<table>
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<th>Report</th>
<th>Sponsor and Subject</th>
<th>Reviewing Entity</th>
<th>Recommended Committee Position</th>
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<tr>
<td>10A</td>
<td>NEW YORK COUNTY LAWYERS ASSOCIATION CRIMINAL JUSTICE SECTION</td>
<td>White-Collar Crime Business and Corporate Litigation</td>
<td>Support Support</td>
</tr>
<tr>
<td></td>
<td>Urges the Department of Justice and the Federal Bureau of Prisons to amend their policies with respect to monitoring emails between attorneys and their incarcerated clients to permit attorneys and their incarcerated clients to communicate confidentially via email and thereby maintain the attorney-client privilege.</td>
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<td>10B</td>
<td>NEW JERSEY STATE BAR ASSOCIATION</td>
<td>Diversity</td>
<td>No position</td>
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<td></td>
<td>Supports constitutional equality for women, urges the extension of legal rights, privileges and responsibilities to all persons, regardless of sex, and reaffirms support of and affirmatively act toward the goal of the ratification of the Equal Rights Amendment to the U.S. Constitution.</td>
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<td>100</td>
<td>SECTION OF DISPUTE RESOLUTION SECTION HEALTH LAW SECTION OF SCIENCE AND TECHNOLOGY LAW</td>
<td>Health Law Dispute Resolution</td>
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<tr>
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<td>Urges lawyers and all interested parties to increase the use of alternative dispute resolution (ADR) processes, to resolve health care disputes.</td>
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<td>103</td>
<td>SECTION OF INTERNATIONAL LAW STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE TASK FORCE ON INTERNATIONAL TRADE IN LEGAL SERVICES</td>
<td>Professional Responsibility Corporate Counsel</td>
<td>Support with revisions TBD</td>
</tr>
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<td></td>
<td>Amends the black letter of Rule 5.5 of the ABA Model Rules of Professional Conduct and the ABA Model Rule for Registration of In-House Counsel, to include language specifying that the court of highest appellate jurisdiction may, in its discretion, allow foreign in-house lawyers who do not meet the ABA definition of foreign lawyer because they cannot be &quot;members of the bar&quot; to be able to practice as in-house counsel in the U.S. and to be so registered.</td>
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<tr>
<td>105</td>
<td>COMMISSION ON THE FUTURE OF LEGAL SERVICES STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE CRIMINAL JUSTICE SECTION LAW PRACTICE DIVISION STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS STANDING COMMITTEE ON CLIENT PROTECTION</td>
<td>Ad Hoc Committee on Future of the Legal Profession</td>
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</table>
Adopts the ABA Model Regulatory Objectives for the Provision of Legal Services, dated February, 2016 and urges each state's highest court, and those of each territory and tribe be guided by the Model Regulatory Objectives if they choose to assess the court's existing regulatory framework and to identify and implement regulations related to legal services beyond the traditional regulation of the legal profession.

