a client consulting a lawyer referral service for the purpose of retaining a lawyer or obtaining legal advice from a lawyer may refuse to disclose, or prevent the lawyer referral service from disclosing, those confidential communications.
I. Introduction

This resolution urges federal, state, tribal, and territorial courts and legislative bodies to adopt rules or enact legislation to establish a privilege for confidential communications between a client\(^1\) and a lawyer referral service (“LRS”) for the purpose of retaining a lawyer or obtaining legal advice from a lawyer. The new LRS-client privilege established by these rules or legislation should be similar to the privilege that currently exists for confidential communications between attorneys and their clients and should also protect other confidential client information relating to the representation, such as the identity of the client, which may not technically be privileged in many jurisdictions. Such a privilege should provide that a person who consults a LRS for the purpose of retaining a lawyer or obtaining legal advice may refuse to disclose the substance of that consultation and may prevent the lawyer referral service from disclosing that information as well. As with other privileges, the client contacting the LRS would have the authority to waive the LRS-client privilege, and each jurisdiction may wish to apply certain recognized exceptions to the attorney-client privilege and/or duty of confidentiality to this new privilege.

II. Background on Lawyer Referral Services

Lawyer referral services help connect people seeking legal advice or representation with attorneys who are qualified to assist the individual client with their specific legal needs. In addition to providing an important service to the public, LRSs provide an important service for attorneys by helping them to get new clients and grow their practices.

LRSs are usually non-profit organizations affiliated with a bar association, local or state. There are hundreds of these organizations nationwide, and they assist hundreds of thousands of clients every year. Some state governments and/or bar associations regulate and certify local LRSs, such as in California. In addition, the ABA offers its own accreditation to LRSs nationwide. While some LRSs are directed by attorneys, most of the staff who do “intake” (answering phone calls from clients or speaking with people who walk-in) are not attorneys and do not typically act under the direct supervision of attorneys.

The lawyer referral process begins when the client contacts the lawyer referral service, usually by phone or email, to explain a problem, and ends when the LRS either provides the client with contact information for one or more attorneys whose expertise is appropriate to the problem or directs the client to a legal services program, government agency, or other potential solution. In the course of this interaction, confidential information is often provided by the client to the LRS to ensure that the client is routed to the appropriate attorney or other service provider.

\(^{1}\)“Client” as used throughout the Resolution and Report means a client of the lawyer referral service, not a client of a lawyer who may later represent the person contacting the lawyer referral service.
III. **Background on the Attorney-Client Privilege and the Lawyer’s Duty to Protect Client Confidentiality**

The concepts of attorney-client privilege and lawyer confidentiality both concern information that the lawyer must keep private and are protective of the client’s ability to confide freely in his or her lawyer, but the concepts are not synonymous.  

The attorney-client privilege protects any information communicated in a confidential conversation between a client and an attorney for the purpose of seeking or obtaining legal assistance, and it usually extends to communications between a prospective client and an attorney (even if the attorney is not ultimately retained). Originally established through the common law and now codified in many state rules of evidence, the attorney-client privilege allows the client and attorney to refuse to reveal such communications in a legal proceeding. The underlying purpose of the attorney-client privilege is to encourage clients to seek legal advice freely and to communicate candidly with lawyers, which, in turn, enables the clients to receive the most competent legal advice from fully-informed counsel. The privilege belongs to the client, not to the lawyer, and so the client is always free to waive the privilege.

On the other hand, the principle of confidentiality is set out in the legal ethics rules adopted by each state and other jurisdictions and in ABA Model Rule of Professional Conduct 1.6. These rules generally prohibit lawyers from revealing information relating to the representation of a client in the absence of the client’s informed consent, and violations of the rules may lead to disciplinary sanctions.

Although these concepts are closely related, the scope of the lawyer’s ethical duty of client confidentiality is somewhat broader than the scope of the attorney-client privilege. While the attorney-client privilege only protects confidential communications and information given for the purpose of obtaining legal representation or advice (i.e., privileged communications and information), the duty of confidentiality protects both privileged information and other non-privileged—but confidential—information relating to the representation, including such things as the identity of the client (which is only privileged in a minority of states). However, despite these and other subtle differences, both the attorney-client privilege and the ethical duty of client confidentiality contribute to the trust that is the hallmark of the confidential lawyer-client

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2 Michmerhuizen, Sue, ABA Center for Professional Responsibility, “Confidentiality, Privilege: A Basic Value in Two Different Applications, May 2007, available online at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/confidentiality_or_attorney_authcheckdam.pdf

relationship and encourage the client to seek legal assistance and to communicate fully and frankly with the lawyer.  

Both the attorney-client privilege and the duty of confidentiality are sometimes subject to exceptions, such as when disclosure may be necessary to prevent death, substantial bodily harm, or substantial injury to the financial interests or property of someone, or when the communication with the lawyer was for the purpose of committing a crime or defrauding others (the so-called “crime-fraud” exception). These exceptions vary somewhat from state to state and can also vary between the privilege and the duty of confidentiality within each state.

IV. The Problem and the Solution

If a client reveals confidential information to a LRS in an effort to obtain legal advice or counsel, it is unclear under existing case law whether any statutory or common law privilege would protect that communication (except in California, which passed a statute creating such a privilege in 2013). As noted above, most LRS staff are not attorneys, nor are most of these staff directly supervised by attorneys. Moreover, the LRS client typically seeks to obtain a referral to an attorney, not legal advice or representation from the LRS itself. Thus, some courts may conclude that neither the attorney-client privilege nor the broader ethical duty of client confidentiality apply to communications between clients and LRSs (though it should be noted that we have found no published case where a court made a finding on this issue).

This is a problem for at least two reasons. First, it hampers communications between some clients and LRSs, making it difficult for the LRS to gather the information necessary to make a referral to the appropriate lawyer. Clients sometimes ask LRSs whether their communications are privileged, and in most states, the current answer is “we don’t know, but the communications may not be protected.” It is crucial that clients feel comfortable sharing as much information as possible with a LRS in order to facilitate a referral to the best possible attorney (or agency) for their particular legal issue. Second, in a number of instances, litigants have sought discovery from a LRS with respect to confidential communications with a client, and it is likely this will continue to occur.

This resolution urges federal, state, tribal, and territorial courts and legislative bodies to adopt rules or enact legislation establishing a new privilege for confidential communications between a client and a LRS in order to eliminate any uncertainty as to the privileged status of such communications from a client seeking legal counsel. It would enable LRSs to reassure clients and thereby maintain the kind of honest and open communication required to make a good referral. It would also eliminate the possibility that an opposing lawyer might attempt to subpoena documents and/or seek testimony from a LRS concerning its confidential communications with the other party.

It should also be noted that the ABA previously expressed support for the goals and substance of this proposal in August 1993 when it adopted the ABA Model Supreme Court Rules Governing Lawyer Referral Services and the ABA Model Lawyer Referral and Information

4 See ABA Model Rule 1.6, Comments 2 and 3.
Service Quality Assurance Act. Rule XIV of the Model Supreme Court Rules and Section 6 of the Model Act both state that:

“A disclosure of information to a lawyer referral service for the purpose of seeking legal assistance shall be deemed a privileged lawyer-client communication.”

In addition, the Commentary to Rule XIV and Section 6 both state that “since a client discloses information to a lawyer referral service for the sole purpose of seeking the assistance of a lawyer, the client's communication for that purpose should be protected by lawyer-client privilege.”

The ABA also adopted related policy in February 2001 stating that confidential client information held by legal aid and other similar programs should remain privileged and confidential and should not be provided to funding sources absent client consent. In particular, ABA Resolution 8A states in pertinent part that:

“…a funding source should not have access to records which contain information protected by the attorney-client privilege, or by ethical provisions prohibiting the disclosure of confidential information obtained by a client, or by statutory provisions prohibiting disclosure, unless the client has knowingly and voluntarily waived such protections specifically to allow the protected information to be released to the funding source.”

Since the ABA Model Supreme Court Rules and the ABA Model Act urging that LRS-client communications be accorded privileged status were adopted in August 1993, however, only one state (California) has taken action on this issue. Therefore, it is time for the ABA to revise and aggressively implement the substance of its existing policy by adopting the proposed resolution urging courts and legislatures to adopt rules or enact legislation establishing a new privilege for confidential communications between a client and a LRS for the purpose of retaining a lawyer or obtaining legal advice from a lawyer.

Respectfully Submitted,

C. Elisia Frazier, Chair
Standing Committee on Lawyer Referral and Information Service
August 2015


1. **Summary of Resolution(s).** This resolution urges federal, state, tribal, and territorial courts and legislatures to adopt rules or enact legislation establishing a new privilege for confidential communications between a client and a lawyer referral service for the purpose of retaining a lawyer or obtaining legal advice from a lawyer. The new LRS-client privilege established by these rules or legislation should be similar to the privilege that currently exists for confidential communications between attorneys and their clients and should also protect other confidential client information relating to the representation, such as the identity of the client, which may not technically be privileged in many jurisdictions.