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<tr>
<th>106A</th>
<th>SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE</th>
<th>Federal Regulation of Securities</th>
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<tbody>
<tr>
<td></td>
<td>Urges Congress to amend 5 U.S.C §522 (a) (1) of the Freedom of Information Act (FOIA) to require that when a standard drafted by a private organization is exempted from Federal Register publication because it has been &quot;incorporated by reference&quot; (IBR) into a substantive rule of general applicability, the rulemaking agency must ensure meaningful free public availability of the incorporated text.</td>
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<tr>
<th>106B</th>
<th>SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE</th>
<th>Federal Regulation of Securities Banking Law Consumer Financial Services</th>
<th>Support TBD Support</th>
</tr>
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<tbody>
<tr>
<td></td>
<td>Urges Congress to amend the rulemaking provisions of the Administrative Procedure Act.</td>
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<tr>
<th>107</th>
<th>COMMISSION ON DIVERSITY AND INCLUSION 360</th>
<th>Diversity</th>
<th>No position</th>
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<tbody>
<tr>
<td></td>
<td>Encourages all state, territorial and tribal courts, bar associations and other licensing and regulatory authorities, that have mandatory or minimum continuing legal education requirements (MCLE) to modify their rules to include as a separate credit, programs regarding diversity and inclusion for the legal profession of all persons regardless of race, ethnicity, gender, sexual orientation, gender identity or disabilities, and programs regarding the elimination of bias.</td>
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<tr>
<th>108A</th>
<th>SECTION OF INTELLECTUAL PROPERTY LAW</th>
<th>Intellectual Property</th>
<th>TBD</th>
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<tbody>
<tr>
<td></td>
<td>Opposes intellectual property laws and agency and court interpretations of intellectual property laws that impose the payment of the government's attorney fees on a party challenging a decision of the United States Patent and Trademark Office in federal district court, unless the statute in question explicitly directs the courts to award attorney fees.</td>
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<tr>
<th>108B</th>
<th>SECTION OF INTELLECTUAL PROPERTY LAW</th>
<th>Intellectual Property</th>
<th>TBD</th>
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<tbody>
<tr>
<td></td>
<td>Supports interpretation and application of the statutory six-year patent damages period (35 U.S.C. §286) as limiting availability of the judicially-created laches defense as a bar to legal damages for patent infringement.</td>
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</table>
| 113 | STANDING COMMITTEE ON LAWYER REFERRAL AND INFORMATION SERVICE  
ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK  
AUSTIN BAR ASSOCIATION  
BROOKLYN BAR ASSOCIATION  
CINCINNATI BAR ASSOCIATION  
OREGON STATE BAR  
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE  
STANDING COMMITTEE ON DISASTER RESPONSE AND PREPAREDNESS  
STANDING COMMITTEE ON GROUP AND PREPAID LEGAL SERVICES  
LAW PRACTICE DIVISION  
| Professional Responsibility | Support |
|---|---|---|
| Urges courts and legislative bodies to adopt rules or enact legislation to establish an evidentiary 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. | | |

| 115C | NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS  
| Business Bankruptcy  
Commercial Finance | No position |
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<tr>
<td>Approves the Uniform Commercial Real Estate Receivership Act, promulgated by the National Conference of Commissioners on Uniform State Laws, as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.</td>
<td>Support</td>
</tr>
</tbody>
</table>

| 115D | NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS  
| Consumer Financial Services  
Banking Law | No position |
<table>
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<tbody>
<tr>
<td>Approves the Uniform Home Foreclosure Procedures Act, promulgated by the National Conference of Commissioners on Uniform State Laws, as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.</td>
<td>TBD</td>
</tr>
</tbody>
</table>
RESOLVED, That the American Bar Association urges the Department of Justice and the Federal Bureau of Prisons to amend their policies with respect to monitoring emails between attorneys and their incarcerated clients to permit attorneys and their incarcerated clients to communicate confidentially via email and thereby maintain the attorney-client privilege.
REPORT

I. INTRODUCTION

Telecommunications are integral to human relationships in today’s society. For attorneys, email has supplanted other technologies as the primary medium for communicating with clients. Email has even become an important tool for attorneys to communicate with their incarcerated clients.

In 2005, the Federal Bureau of Prisons (“BOP”) launched a pilot program offering inmates limited email access through the Trust Fund Limited Inmate Computer System (“TRULINCS”). Today, all BOP facilities provide inmates email access through TRULINCS. However, to use TRULINCS, inmates must acknowledge that all of their emails, including emails between an inmate and his or her attorney (together, “Legal Email”), are monitored by the BOP, and consent to the monitoring.

The compulsory acknowledgment and consent to monitoring of their Legal Email waives the attorney-client privilege with respect to inmates’ TRULINCS emails. There is no exception for attorney-client email communications as there is for traditional postal mail correspondence, unmonitored telephone calls, and in-person meetings. Relying on the privilege waiver, the United States Attorney’s Office in at least some federal districts require the BOP to turn over

For the purposes of this report, the terms “inmate” and “incarcerated client” refer to both pre-trial detainees and convicts.