2. **Approval by Submitting Entity.** Standing Committee on Lawyer Referral Services, by email on April 17, 2015

3. Has this or a similar resolution been submitted to the House or Board previously? A similar principle was incorporated into the ABA Model Supreme Court Rules Governing Lawyer Referral Services and the ABA Model Lawyer Referral and Information Quality Assurance Act, previously adopted by the ABA House of Delegates as policy in August 1993 (See ABA Resolution 10D). However, while Resolution 10D urged state supreme courts and legislatures to apply the attorney-client privilege to confidential communications between clients and lawyer referral services, the proposed resolution would urge federal, state, tribal, and territorial courts and legislative bodies to adopt rules or enact legislation establishing a new privilege for confidential communications between clients and lawyer referral services.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** This resolution is generally consistent with and would implement the substance of ABA Resolution 10D adopted in August 1993, which adopts Rule XIV of the ABA Model Supreme Court Rules Governing Lawyer Referral Services and Section 6 of the ABA Model Lawyer Referral and Information Service Quality Assurance Act. Both Rule XIV and Section 6 provide as follows:

   “A disclosure of information to a lawyer referral service for the purpose of seeking legal assistance shall be deemed a privileged lawyer-client communication.

Commentary
Since a client discloses information to a lawyer referral service for the sole purpose of seeking the assistance of a lawyer, the client's communication for that purpose should be protected by lawyer-client privilege.”

In addition, the proposed resolution is generally consistent with ABA Resolution 8A, adopted in February 2001, which urges that confidential client information held by legal
aid and other similar programs should remain privileged and confidential and should not be provided to funding sources absent express client consent. ABA Resolution 8A states in pertinent part that:

“…a funding source should not have access to records which contain information protected by the attorney-client privilege, or by ethical provisions prohibiting the disclosure of confidential information obtained by a client, or by statutory provisions prohibiting disclosure, unless the client has knowingly and voluntarily waived such protections specifically to allow the protected information to be released to the funding source.

Furthermore, because the proposed resolution would call for the establishment of a new lawyer referral service-client privilege that is similar to the attorney-client privilege, the resolution is also generally consistent with ABA Resolution 111, adopted in August 2005, which supports the preservation of the attorney-client privilege as essential to maintaining the confidential relationship between client and lawyer required to encourage clients to discuss their legal matters fully and candidly with their counsel.

5. If this is a late report, what urgency exists which requires action at this meeting of the House? This is not a late report, but there is urgency for House action nonetheless. Lawyer referral services get questions from clients about this issue on a regular basis, such as, “Before I tell you about my case, is this conversation privileged and confidential?” Lawyer referral services need the certainty of a specific codified or court-recognized privilege protecting confidential communications between a client and a lawyer referral service in order to reassure such clients and facilitate the kind of open communication required to make the right referral to the right lawyer. Without such a specific privilege, litigants will continue to seek inappropriate discovery of these confidential communications between clients and lawyer referral services.


7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. Lawyer referral services and their respective state and local bars around the country would hopefully urge their respective state supreme courts and legislatures to adopt rules or pass laws recognizing this privilege. In addition, the ABA sponsoring entities, in coordination with the ABA Governmental Affairs Office and the ABA Center for Professional Responsibility, would urge the federal courts and Congress to approve similar rules and legislation at the federal level.

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

9. Disclosure of Interest. (If applicable) None

10. Referrals. None
11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)

   C. Elisia Frazier  
   114 Grand View Drive  
   Pooler, GA 31322-4042  
   Cef1938@hargray.com  
   912-450-3695

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.

   C. Elisia Frazier  
   114 Grand View Drive  
   Pooler, GA 31322-4042  
   Cef1938@hargray.com  
   912-450-3695
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges federal, state, tribal, and territorial courts and legislatures to adopt rules or enact legislation establishing a new privilege for confidential communications between a client and a lawyer referral service for the purpose of retaining a lawyer or obtaining legal advice from a lawyer. The new LRS-client privilege established by these rules or legislation should be similar to the privilege that currently exists for confidential communications between attorneys and their clients and should also protect other confidential client information relating to the representation, such as the identity of the client, which may not technically be privileged in many jurisdictions.

2. Summary of the Issue that the Resolution Addresses

Lawyer referral services provide a public service in helping clients to find legal representation (and attorneys find clients). In order to provide this service, lawyer referral services must first obtain information from each client about their case or issue, to ensure that they are referred to the appropriate attorney for their specific legal needs. In most states, it is unclear under existing case law whether any statutory or common law privilege would protect these confidential communications between a client and a lawyer referral service, meaning that they are potentially subject to compelled discovery and disclosure. Lawyer referral services are regularly questioned by clients about this issue, and most are unable to reassure clients that their communications are clearly privileged. This can hamper the kind of open communication required to make the right referral. Moreover, in a number of instances, litigants have sought discovery into such communications.

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

This resolution would urge federal, state, tribal, and territorial courts and legislatures to adopt rules or enact legislation establishing a new privilege for confidential communications between a client and a lawyer referral service for the purpose of retaining a lawyer or obtaining legal advice from a lawyer. It would enable lawyer referral services to reassure their clients and thereby maintain the kind of open communications required to make a good referral. It would also eliminate, or at least minimize, the risk that an opposing lawyer might subpoena documents or seek testimony from a lawyer referral service concerning its confidential communications with the other party.

3. Summary of Minority Views

None as of this writing.
RESOLVED, That the American Bar Association urges federal, state, local, territorial and tribal legislatures and government agencies to provide the funding necessary to develop, implement, and maintain appropriate cybersecurity programs for the courts and to train court personnel on methods to counter threats and protect judicial information systems from cyber intrusions or data breaches.
REPORT

I. INTRODUCTION

This Resolution focuses on cybersecurity threats that affect the judicial system and may pose a risk to the fair and efficient administration of justice. It urges federal, state, local, tribal and territorial legislatures and government agencies to provide the funding necessary to develop, implement, and maintain appropriate cybersecurity programs for the courts and to train court personnel on methods to counter threats and protect judicial information systems from cyber intrusions or data breaches.

The ABA Resolution is based upon the recognition that adequate funding and training are necessary to protect the public’s interest in the integrity of the courts and the data they hold. Such funding and training should enable the courts to perform a number of important tasks, including the conduct of regular risk assessments of each court’s information security program; updates to security controls; continuous vulnerability monitoring; the development and testing of comprehensive incident response and business continuity/disaster recovery (BC/DR) plans; and the sharing of cyber threat information among the courts and the legal community.

Over the years, the ABA House of Delegates has adopted a number of Resolutions sponsored by the ABA Cybersecurity Legal Task Force and the Section of Science & Technology Law that address cybersecurity threats and urge organizations to follow best practices to address them. In addition, the ABA has adopted Resolutions that address threats within courthouses and are directed toward participants in the judicial system, and any actual or perceived threat that may impede or interfere with access to the justice system and are also a threat to the fair and efficient administration of justice. The ABA has not adopted any policy that addresses the need for funding to develop, implement, and maintain an appropriate cybersecurity program for the courts.

From a security perspective, the courts in recent years have provided resources for building security. For example, the National Center for State Courts (NCSC) has been in the forefront of courthouse building security—a number of highly-publicized incidents of violence in courthouses around the country focused attention on this problem and best practices have been developed to address it.¹ Now, as the courts modernize their information systems, adequate funding will be required to develop, implement, and maintain an appropriate cybersecurity program, assess the threats to those systems, and protect the volumes of confidential and sensitive data that the courts collect, use, store, and share.

¹ The NCSC has conducted extensive research on the causes and prevention of court building violence and published Steps to Best Practices for Court Building Security (“Steps to Best Practices”), available at http://www.ncsc.org/services-and-experts/areas-of-expertise/~/media/Files/PDF/Services%20and%20Experts/Areas%20of%20expertise/Emergency%20Preparedness/Security_Best%20Practices_%20Steps_to_Best_Practices.ashx. These best practices represent collaboration with the Center for Judicial and Executive Security (“CJES”) in St. Paul, Minnesota, and the administrative offices of the courts of several states. NCSC encourages the leadership of every court building to strive to achieve and maintain best practices in every area identified in their publication so that every person who works in or visits a court building may do so in the safest environment possible.
As with all organizations, courts must remain forward-looking in managing their cybersecurity program. The threat environment, operational requirements, and innovation are constantly changing. This requires regular assessments of cybersecurity programs, evaluations of the effectiveness of controls and deployed technologies, and adjustments where necessary to maintain a strong security posture. This process necessarily involves a review of funding needs for the security program and updated training.

This is a particularly urgent need for state courts, many of which report having insufficient security budgets. The 2014 Deloitte-NASCIO study emphasized that the cybersecurity landscape for state government is a complex and challenging one, and concluded that unless deliberate action is taken, budgets will continue to be a challenge as cybersecurity threats mount.²

ABA has been an active proponent of adequate court funding. This Resolution builds on the ABA Resolutions adopted over the past decade that urge governments to provide adequate funding for the courts to ensure their security. As cybersecurity threats grow, the need for adequate funding for the courts to address these risks becomes critically important.

II. COURT TECHNOLOGY INITIATIVES

Courts at the federal, state, and local levels are embracing a variety of new technologies; many courts have undertaken important initiatives to modernize their information systems, measures that are designed to facilitate access, openness and transparency, increase efficiency, and reduce costs. These initiatives are vitally important to the cause of justice because they can make the courts more accessible and affordable to a diverse body of litigants. The NCSC website provides a summary of technology developments in state courts over the past decade.³ Important federal and state court technology initiatives are highlighted below.

In the 2014 Year-End Report on the Federal Judiciary, Chief Justice John Roberts announced that the U.S. Supreme Court will launch an online case filing system in 2016.⁴ Once the system is implemented, all filings at the Court—petitions and responses to petitions, merits briefs, and all other types of motions and applications—will be available to the legal community and the public without cost on the Court’s website.⁵

**Electronic Case Filing and Case Management (CM/ECF)**⁶—The courts have deployed new technologies to automate the filing, acceptance, and retrieval of the vast inflow of litigation documents that reach the courts every day. More than 600,000 attorneys have filed case documents using CM/ECF, and they currently file electronically more than 2.5 million documents each month. This system is not limited to attorneys. By logging onto the Public

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⁵ Id. at 9.
Access to Court Electronic Records (PACER) system, members of the public can instantly access and review federal court filings located in courthouses across the Nation.7

“Next Gen” CM/ECF—The national roll out of the Next Generation of the CM/ECF has begun in the U.S. courts of appeals. It is designed to increase chambers’ and clerks’ office efficiency and, when fully implemented, will provide a single sign-on that will allow court users and attorneys to file and retrieve information in any federal court using the same login and password, greatly simplifying access to the system. Testing in district and bankruptcy courts will begin in 2015.

Courtroom Modernization—The federal judiciary has likewise modernized courtrooms to take advantage of technological innovations in exchanging information and ideas. Attorneys can rely on computer-assisted graphics, video, and other technological aids to introduce evidence and facilitate communications with judges and juries.

Video conferencing of court hearings is used to save costs and improve security in some situations by eliminating the need to transport prisoners and making it easier to allow victims and child witnesses to testify. Judges use it to conduct hearings remotely.

Computer-assisted legal research has been integrated into the case resolution process. Courts now have access to extensive legal databases and can quickly locate relevant authority through search commands on desktop computers, tablets, and mobile devices.

Integrated Workplace Initiative (IWI)—While the impetus for the IWI was to reduce the judiciary’s real estate footprint, courts are creating a better and more efficient workplace environment by capitalizing on the flexibility that new and emerging technologies provide. IWI examines how court units work, researches work style changes, and identifies successful mobile working situations, for example, where probation officers work remotely in the field rather than in the courthouse.

eVoucher—An automated system for processing and managing vouchers submitted by lawyers appointed to represent indigents under the Criminal Justice Act was developed by the District of Nevada. Through a collaborative effort, the eVoucher system is being adopted for national use and shared with courts throughout the country.

Other systems are being developed to assist litigants, jurors, and members of the public, including:
- Online jury services support
- Centralized and automated payable processes
- Virtual self-help centers to assist self-represented litigants

Additional technology changes are expected in the coming years to enhance court services.

Electronic Discovery—Amendments to the Federal Rules of Civil Procedures have spurred the transformation of litigation through e-discovery.8 e-Discovery has resulted in the transfer of

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huge amounts of confidential and sensitive data from companies and other organizations to the courts, law firms, technology companies, and other third party outsourcing entities.

**Governments Are Going Paperless**—The federal government and the states are transitioning from print-only publishing to either an environment in which legal materials, including judicial decisions and legislation, are published in a mix of formats or one in which legal material are published in electronic format only. To address these developments, the Uniform Law Commission adopted the Uniform Electronic Legal Material Act (UELMA), a model state law that provides for authentication of legal material, and preservation and archiving of this material for the future. This transition creates an immediate need for all federal, state and local courts to protect their electronic records. At the federal level, the Government Publication Office (GPO) is developing best practices for authentication of official documents.  

III. **TECHNOLOGY CHALLENGES**

**Sensitive Data at Risk**

Litigation often involves sensitive matters: criminal prosecutions, bankruptcy petitions, malpractice suits, discrimination cases, and patent disputes may all lead to the collection of confidential information that should be shielded from public view to protect the safety of witnesses, the privacy of litigants, and the integrity of the adjudicatory process.10

--Chief Justice John Roberts, U.S. Supreme Court (2014)

With the opportunities presented by information technology come many challenges and risks that the courts must address. As courts modernize many aspects of their operations, their information systems are becoming interconnected and users are now able to access court services through the Internet. In today’s digital world, threats to data and information systems are found almost everywhere a computer, server, smart phone, thumb drive, or other electronic device is operating (including the cloud). The proliferation of mobile devices and wireless technologies present vulnerable points in the flow of sensitive data in computer networks. Services are provided and documents are stored in the cloud. These developments present cybersecurity issues that must be assessed and taken into consideration as the courts determine their funding requirements for court security.

**Law Offices, Governments, and the Courts Are Targets of Cyber Attacks**

The recent highly-publicized data breaches of leading retail companies, health insurers, and government agencies have caught the attention of the public, politicians, and law enforcement.

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The indictment of a Russian national charged in the largest known data breach prosecution provides details of attack methodology used by hackers in several of the largest data breaches.11 A website that goes by the name “information is beautiful” provides a visualization of hundreds of the major data breaches over the past decade and serves as a useful resource to identify and learn about the massive data breaches that have affected the private sector and government.12

Similarly, the courts have suffered data breaches. For example, more than one million driver's license numbers and 160,000 Social Security numbers (SSN) were accessed in a data breach at the Washington State Administrative Office of the Courts' website.13 Citizens booked at a city or county jail, or with a traffic case in a district or municipal court through 2012, or anyone with a DUI citation in the state going back to 1989, may have had their data compromised. The courts have since taken steps to enhance their online security.

It is believed that hackers launched a successful denial-of-service attack against the PACER system that shut down online access for several hours in January 2014.14 Also uscourts.gov and various other federal court websites around the country were affected. The U.S. Court of Appeals website in the Middle District of Florida was also not available for an entire afternoon; no one could file or retrieve documents. A spokesperson for the Administrative Office of the U.S. Courts suggested that the outage was the result of a malicious attack, and the European Cyber Army claimed responsibility in a Twitter message.15

The Florida Department of Juvenile Justice (DJJ) reported the theft of a mobile device containing youth and employee records in January 2011. The Tallahassee Police Department (TPD) was responsible for investigating the theft. The device, which was stolen from a secure DJJ office, was not encrypted or password-protected as required by DJJ’s technology policy.16

Both large and small law firms have been the target of hacker attacks in the U.S. as well as abroad. The ABA Cybersecurity Handbook: A Resource for Attorneys, Law Firms, and Business Professionals (2013) provides details about the threat landscape of legal organizations. The FBI

11 United States v. Drinkman, et. al., No. 09-626 (JBS) (S-2) (D. N.J.) available at http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/02/18/drinkman_vladimir_et_al_indictment_comp.pdf (second superseding indictment); http://www.justice.gov/opa/pr/russian-national-charged-largest-known-data-breach-prosecution-extradited-united-states (February 18, 2015). "This case reflects the cutting-edge problems posed by today's cybercrime cases, where the hackers didn't target just a single company; they infiltrated most of the country's email distribution firms," said Acting U.S. Attorney John Horn in Atlanta. "And the scope of the intrusion is unnerving, in that the hackers didn't stop after stealing the companies' proprietary data—they then hijacked the companies' own distribution platforms to send out bulk emails and reaped the profits from email traffic directed to specific websites."
has issued warnings to firms and held a meeting in early 2012 with approximately 200 law firms in New York City to discuss the risk of breaches and theft of client data.\textsuperscript{17} A cybersecurity firm that helps organizations secure their networks against threats and resolve computer security incidents estimated that 80 major law firms were breached in 2011 alone.\textsuperscript{18}

Hackers targeted law enforcement officers from 70 different U.S. law enforcement agencies.\textsuperscript{19} In August 2011 hackers associated with Anonymous and the disbanded hacktivist group LulzSec published 10 GB of personal data of law officers, including thousands of SSNs and dozens of bank account numbers. Security firm Identity Finder CEO Todd Feinman, who disclosed this breach, characterized it as a “staggering amount of personal data that could cause identity theft problems for years to come.”\textsuperscript{20}

\textit{Privacy Violations}—Personally identifiable information (PII) that can be used for fraud and identity theft is being collected and often stored unprotected, putting many Americans at risk.\textsuperscript{21} PII, including SSN, has been publicly available through court online filing systems, and even published on court websites. There is a vibrant market for these data, and the harm to individuals from identity theft has been well-documented. As just one example, on its website, the Internal Revenue Service (IRS) indicates that it “has seen a significant increase in refund fraud that involves identity thieves who file false claims for refunds by stealing and using someone's Social Security number.”\textsuperscript{22}

Data breaches of government agencies are occurring with alarming frequency. In the annual report on the Federal Information Security Management Act (FISMA), the Office of Management and Budget (OMB) stated that federal agencies reported nearly 70,000 information security incidents in FY 2014, up 15 percent from FY 2013.\textsuperscript{23} The Government Accountability Office (GAO) found that the number of reported information security incidents involving PII have more than doubled over the last several years.\textsuperscript{24}

In a state government breach, about 1,500 computers in the Massachusetts Office of Labor and Workforce Development were infected with the computer virus that was designed to let an

\textsuperscript{19} http://www.pcmag.com/article2/0,2817,2390582,00.asp.
\textsuperscript{20} Id.
\textsuperscript{21} For example, a Vietnamese national was indicted recently for allegedly participating in an international scheme to steal and sell hundreds of thousands of Americans’ PII through various websites he operated. United v. Ngo, No. 13-crm-1116 (D.N.H. 2013), available at http://www.justice.gov/opa/pr/2013/October/13-crm-1116.html.
attacker take control of infected computers and transmit confidential information to the digital thieves.\textsuperscript{25} Personal financial information, including names, addresses and SSN of up to 210,000 unemployed Massachusetts residents may have been stolen in the data breach in May 2011. In March 2012 hackers from Eastern Europe illegally accessed a Utah Department of Technology Services (DTS) server containing patients’ SSN and data on children’s health plans. It is believed that a weak password lead to the breach of about 780,000 patient files of Medicaid claims.\textsuperscript{26}

Malware on a San Francisco utilities agency server lead to a data breach of customer names, account numbers, addresses, phone numbers and some e-mail addresses for 180,000 customers.\textsuperscript{27} The agency notified customers that hackers used an open port on an unsecured server to infect it with computer viruses. Improper disclosure of sensitive records is a frequent cause of data breaches. In the State of Texas, 3.5 million records were accidentally published online, including names, addresses, SSN, DOB, and driver’s license numbers.