If an attorney-client communication is not kept confidential, then the privilege is waived. Bower v. Weisman, 669 F. Supp. 602, 606 (S.D.N.Y. 1987) (holding that the privilege did not apply to defendant’s letter to his attorney because it was left spread out on a table in an office’s waiting room). Further, even if a party intended the communication to be confidential, courts generally hold the privilege inapplicable if her actions undermine that intent. P.R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 9:24 (2d ed. 1999). Thus, when a party knowingly discloses privileged information in the presence of a third party, or fails to take reasonable precautions to prevent third parties from overhearing or reading a privileged communication, courts generally hold that the privilege was waived. United States v. Gann, 732 F.2d 714, 723 (9th Cir. 1984) (holding that statements made by a client to his attorney over the telephone while detectives were searching his house were not privileged). Monitored telephone calls and emails are not privileged because the presence of a recording device is the “functional equivalent of a third party.” United States v. Hatcher, 323 F.3d 666, 674 (8th Cir. 2003). Thus, TRULINCS emails between inmates and their attorneys are not privileged because the automated waiver informs inmates that all of their emails are subject to monitoring. Id.
copies of TRULINCS communications between criminal defendants and counsel, and prosecutors have been permitted to offer the emails in evidence against the defendants.  

Prison monitoring of inmates’ email communications creates at least two significant problems. First, although defense lawyers must avoid making confidential disclosures and warn their clients against doing so, defendants sometimes discuss confidential information in TRULINCS emails. More troubling, the BOP’s email monitoring policy deprives attorneys of the most effective means to promptly inform and consult with their inmate clients regarding important case matters, as required by Model Rule of Professional Conduct 1.4, and frustrates their ability to provide meaningful Sixth Amendment representation. Moreover, by forcing inmates and their attorneys to rely on traditional media to communicate confidentially, the BOP’s Legal Email monitoring policy causes significant administrative burdens and may thereby decrease prison security.

Additionally, because the BOP’s Legal Email monitoring policy restricts inmates’ ability to communicate with their attorneys, it is ripe for challenge on constitutional grounds. This report argues that the BOP’s policy raises serious constitutional concerns and may be vulnerable to challenge on the grounds that it is not reasonably related to legitimate penological interests and unreasonably restricts pretrial detainees’ Sixth Amendment right of access to counsel.

This report also explains that the BOP could provide a secure, unmonitored Legal Email system at a relatively low cost using existing email encryption technology. It concludes that a change in BOP policy, to permit attorneys and their incarcerated clients to communicate confidentially via email, would improve both the quality of representation of criminal defendants detained in BOP facilities and the reality of justice in the federal criminal justice system. The proposed Resolution urges the BOP to change its policy to allow confidential attorney-client email communications.

II. THE BOP’S EMAIL MONITORING POLICY UNDERMINES COMPETENT REPRESENTATION AND WASTES RESOURCES

The BOP’s Legal Email policy imposes unnecessary and substantial administrative burdens on attorneys’ ability to communicate with their inmate-clients. These burdens frustrate attorneys’ ability to promptly inform and consult with their inmate-clients regarding important case matters, as required by Model Rule of Professional Conduct 1.4, and, in the case of counsel representing pretrial detainees, also frustrates their ability to provide meaningful Sixth Amendment representation. The same burdens also undermine the efficiency of the lawyers representing federal convicts and raise the cost of that representation. This cost is largely borne by taxpayers, as each United States District Court is required to implement a plan to furnish

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8 See infra Section IV.
adequate representation for indigent defendants under the Criminal Justice Act.\textsuperscript{10}

\textit{A. The BOP’s Policy Imposes Significant Burdens on Inmates’ Attorneys}

The BOP’s Legal Email monitoring policy limits the means by which federal inmates can consult counsel, effectively allowing confidential correspondence only by traditional media: postal mail, pre-arranged unmonitored telephone calls, and in-person visits. As explained in greater detail in Sections III. and IV., communicating confidentially via these traditional channels is grossly inefficient and imposes substantial burdens on attorneys, especially compared to the relative speed, ease, and low cost of a system providing for confidential Legal Email.