The problem of data breaches will only become more serious in the future as the courts receive increasing amounts of confidential and sensitive data, reflecting a growing trend in data analytics. The sensitive personal data being amassed by companies and governments is staggering. Inexpensive storage has enabled companies to collect and store large amounts of data, and data analytics is driving companies to retain it far longer than they would have if it were in paper. Litigation will reflect these trends, resulting in the presentation of large amounts of critical, highly-valuable corporate records, including intellectual property, strategic business data, and litigation-related theories and records collected through e-discovery.

Security is only as strong as its weakest link. Failed security has resulted in thousands of data breaches that have led to the loss or compromise of millions of personally identifiable records, as well as the theft of classified information, valuable intellectual property and trade secrets, and the compromise of critical infrastructure.\textsuperscript{28} In many cases, data breaches or other types of cyber incidents could have been prevented or detected early and the risks of the incident mitigated if the organization had undertaken proper security planning and implemented appropriate security safeguards. The NCSC launched the eCourts 2014 initiative to raise awareness of cyber threats and educate court personnel about the steps they need to take to secure their information systems and sensitive data.\textsuperscript{29}

\textsuperscript{25} http://www.mass.gov/lwd/.
\textsuperscript{26} http://www.eweek.com/c/a/Health-Care-IT/Utah-Health-Care-Data-Breach-Exposed-About-780000-Patient-Files-189084.
\textsuperscript{29} Bryant J. Baehr, CIO, Oregon Judicial Department, CyberSecurity: What Judges, Court Administrators, and Court Technologists Must Know, \textit{available at} http://www.e-courts.org/~/media/Microsites/Files/e%20Courts/2014/Materials/Session-8-330pm-Cybersecurity-Bryant.ashx.
IV. ABA POLICIES

Cybersecurity

The House of Delegates adopted Resolution 109 during the 2014 Annual Meeting, sponsored by the ABA Cybersecurity Legal Task Force and the Section of Science & Technology Law. Resolution 109 encourages all private and public sector organizations to develop, implement, and maintain an appropriate cybersecurity program that complies with applicable ethical and legal obligations, and is tailored to the nature and scope of the organization, and the data and systems to be protected. The Report that accompanies the Resolution identifies accepted frameworks and standards that can serve as a reference for developing, implementing, and maintaining an appropriately-tailored cybersecurity program.

Risk Assessment—Cybersecurity is based on a systematic assessment of risks that are present in a particular operating environment. Risk assessments are undertaken to identify gaps and deficiencies in a cybersecurity program due to operational changes, new compliance requirements, an altered threat environment, or changes in the system architecture and technologies deployed. The National Institute of Standards and Technology (NIST) recently published the Framework for Improving Critical Infrastructure Cybersecurity and mapped the Framework to other accepted security frameworks and standards.30

Risk assessments are the basis for the selection of appropriate security controls and the development of remediation plans so that risks and vulnerabilities are reduced to a reasonable and appropriate level. Administrative, technical, organizational and physical controls help ensure the confidentiality, availability, and integrity of digital assets. Such controls should be carefully determined, implemented, and enforced. NIST has published extensive guidance on the selection of controls for government systems.31

Due to the nature of the threat environment, certain activities in a cybersecurity program are ongoing. Continuous monitoring and log analysis are designed to provide data that can enable the early detection of threats. To maintain a proactive security posture, potential threats should be investigated and targeted attacks detected in advance or addressed as they occur. The objective is to address cybersecurity threats and risks in a timely, disciplined, and structured fashion.

Incident Response and Business Continuity/Disaster Recovery (BC/DR)—Incident response is the practice of detecting a problem, determining its cause, minimizing the damage it causes, resolving the problem, and documenting each step of the response for future reference. Fully developed and tested incident response plans and business continuity/disaster recovery (BC/DR) plans are components of a cybersecurity program. Organizations should be prepared if a cyber attack or data breach occurs or if an event interrupts their operations. Response plans, policies,

and procedures should be able to accommodate the full array of threats, not just data breaches. A
cybersecurity incident that is initially handled under an incident response plan may cause a
business interruption that requires implementation of business continuity procedures. GAO has
recommended key management and operational practices to be included in policies for
responding to data breaches of PII.  

The NCSC has focused on the need for emergency planning and response.  

As is the case with most organizations today, data, in electronic as well as hard
copy form, have become the life blood of courts. Managing data and files has become an
essential court function. [ ] court operations face the risk of disruption that can be caused
by many kinds of disasters or emergencies, both man-made and natural. When a disaster
disrupts a court’s data system, the court will be hard pressed to discharge even its most
basic and essential responsibilities. Therefore, courts must develop plans not only to
prevent disruptions to data systems to the maximum extent feasible, but also to recover
such systems as soon and as effectively as feasible after a significant disruption occurs.

Court Security

Resolution 106C, adopted by the ABA House of Delegates at the Annual Meeting in 2005, made
comprehensive recommendations related to federal court security. This Resolution also made
recommendations that related to both the federal and state judiciaries, including urging Internet
vendors and government entities to voluntarily remove certain personal information about a
judge upon request, urging federal and state government departments and agencies to assess
security needs of the administrative adjudication programs within their control, supporting the
creation of a National Clearinghouse on Federal and State Court Security to facilitate
information sharing, and urging Congress to explore ways to assist state courts with enhancing
court security. The Resolution expands the scope of ABA policy on court security to fully
encompass state, local, and territorial courts, including urging state, local, and territorial
legislative bodies and governmental agencies to adopt laws and policies providing for the
development and funding of adequate judicial system security protocols and to take the
necessary steps to minimize the impact of court-related violence.

The Resolution further emphasizes the importance of applying principles of judicial
administration to court security by recommending that courts engage in a comprehensive review
of each court’s respective judicial system security needs, create and regularly review judicial
system security protocols that fulfill those needs, and seek the funding necessary to implement
those protocols. The Resolution also encourages the development of resources to educate those
who participate in the justice system how to identify potential security threats related to the
administration of justice, and how to be effective first responders in the event of an incident of
violence. This multi-faceted approach was designed to enhance court security for all participants,
promote fair and impartial courts, and increase public confidence in the judicial system.

32 Federal Agencies Need to Enhance Responses to Data Breaches, GAO-14-487T (April 2, 2014), page 12,
34 Id.
Resolution 106C included nine resolved clauses pertaining to court building and judicial security in the federal courts. For example, it urges Congress and the Department of Justice Judicial Security Review Group to review changes to U.S. Marshals Service (USMS) procedures to determine whether security vulnerabilities have been remedied. The Resolution also urges Congress to enact legislation requiring the USMS and the Administrative Office of the United States Courts to consult on a continuing basis, and for Congress and the Department of Justice to consider amending existing laws to strengthen court building and judicial security. Resolution 106C also encourages Congress to include sufficient funds in its annual appropriations for the federal judiciary and the USMS so that existing and additional security measures can be fully and effectively implemented.

A 2004 U.S. Department of Justice Office of the Inspector General Report, Resolution 106C, and numerous congressional hearings led to significant changes that benefit the federal courts. The USMS established the National Center for Judicial Security (NCJS) in fiscal year 2008. The goal of the NCJS is to provide educational, operational, and technical functionality in the areas of security not only to federal courts but to all levels of state courts as well. The USMS also established a Threat Management Center within its Office of Protective Intelligence. The purpose of the Threat Management Center is to provide 24/7 response support and information sharing between the USMS and state and local entities. During the 2012 fiscal year the Threat Management Center investigated and analyzed 1,370 threats and inappropriate communications to those protected by the USMS.