It can take two weeks or more for an inmate to receive postal mail sent from an attorney, and additional time to receive an inmate’s response.\textsuperscript{11} Most prisons do not accept expedited mail delivery. Similarly, unmonitored telephone calls are procedurally difficult and time-consuming to set up.\textsuperscript{12} The process must ordinarily be initiated by the inmate, and can take up to a month to complete.\textsuperscript{13} In-person visits are especially burdensome, because attorneys often must wait several hours for their client to be produced by the prison, in addition to time spent traveling to and from the facility and passing through security.\textsuperscript{14}

In contrast, an unmonitored Legal Email system would allow attorneys and their inmate clients to send email communications regarding confidential matters at their convenience. Unlike traditional legal mail, emails are delivered to the recipient’s inbox instantaneously. Moreover, unlike unmonitored telephone calls and in-person visits, inmates and their attorneys do not have to rely on BOP staff to coordinate a specific time and place for the emails to be sent. Lastly, an unmonitored Legal Email system would greatly reduce the number of in-person visits attorneys are required to make, saving attorneys countless hours traveling to and from prisons and waiting for their clients to be produced once they arrive at the prison.

Thus, traditional postal mail, unmonitored telephone calls, in-person visits are not adequate alternatives to unmonitored emails.

\textit{B. The BOP’s Policy Frustrates the Ability of Attorneys to Promptly Communicate with Incarcerated Clients as Required Under Rule of Professional Conduct 1.4}

The burdens imposed by the BOP’s Legal Email monitoring policy substantially frustrate attorneys’ ability to promptly communicate with incarcerated clients regarding important case matters, as required by Rule 1.4 of the ABA Model Rules of Professional Conduct,\textsuperscript{15} compared to the relative speed, ease, and low cost of a system providing for confidential Legal Email. Rule

\textsuperscript{11} Transcript of Criminal Cause for Status Conference Before the Honorable Dora L. Irizarry at 16:14–16, United States v. Ahmed, No. 1:14-cr-00277 (E.D.N.Y. June 27, 2014) [hereinafter Tr. of Ahmed Conference]
\textsuperscript{12} Id. at 16:5–13 (Defense counsel argued that unmonitored telephone calls were seemingly unavailable, as defense counsels’ law firm was unable to coordinate an unmonitored telephone call with their client despite numerous telephone calls to the prison over the course of several days).
\textsuperscript{13} Id. at 19:14–17.
\textsuperscript{14} Id. at 19:5–11.
\textsuperscript{15} MODEL RULES OF PROF’L CONDUCT R. 1.4 (2014).
1.4 states that:

(a) A lawyer shall:

1. promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

2. reasonably consult with the client about the means by which the client's objectives are to be accomplished;

3. keep the client reasonably informed about the status of the matter;

4. promptly comply with reasonable requests for information; and

5. consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.16

Comment 2 to Rule 1.4 explains that paragraph (a)(1) “requires that the lawyer promptly consult with and secure the client’s consent prior to taking action” regarding a decision that must be made by the client, such as a proffered plea bargain.17 Moreover, an attorney’s failure to communicate with a client may lead to discipline, even if the client’s legal interests are unaffected.18

C. The BOP’s Policy Frustrates the Ability of Attorneys to Provide Meaningful Sixth Amendment Representation and Wastes Resources

Most pretrial defendants detained in BOP facilities are “financially unable to obtain adequate representation.”19 The BOP’s Legal Email monitoring policy disproportionately impacts these indigent defendants and the already-overburdened lawyers who represent them: federal public defenders and private counsel appointed from the Criminal Justice Act Panel (“CJA Counsel”).20 Federal defenders and CJA Counsel represent over 60% of federal criminal defendants nationwide.21

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16 Id.
17 Id. at cmt. 2.
18 See id. at R. 8.4 cmt. 1 (“Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct.”).
The Criminal Justice Act mandates that each United States District Court implement a plan for providing adequate representation to indigent defendants, and requires that counsel furnishing representation under the plan be selected from a panel of court-approved private attorneys (CJA Counsel), or a public defender organization, bar association, or legal aid agency. The Criminal Justice Act was passed in 1964, one year after the Supreme Court’s landmark ruling in *Gideon v. Wainwright*, which guaranteed all criminal defendants the right to adequate counsel. Five decades after that ruling, however, “the basic rights guaranteed under *Gideon* have yet to be fully realized.” Part of the reason, explained former United States Attorney General Eric H. Holder Jr., speaking at the 2012 American Bar Association’s National Summit on Indigent Defense, is that “public defender offices and other indigent defense providers are underfunded and understaffed. Too often, when legal representation is available to the poor, it’s rendered less effective by insufficient resources, overwhelming caseloads and inadequate oversight.”