Court Funding

Ensuring effective court security at the federal, state, and local levels is in many ways related to funding issues. The ABA has been an active proponent of adequate court funding. The Task Force on Preservation of the Justice System (Task Force), under the leadership of past ABA Presidents Stephen N. Zack and Wm. T. (Bill) Robinson III, convened high-profile symposiums, hearings, and programs on the issue of court funding, and sponsored two Resolutions in 2011 and 2013. The House of Delegates adopted Resolution 302 at the 2011 Annual Meeting. Resolution 302 urges state, territorial, and local bar associations to document the impact of funding cutbacks to the justice system and to publicize those impacts so that the public may be informed of the need to support their court systems. Resolution 302 also urges state, territorial, and local governments to provide stable and predictable levels of funding to justice systems. The Task Force also sponsored Resolution 10C which was adopted at the 2013 Annual Meeting. Resolution 10C urges legislative bodies and governmental agencies to adopt laws or policies to ensure full and adequate court funding. Resolution 10C also adopted the Principles for Judicial Administration, promulgated by NCSC and adopted by CCJ in an effort to assist courts in their efforts to restructure court services and secure adequate funding.

The introduction to the Principles for Judicial Administration states that “[j]udicial leaders have the responsibility to demonstrate what funding level is necessary and to establish administrative

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structures and management processes that demonstrate they are using the taxpayers’ money wisely.”

Reflecting that responsibility, this Resolution urges courts to create and review judicial system security protocols on a regular basis. The author urges courts to be proactive in assessing the needs and effectiveness of their judicial security systems so that they may effectively communicate with appropriators and policymakers. As the commentary to Principle 18 explains, “[t]he court management team is in the best position to know what resources are needed to fulfill its constitutional mandate and how best to present and justify its needs for those resources.” The proactive assessment of security needs is not only a vital component towards effective communication with appropriators, but is also crucial to the preservation of courts as a separate and co-equal branch of government.

Principle 22 directly addresses the issue of court security, stating that “[r]esponsible funding entities should ensure that courts have facilities that are safe, secure and accessible and which are designed, built and maintained according to adopted courthouse facility guidelines.” Courts must examine existing national standards, including the resources discussed above, to determine how best to implement principle 22 in their jurisdictions. Every individual who interacts with the court must have access to proceedings in a safe environment. Adequate court funding is a necessary component in this endeavor. Principle 23 focuses on the importance of technology to provide required security, stating “the court system should be funded to provide technologies needed for the courts to operate efficiently and effectively and to provide the public services comparable to those provided by the other branches of government.”

V. ABA POLICIES—SUMMARY

This section provides a list of ABA policies related to cybersecurity, court security, and court funding, with a brief summary and citation for each policy.

Cybersecurity

In recent years, the ABA House of Delegates and Board of Governors have adopted several policies regarding cybersecurity and lawyers’ use of technology, and the proposed Resolution is consistent with those existing ABA policies. These ABA policies include the following:

Resolution 109, Adopted by the House of Delegates at the 2014 Annual Meeting in Boston (August 2014)

Resolution 109, which was sponsored by the Cybersecurity Legal Task Force and the Section of Science & Technology Law, encourages all private and public sector organizations to develop, implement, and maintain an appropriate cybersecurity program that complies with applicable ethical and legal obligations, and is tailored to the nature

38 Id. at 15 (Principle 18 states “Judicial Branch budget requests should be considered by legislative bodies as submitted by the Judicial Branch.”).
39 See Principles for Judicial Administration at 4 (“Court leaders, whether state or local, should exercise management control over all resources that support judicial services within their jurisdiction.”).
and scope of the organization, and the data and systems to be protected.

The Resolution and Report are available at:


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Resolution 118, Adopted by the House of Delegates at the 2013 Annual Meeting in San Francisco (August 2013)

This Resolution condemns intrusions into computer systems and networks utilized by lawyers and law firms, urges federal, state, and other governmental bodies to examine and amend existing laws to fight such intrusions, and makes other related recommendations.

The Resolution and Report are available at:

http://www.americanbar.org/content/dam/aba/administrative/law_national_security/resolution_118.authcheckdam.pdf

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Policy Adopted by the ABA Board of Governors (November 2012)

The ABA Board of Governors approved a policy in November 2012 comprised of five cybersecurity principles developed by the ABA Cybersecurity Legal Task Force.

The Resolution and Report are available at:

http://www.americanbar.org/content/dam/aba/marketing/Cybersecurity/aba_cybersecurity_res_and_report.authcheckdam.pdf

* * *

Resolutions 105 A, B and C, Adopted by the House of Delegates at the 2012 Annual Meeting in Chicago (August 2012)

Resolution 105A amends the black letter and Comments to Model Rule 1.0 (Terminology), the Comments to Model Rule 1.1 (Competence) and Model Rule 1.4 (Communication), and the black letter and Comments to Model Rule 1.6 (Confidentiality of Information) and Model Rule 4.4 (Respect for Rights of Third Parties) of the ABA Model Rules of Professional Conduct dated August 2012, to provide guidance regarding lawyers’ use of technology and confidentiality. Resolution 105B amends the black letter and Comments to Model Rules 1.18 and 7.3, and the Comments to Model Rules 7.1, 7.2 and 5.5 of the ABA Model Rules of Professional Conduct dated August 2012, to provide guidance regarding lawyers’ use of technology and client development.
Resolution 105C amends the Comments to Model Rule 1.1 (Competence) and Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law), and the title and Comments to Model Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants) of the ABA Model Rules of Professional Conduct dated August 2012, to provide guidance regarding the ethical implications of retaining lawyers and nonlawyers outside the firm to work on client matters (i.e., outsourcing).

The Resolutions and Reports are available at:

http://www.americanbar.org/content/dam/aba/directories/policy/2012_hod_annual_meeting_105a.doc

http://www.americanbar.org/content/dam/aba/administrative/law_national_security/resolution_105b.authcheckdam.pdf

http://www.americanbar.org/content/dam/aba/directories/policy/2012_hod_annual_meeting_105c.doc

**Court Security**

Resolution 106C, Adopted by the House of Delegates at the 2005 Annual Meeting in Chicago (August 2005)

Resolution 106C made comprehensive recommendations related to federal court security. It includes nine resolved clauses pertaining to court building and judicial security in the federal courts.

The Resolution and Report are available at:

http://www.americanbar.org/content/dam/aba/directories/policy/2005_am_106c.authcheckdam.pdf

**Court Funding**

Resolution 302, Adopted by the House of Delegates at the 2011 Annual Meeting in Toronto, Canada (August 2011)

Resolution 302 urges state, territorial, and local bar associations to document the impact of funding cutbacks to the justice system and to publicize those impacts so that the public may be informed of the need to support their court systems; and urges state, territorial, and local governments to provide stable and predictable levels of funding to justice systems.
The Resolution and Report are available at:

http://www.americanbar.org/content/dam/aba/administrative/tips/Court%20Funding/2013%20Annual%20Resolution%2010C.authcheckdam.pdf

Resolution 10C, Adopted by the House of Delegates at the 2013 Annual Meeting in San Francisco, CA (August 2013)

This Resolution urges legislative bodies and governmental agencies to adopt laws or policies to ensure full and adequate court funding. It also adopted the Principles for Judicial Administration, promulgated by NCSC and adopted by CCJ in an effort to assist courts in their efforts to restructure court services and secure adequate funding.

The Resolution and Report are available at:

http://www.americanbar.org/content/dam/aba/administrative/tips/Court%20Funding/2013%20Annual%20Resolution%2010C.authcheckdam.pdf

VI. CONCLUSION

This Resolution focuses on cybersecurity threats that affect the judicial system and may pose a risk to the fair and efficient administration of justice. Now, as the courts modernize their information systems, adequate funding will be required to develop, implement, and maintain an appropriate cybersecurity program, assess the threats to those systems, and protect the volumes of confidential and sensitive data that the courts collect, use, store, and share. This Resolution builds on the ABA Resolutions adopted over the past decade that urge governments to provide adequate funding for the courts to ensure their security. As cybersecurity threats grow, the need for adequate funding for the courts to address these risks becomes critically important. The adoption of this Resolution will enhance court cybersecurity and promote fair and impartial courts.

Respectfully Submitted,

Judith Miller
Harvey Rishikof
Co-Chairs, ABA Cybersecurity Legal Task Force

August 2015
1. **Summary of Resolution.**

   This Resolution focuses on cybersecurity threats that affect the judicial system and may pose a risk to the fair and efficient administration of justice. Now, as the courts modernize their information systems, adequate funding will be required to assess the threats to those systems, and protect the volumes of confidential and sensitive data that reside in the courts. This Resolution builds on the ABA resolutions adopted over the past decade that urge governments to provide adequate funding for the courts to ensure their security. As cybersecurity threats grow, the need for adequate funding for the courts to address these risks becomes critically important. The adoption of this Resolution will enhance court security and promote fair and impartial courts.

2. **Approval by Submitting Entities.**

   The Cybersecurity Legal Task Force approved the Resolution on April 10, 2015.

   The Section of Science & Technology Law voted to co-sponsor this Resolution by email vote of the Section Council (in accordance with the Section Bylaws) on April 29, 2015; the Criminal Justice Section voted to co-sponsor this Resolution by vote of the Section Council on April 25, 2015; the International Law Section voted to co-sponsor this Resolution by vote of the Section Council on May 1, 2015; the Judicial Division voted to co-sponsor this Resolution by vote of the Section Council on May 5, 2015; the Environment, Energy and Resources Section voted to co-sponsor this Resolution by vote of the Section Council on May 8, 2015; the Standing Committee on Law and National Security voted to co-sponsor this Resolution by vote of the Committee Council on May 16, 2015; and the Standing Committee on Technology and Information Systems voted to cosponsor this Resolution by vote of the Committee Council on May 21, 2015.

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?**

   ABA voted to support the Uniform Law Commission’s Uniform Electronic Legal Material Act (UELMA) on February 6, 2012.

   The proposed Resolution is consistent with, and would build upon, several existing ABA policies, including the following:
Resolution 118, Adopted by the House of Delegates at the 2013 Annual Meeting in San Francisco (August 2013)

This Resolution condemns intrusions into computer systems and networks utilized by lawyers and law firm, urges federal, state, and other governmental bodies to examine and amend existing laws to fight such intrusions, and makes other related recommendations.

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Policy Adopted by the ABA Board of Governors (November 2012)

The ABA Board of Governors approved a policy comprised of five cybersecurity principles developed by the ABA Cybersecurity Legal Task Force.

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Resolutions 105 A, B and C, Adopted by the House of Delegates at the 2012 Annual Meeting in Chicago (August 2012)

Resolution 105A amends the black letter and Comments to Model Rule 1.0 (Terminology), the Comments to Model Rule 1.1 (Competence) and Model Rule 1.4 (Communication), and the black letter and Comments to Model Rule 1.6 (Confidentiality of Information) and Model Rule 4.4 (Respect for Rights of Third Parties) of the ABA Model Rules of Professional Conduct dated August 2012, to provide guidance regarding lawyers’ use of technology and confidentiality.

Resolution 105B amends the black letter and Comments to Model Rules 1.18 and 7.3, and the Comments to Model Rules 7.1, 7.2 and 5.5 of the ABA Model Rules of Professional Conduct dated August 2012, to provide guidance regarding lawyers’ use of technology and client development.

Resolution 105C amends the Comments to Model Rule 1.1 (Competence) and Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law), and the title and Comments to Model Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants) of the ABA Model Rules of Professional Conduct dated August 2012, to provide guidance regarding the ethical implications of retaining lawyers and nonlawyers outside the firm to work on client matters (i.e., outsourcing).

Court Security

Resolution 106C, Adopted by the House of Delegates at the 2005 Annual Meeting in Chicago, IL (August 2005)

Resolution 106C made comprehensive recommendations related to federal court security. It includes nine resolved clauses pertaining to court building and judicial security in the federal courts.
Court Funding

Resolution 302, Adopted by the House of Delegates at the 2011 Annual Meeting in Toronto, Canada (August 2011)

Resolution 302 urges state, territorial, and local bar associations to document the impact of funding cutbacks to the justice system and to publicize those impacts so that the public may be informed of the need to support their court systems; and urges state, territorial, and local governments to provide stable and predictable levels of funding to justice systems.

* * *

Resolution 10C, Adopted by the House of Delegates at the 2013 Annual Meeting in San Francisco, CA (August 2013)

This Resolution urges legislative bodies and governmental agencies to adopt laws or policies to ensure full and adequate court funding. It also adopted the Principles for Judicial Administration, promulgated by NCSC and adopted by CCJ in an effort to assist courts in their efforts to restructure court services and secure adequate funding.

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

Although not a later Report, this Resolution focuses on cybersecurity threats that affect the judicial system and may pose a risk to the fair and efficient administration of justice. The threat environment today is highly sophisticated, and massive data breaches are occurring with alarming frequency. Now, as the courts modernize their information systems, adequate funding will be required to develop, implement, and maintain an appropriate cybersecurity program, assess the threats to those systems, and protect the volumes of confidential and sensitive data that the courts collect, use, store, and share.

The only effective defense is a fully-implemented cybersecurity program with controls based on operational criteria and magnitude of harm and risk categorization. In many cases, data breaches or other types of cyber incidents could have been prevented or detected early and the risks of the incident mitigated if the organization had undertaken proper cybersecurity planning and implemented appropriate security safeguards.

6. Status of Legislation. (If applicable)

Not applicable.

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

The Resolution will be distributed to federal, state, local, tribal and territorial court judges and executives, the U.S. Department of Justice and the U.S. Marshals Service, appropriate
members of federal, state, local, tribal and territorial legislatures and government agencies, and other stakeholders in order to alert them to the ABA’s newly-adopted policy and to encourage them to take action consistent with that policy.

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

9. **Disclosure of Interest.** (If applicable) Not Applicable.

10. **Referrals.**

    The proposed Resolution and Report has been sent to the Chairs and staff liaisons of each ABA Section, Division, Task Force, Standing Committee and Commission represented on the ABA Cybersecurity Legal Task Force. They are: Section of Administrative Law, Business Law, Center for Professional Responsibility, Criminal Justice Section, Section of Individual Rights and Responsibilities, Section of Environment, Energy and Resources, International Law, Law Practice Division, Litigation, Science and Technology Law, Special Committee on Disaster Response and Preparedness, Standing Committee on Law and National Security, Standing Committee on Technology and Information Systems, State and Local Government Law, Tort, Trial and Insurance Practice and Public Utility, Communications and Transportation Law.

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

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Delegates, ABA House of Delegates
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

This Resolution focuses on cybersecurity threats that affect the judicial system and may pose a risk to the fair and efficient administration of justice. This Resolution urges federal, state, local, tribal and territorial legislatures and government agencies to provide the funding necessary to develop, implement, and maintain appropriate cybersecurity programs for the courts and to train court personnel on methods to counter threats and protect judicial information systems from cyber intrusions or data breaches.

This Resolution builds on the ABA Resolutions adopted over the past decade that urge governments to provide adequate funding for the courts to ensure their security. As cybersecurity threats grow, the need for adequate funding for the courts to address these threats becomes critically important. The adoption of this Resolution will enhance court cybersecurity and promote fair and impartial courts.

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

This Resolution focuses on cybersecurity threats that affect the judicial system and may pose a risk to the fair and efficient administration of justice. The threat environment today is highly sophisticated, and massive data breaches are occurring with alarming frequency. Now, as the courts modernize their information systems, adequate funding will be required to develop, implement, and maintain an appropriate cybersecurity program, assess the threats to those systems, and protect the volumes of confidential and sensitive data that the courts collect, use, store, and share.

The only effective defense is a fully-implemented cybersecurity program with controls based on operational criteria and magnitude of harm and risk categorization. In many cases, data breaches or other types of cyber incidents could have been prevented or detected early and the risks of the incident mitigated if the organization had undertaken proper cybersecurity planning and implemented appropriate security safeguards.

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

Through this Resolution, the ABA highlights the importance of adequate funding for the courts to address cybersecurity threats. This Resolution and Report will educate stakeholders, heighten their sensitivity to cybersecurity risks, and help the courts effectively evaluate their own specific risks and request adequate funding on behalf of their organizations.

4. **Summary of Minority Views**

This Resolution and Report have been revised in response to input received from several ABA entities. No minority views have come to our attention with respect to the Report.
RESOLVED, that the American Bar Association urges public companies in the United States to diversify their boards so as to more closely reflect the gender balance and diverse nature of the society and workforce in the United States.

FURTHER RESOLVED that the American Bar Association encourages public companies in the United States to adopt plans, policies and practices to so diversify their boards and to include board composition in public disclosure materials.

FURTHER RESOLVED that the American Bar Association urges Federal, State and Territorial Governments to encourage public companies in the United States to adopt plans, policies and practices for achieving diverse boards, and to publicly disclose those plans, policies and practices.
REPORT

I. Introduction and Overview

The Commission on Women in the Profession, its co-sponsors and supporters ask the House of Delegates to adopt this Resolution which (a) urges public companies in the United States to diversify their boards; (b) encourages public companies to adopt plans, policies and practices to diversify their boards and include information on board composition in public disclosure materials; and (c) urges state, federal and territorial governments to encourage public companies to adopt board diversity plans and policies. This Resolution does not ask federal, state, or territorial governments to enact regulations or legislation in support of diversity; nor does it seek to impose quotas on board composition. Instead, this Resolution asks the ABA to support the encouragement of voluntary compliance by companies in an effort to create diverse boards which more closely reflect the population of the United States.

The ABA is committed to the elimination of bias and the enhancement of diversity in its own organization and in the legal profession and justice system. This commitment is not only recognized in prior resolutions passed by the House of Delegates but also by the adoption of Goal III, which promotes full and equal participation in the association, the legal profession and the judicial system.

There is a worldwide movement to enhance diversity on corporate boards, but not necessarily a consensus on how best to achieve that goal. Some countries have enacted legislation which imposes quotas, others have enacted regulations. Other countries seek voluntary compliance, encouraging companies to develop their own policies and procedures for the best way to diversify their individual company board.

The United States follows the voluntary compliance model. Securities and Exchange Commission (“SEC”) rules require public companies to disclose on proxy statements: (1) whether diversity is a factor in considering candidates for nomination to the board; (2) how diversity is considered in that process; and (3) how the company assesses the effectiveness of its policy for considering diversity. But there is no definition of “diversity” in the rule or guidelines for the type of information to be provided. This has resulted in disparate reporting results. This Resolution does not seek to change that voluntary compliance and only seeks to add the support of the American Bar Association and its already public commitment to diversity and inclusion to the current voices encouraging companies to take a more rigorous approach to establishing and outlining their diversity efforts.

Despite the fact that there is no consensus on how to achieve board diversity, it is clear that board diversity is top of mind with thought leaders. There is a plethora of consultants, academics and non-profits providing research and commentary on this issue. News outlets are reporting on diversity efforts nationally and across the globe on a weekly and sometimes daily basis. Former and current officers and directors of public companies are speaking out to aid the effort of creating board diversity in the United States. This Report will (a) set out the statistics of the board composition of public companies in the United States, (b) explain the benefits of board diversity; (c) provide an overview of the support for board diversity; and (d) explain the limiting
effect of the SEC rules and how encouraging additional disclosures can assist in creating board diversity.

II. Why the American Bar Association Should Encourage Public Companies to Create Diverse Boards

A. The Statistics

It is no secret that corporate boardrooms do not reflect the diversity of the population of the United States. The 2013 Census of the United States population shows a breakdown by gender of 50.8% women and 49.2% men. Breaking down the population by race shows:

- 77% White
- 17.1% Hispanic
- 13.2% African American
- 5.3% Asian
- 0.2% native Hawaiian and other Pacific Islander; and
- 2.4% who identify as two or more races.¹

Yet, a 2012 study by the Alliance for Board Diversity that looked at board seats of Fortune 500 Companies by gender and race² showed that 73.3% of those board seats were held by white men and 13.4% of those board seats were held by white women. In contrast, men of color accounted for only 10.0% of the board seats and women of color held just 3.3% of the board seats of Fortune 500 companies. Of the 13.3% of board seats held by people of color, this study showed that African Americans held 7.4% of the board seats, Hispanics held 3.3%, and Asian Pacific islanders held 2.6%.³

Significantly more research and data has been compiled regarding the number of women on corporate boards. A 2014 survey on the percentage of women serving on corporate boards of Fortune 1000 companies reports that the percentage of women (not distinguished by race) on these boards in 2014 was 17.7% compared to 16.6% for the same demographic in 2013.⁴ The percentage of women on the boards of the S&P 500 companies remained flat the last two years at 19.2%.⁵ Although the numbers are slowly rising, the change is not significant. The story for

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¹ United States Census Bureau: http://quickfacts.census.gov/qfd/states/0000.html.
² There are minimal statistics on diversity of corporate board composition other than for race and gender. However, on February 19, 2015 the California State Treasurer renewed his call for more diversity in corporate boardrooms and at the same time called for broadening the definition of diversity to include sexual orientation and gender identity. By the time this Report gets to the House at the Annual meeting, we suspect that there will be more support for this expanded definition, which comports with the American Bar Association definition of diversity and inclusion. See, www.treasurer.ca.gov/news/releases/2015/20150219.asp
⁴ Women on Boards 20/20 Gender Diversity Index of Fortune 1000 Companies for 2014.
⁵ Catalyst, Increasing Gender Diversity on Boards: Current Index of Formal Approaches (2014).
women of color is even worse. In 2014, women of color made up 2.8% of board seats in Fortune 500 companies.\textsuperscript{6}

The InterOrganization Network’s (ION) analysis of the 2013 proxy season, which includes data from almost 2800 companies in the U.S., “continues to show that with few notable exceptions, smaller companies generally lag behind their larger counterparts in electing women to boards. . . only 12.2 percent of board members in the companies included in this analysis were women.”\textsuperscript{7}

These statistics show that the make-up of corporate boards in the United States does not reflect the gender balance and diversity of the society and workforce of the United States. But research shows that diverse boards are important to corporate operations.

B. The Importance of Diverse Corporate Boards

Plain and simple, diverse boards are good for business. Research shows that public companies with boards that are gender diverse and reflective of the diversity in the United States population have positive financial performance and overall stronger organizational health.

For example, a study by McKinsey & Company in 2012 looked at executive board composition, return on equity (ROE) and margins on earnings before interest and taxes (EBIT) of 180 publicly traded companies in France, Germany, the United Kingdom and the United States for the period 2008-2010. To score diversity, the research team looked at gender and racial and ethnic diversity. For companies ranking in the top quartile of executive board diversity, ROE was 53% higher than those in the bottom quartile. At the same time EBIT margins at the most diverse companies were 14% higher than those of least diverse companies.\textsuperscript{8}

In addition, a report commissioned by the California Employees’ Retirement System (CalPERS) found that companies with diverse board seats exceeded the average returns of the Dow Jones and NASDQ indices over a five year period. CalPERS concluded that companies without ethnic and gender diversity on their boards could eventually be at a competitive disadvantage.\textsuperscript{9}

Studies that focus specifically on gender make-up of corporate boards came up with similar conclusions. According to a 2014 Credit Suisse Research Institute study, greater gender diversity in companies’ management coincides with improved corporate financial performance and higher stock market values.\textsuperscript{10} A 2012 study prepared by Credit Suisse reported that companies with women on their boards outperformed companies with no women on the board. By reviewing six years of corporate data, Credit Suisse found that for companies with a market capitalization of greater than $10 billion, the share prices for companies with women on the board had an average 55% higher return on equity and 43% higher margins on earnings before interest and taxes than companies with no women on the board.\textsuperscript{9}

\begin{footnotesize}
\textsuperscript{6} Id.
\textsuperscript{7} Summary of Survey found in the Thirty Percent Coalition letter to Russell 1000 members October 24, 2014.
\textsuperscript{8} \textit{Is There a Payoff from Top-Team Diversity: Between 2008 and 2010, Companies with More Diverse Top Teams Were also Top Financial Performers}, Thomas Barta, Markus Kleiner and Tilo Neumann, McKinsey Quarterly (April 2012), http://mckinsey.com/insights/organization/is_there_a_payoff_from_top_team_diversity.
\textsuperscript{9} Board Diversification Strategy: Realizing Competitive Advantage and Shareowner Value (February 18, 2009).
\textsuperscript{10} See, Credit Suisse, “The GS Gender 3000: Women in Senior Management” September 2014.
\end{footnotesize}
board outperformed those without women by 26%. For smaller companies the number is 17%. \textsuperscript{11} Furthermore, a study published by Catalyst in 2011 found that Fortune 500 companies with three or more women on their board significantly outperformed companies with no women on the board. \textsuperscript{12} Studies published by accounting firms and consultants in addition to those mentioned above came to the same conclusion that diversity improves performance. \textsuperscript{13}

But it is also important to recognize other benefits of diverse boards. Deborah Rhode and Amanda Packel from Stanford University performed an analysis of significant amounts of research supporting the case for racial, ethnic and gender diversity on corporate boards. The article on their findings concludes that diversity can improve decision making and enhance a corporation’s public image by conveying commitment to equal opportunity and inclusion. \textsuperscript{14} All of these findings align with the American Bar Association’s commitment to diversity and inclusion.

\textbf{III. Why The ABA Should Encourage Public Companies To Adopt Plans, Policies And Practices To Diversify Their Boards And Include Information On Board Composition In Public Disclosure Materials}

\textbf{A. There is Overwhelming Support For Diversity But The Statistics Referenced Above Show that the Majority of Companies are Not Creating Diverse Boards}

In addition to encouraging companies to diversify their boards, this Resolution also urges the American Bar Association to encourage companies to enact policies and practices to diversify boards; and to include that information on board composition in public disclosure materials. Although there is significant support for the idea of board diversity, that support is not yet reflected in board composition. Research (and actions taken by companies that have diverse boards) shows that having policies and procedures in place and complying with those polices helps achieve the diversity goal. As a result, This Resolution encourages companies to adopt policies and procedures that can help in creating a diverse board.

The American Bar Association has been at the forefront of the efforts to place more women on corporate boards. In 2007, the American Bar Association founded DirectWomen. An innovative initiative of the American Bar Association, the ABA Section of Business Law, and Catalyst, Inc., DirectWomen is a program specifically designed to identify, develop, and support accomplished women lawyers for placement in qualified director positions in U.S. companies, while promoting the independence and diversity required for good corporate governance. DirectWomen identifies leading women lawyers from around the country who are able to provide the experience, independence, business judgment and diversity required for board effectiveness and good corporate governance. It also serves as a resource for companies seeking

\textsuperscript{11} See, Credit Suisse, Gender Diversity and Corporate Performance August 2012.
\textsuperscript{13} See, e.g., Andre Chanavat and Katherine Ramsden, Mining the Metrics of Board Diversity (Thompson Reuters 2013); Women in the boardroom: a global perspective (Deloitte 2013); No More Excuses: The case for bold action to move women onto boards and into senior executive roles (Ernst & Young 2014).
qualified women-attorney board candidates. The ABA already has an active voice in the promotion of diversity on corporate boards. The adoption of this Resolution will amplify that voice.

B. Directors and Officers Favor Plans To Diversify Corporate Boards

A 2014 PWC study found that 57% of Directors on Fortune 500 Boards indicate that their boards are talking about recruiting new members with diverse backgrounds. In a 2012 survey of U.S. corporate board members by Spencer Stuart, three-quarters of the respondents indicated that their company had taken steps to support and promote board diversity. The Thirty Percent Coalition, a national organization of senior business executives, national women's organizations, institutional investors, corporate governance experts and board members working for increased board diversity, has a commitment from a cross section of corporate partners working together to increase board diversity. In addition The Thirty Percent Coalition has established a group of “Corporate Champions” comprised of former CEOs of U.S. companies and current members of corporate boards who are working with the Coalition to advocate for diversity on boards.

C. Institutional Investors Favor Plans to Diversify Boards

Institutional Investors are also encouraging companies in their portfolios to address diversity in the boardroom. For the last three years Institutional Investors representing more than $3 trillion in assets under management along with some of the nation’s leading women’s organizations have sent letters to select companies in the Russell 1000 index urging them to embrace diversity on their corporate boards. Ninety-Six entities including State Treasurer’s Offices, pension funds, mutual funds and investment managers, foundations, religious institutions and women’s organizations signed the 2014 letters.

New York State Comptroller Thomas P. diNapoli, who signed the Institutional Investor letter said: “The ability to draw on a wide range of viewpoints, background, skills and experience is vital to be competitive in the global markets…We are urging companies in our portfolio to increase board diversity, including gender diversity, as a means of increasing financial performance and generating long-term value for shareholders.” CalSTRS Corporate Governance Director Anne Sheehan further supports these efforts and states “[w]e believe that diversity of age, ethnicity, culture experience and education enrich the effectiveness and efficiency of boards.”

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15 Governance trends shaping the board of the future: Board performance and diversity (PWC’s 2014 Annual Corporate Director’s Survey), p. 10.
17 Founding members of the “Champions of Change” were: Aida Alvarez, nominating and governance committee member of Walmart; Doug Conant, former CEO of Campbell Soup, Chairman of Avon; Rosemarine Greco, former CEO Corestates Bank; Robert Igram, former CEO and Chairman of Glaxo Wellcome; William McCracken, former CEO and Chairman of CA Technologies, Pat Mitchell President and CEO, The Paley Center for Media; and James Turley, former chairman and CEO of Ernst and Young. Each of these members also serve on public company boards and their membership may be viewed at http://thirtypercent.org/news.
18 See, the content of the letter and the signatories at http://www.30percentcoalition.org/outreach-efforts.
“Around the Globe and across all avenues for change from legislated quotas to an explosion of advocacy groups championing voluntary measure – efforts for calling for actions to increase board diversity are approaching a tipping point.”\(^{20}\) Many countries are significantly ahead of the United States in their efforts to diversity boards.\(^{21}\) Granted, some of those countries have regulations or legislation requiring quotas which This Resolution does not advocate. However, the level of volunteer efforts at the national level and corporate interest pushing this agenda in the United States is significant.\(^{22}\)

All of the organizations working to promote board diversity conclude that developing and executing on diversity policies will be the driver of change. A report prepared by Credit Suisse concluded that there are three main obstacles to achieving greater diversity on boards: cultural biases; work place related biases and structural policy issues. The study further found that policy (but not quotas) can significantly improve the diversity equation.\(^{23}\) Social science research suggests that “requiring individuals to give reasons for particular actions improves decision making quality, reduces reliance on stereotypes and helps to level the playing field for underrepresented groups.”\(^{24}\) By passing this Resolution, the ABA will add its voice to the growing call for corporations to voluntarily adopt policies and procedures which provide accountability for the creation of a diverse board.


On February 28, 2010, an SEC rule went into effect which requires publicly traded companies to disclose in their annual proxy and information statements how a corporate board or nominating committee considers diversity in identifying nominees for director. The rule requires public companies to disclose: (a) whether diversity is a factor in considering candidates for nominations for boards of directors; (b) how diversity is considered in that process; and (c) how the company assesses the effectiveness of its policy for considering diversity.\(^{25}\) The rule does not define “diversity” or require a commitment to diversity from the companies. It only requires companies to disclose if they have a policy regarding board diversity. In public presentations shortly after the adoption of the rule, SEC Commissioner Luis Aguilar stated that “unfortunately while some companies provided useful information in the spirit of the SEC rule, many other companies provided only abstract disclosure – often times limiting their disclosure to a brief statement indicating diversity was something considered as part of an informal policy.”\(^{26}\)


\(^{21}\) *Id.*

\(^{22}\) See, e.g., work from the following advocacy groups: DirectWomen, ION, Thirty Percent Coalition, Women on Boards 20/20, Alliance for Board Diversity and Catalyst. This list is not inclusive and does not include local organizations working on the issue of board diversity at the state level.

\(^{23}\) The CS Gender 3000: Women in Senior Management (Credit Suisse September 2014).


\(^{25}\) See, Speech by SEC Commissioner Luis Aguilar, November 4, 2010: *Board Diversity: Why it Matters and How to Improve It.*

\(^{26}\) *Id.*
An analysis of the data provided by public companies during the first two years of the SEC reporting rule found that 98% of the companies claim to consider diversity in making board appointments; but that only 8% reported having a formal diversity policy.\textsuperscript{27} According to the author of the study,

when interpreting diversity the dominant corporate discourse is experiential...rather than identity –based. In other words, most frequently [companies] define diversity in reference to a director’s prior experience or other generic factors, rather than his or her socio-demographic characteristics. The rule would be stronger if the SEC made clear that considerations of diversity constitute a policy triggering additional disclosure requirements and if the Commission defined diversity to include race, gender and other demographic characteristics.\textsuperscript{28}

The study concludes (and Commissioner Aguilar concedes in a 2013 speech) that “identify related characteristics were what commentators on the rule wanted to see disclosed.”\textsuperscript{29}

Three years after the enactment of the disclosure rule, the information disclosed by companies has not substantially improved. A recent study has shown that although over half of the S&P 100 companies disclose some level of diversity data, there is a lack of specific disclosure of the statistics regarding each board nominee’s gender, race, ethnicity, skills, experiences and attributes.\textsuperscript{30} Commissioner Aguilar has stated that the collaborative actions of diversity advocates (which includes directors and officers of public companies) and shareholder resolutions urging companies to adopt charter language supporting board diversity has been instrumental in promoting real change.\textsuperscript{31}

This Resolution calls for the ABA to urge state, federal and territorial governments to continue to call on corporations to voluntarily adopt policies, plans and procedures for achieving a diverse board, and to publically disclose those plans, policies and procedures within the current reporting requirements outlined by the SEC or the states. As you can see from the research cited above, this was truly the intent of the SEC Reporting Rule.

Others are already encouraging the specific disclosures that This Resolution seeks. On March 31, 2015, nine large public pension funds asked the SEC to require companies to disclose more about their boards’ diversity. The group called upon the SEC to update existing rules by requiring companies to create a chart of each board nominee’s gender, race, ethnicity, skills, experiences and attributes.\textsuperscript{32} The SEC is already calling for companies to take this action on a

\begin{itemize}
  \item \textsuperscript{28} \textit{Id.}
  \item \textsuperscript{29} \textit{Id.}
  \item \textsuperscript{30} March 21, 2013 U.S. Securities and Exchange Commissioner Luis Aguilar, Inclusion is a Strength: Corporate America and the SEC Should Reflect America; \textit{See, also, http://www.pionline.com/article/20150331/ONLINE/150339963/sec-should-increase-board-diversity-disclosure-8212-public pension-funds.}
  \item \textsuperscript{31} \textit{Id.}
  \item \textsuperscript{32} \textit{http://www.pionline.com/article/20150331/ONLINE/150339963/sec-should-increase-board-diversity-disclosure-8212-public pension-funds.}
\end{itemize}
voluntary basis and the ABA voice in support should be part of this coordinated effort in effecting real change.

There are many resources available to assist companies in developing policies and procedures to help them create a diverse board. By way of example, the Thirty Percent Coalition offers “Nominating Committee Model Charter Language on Board Diversity.” Many organizations are preparing candidates to move into a board role and/or are assisting companies in identifying qualified diverse candidates. Lack of qualified board candidates cannot be used as an excuse for maintaining a non-diverse board. The list below, although not exhaustive, shows the depth of resources available to companies seeking to diversify their boards. See, for example; (and in no particular order) Catalyst (www.Catalyst.org); InterOrganization Network (www.ionwomen.org); The Boston Club (www.thebostonclub.com); DirectWomen (www.directwomen.org); Diverse Director Datasource (gmi3d.com); Diversified Search (Diversifiedsearch.com); Diversity in Boardrooms (diversityinboardrooms.com); Stanford Women on Board Initiative (www.stanford.edu); The Leader’s edge/Leaders by design (www.the-leaders-edge.com); Trewstart (Trewstart.com); Women business leaders of the US health care industry foundation (WBL.org); women corporate directors directory (women corporate directors.com); women in the boardroom (www.womenintheboardroom.com); Watermark Institute Board Access (www.wearewatermark.org); Executive Leadership Counsel (www.elcinfo.com); Hispanic Association on Corporate Responsibility (www.hacr.org); New American Alliance (www.naaonline.org); and Director Diversity Initiative (www.ddi.law.unc.edu).  

V. Conclusion

In conclusion, the expectation that businesses diversify their boards is the “new norm.” The voice of the American Bar Association is an important part of the coordinated actions among companies, investors, governmental bodies, advocates and regulators in changing the face of corporate boards in the United States.

Respectfully submitted,

Michele Coleman Mayes, Chair
February, 2016

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33 This list was compiled from a list on the web page of the Thirty Percent Coalition; a general internet search for relevant organizations and list in a footnote of Commissioner Aguilar’s March 21, 2013 speech referenced in footnote 30.