Implementation of a confidential Legal Email system is a cost-effective solution for improving the representation of indigent criminal defendants in federal court. Most indigent federal defendants are detained before trial in BOP facilities. The BOP’s Legal Email monitoring policy substantially interferes with pretrial detainees’ ability to consult counsel by forcing them to use inefficient and costly traditional communication media. In the context of the Sixth Amendment right to counsel, unreasonable interference with the accused person’s ability to consult counsel is itself an impairment of the right. Implementation of a confidential Legal Email system would not only eliminate the burdensome costs and administrative tasks associated with traditional forms of communication, but as explained in Section IV., would also be relatively simple, quick and inexpensive to implement using existing email encryption technology.

Five decades after the Supreme Court affirmed that adequate legal representation is a basic right for every person accused of a crime, the BOP’s Legal Email monitoring policy is undermining this fundamental promise. By implementing a confidential Legal Email system, the BOP could facilitate bringing this fundamental promise closer to reality.

steep-federal-budget-cuts.html?r=0. (Federal defenders alone represent approximately 60% of federal defendants nationwide).

25 *Id.*
26 Benjamin v. Frasier, 264 F.3d 175, 185 (2d. Cir 2001); see also Wolfish v. Levi, 573 F.2d 118, 133 (2d Cir.1978), rev’d on other grounds, Bell v. Wolfish, 441 U.S. 520 (1979) (prison regulations restricting pretrial detainees' contact with their attorneys are unconstitutional where they “unreasonably burdened the inmate's opportunity to consult with his attorney and to prepare his defense”).
III. THE BOP'S EMAIL MONITORING POLICY RAISES SERIOUS CONSTITUTIONAL CONCERNS

Prison policies that impact inmates’ constitutional rights, such as the Sixth Amendment right to counsel, “must be evaluated in light of the central objective of prison administration, safeguarding institutional security.” Providing a confidential Legal Email system would enhance prison security by reducing the opportunities for drugs and contraband to be smuggled into BOP facilities with outside mail and would also ease the burden on prison staff by relieving them of the responsibility of coordinating unmonitored attorney calls and in-person visits. Thus, the BOP cannot justify its Legal Email monitoring policy, or the lack of a confidential email system, as reasonably necessary to safeguard prison security.

In *Turner v. Safley*, the Supreme Court enunciated the standard that generally governs in cases assessing the constitutionality of prison policies that implicate inmates’ constitutional rights. In *Turner*, the Court held that “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.” The Court held that four factors are particularly relevant in determining the reasonableness of prison regulations: (1) a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it; (2) consideration of alternative forms of expression available to the inmate; (3) the burden on guards, prison officials, and other inmates if the prison is required to provide the freedom claimed by the inmate; and (4) consideration of the existence of less restrictive alternatives that might satisfy the governmental interest. The Court further held that, “if an inmate claimant can point to an alternative that fully accommodates the prisoner’s rights at de minimis cost to valid penological interest, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.”

*Turner*, however, is inapplicable to claims challenging prison policies that implicate the constitutional rights of pretrial detainees, and specifically to claims that implicate pretrial detainees’ Sixth Amendment right to adequate defense counsel. As explained in *Bell v. Wolfish*, the Fourteenth Amendment prohibits any “punishment” of pretrial detainees, and thus prison policies restricting a specific constitutional right of pretrial detainees are held to a stricter standard than those affecting only the rights of convicted prisoners. Under *Bell*, “if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment,” and thus

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29 *Id.* at 89.
30 *Id.* at 89–90.
33 *Bell*, 441 U.S. at 538 (“[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.”); Demery v. Arpaio, 378 F.3d 1020, 1028–29 (9th Cir. 2004), *cert. denied*, 545 U.S. 1139 (2005).
34 See, e.g., Benjamin v. Frasier, 264 F.3d 175, 178 n. 10 (2d. Cir 2001) (“We need not decide this issue, however, as we believe the policies and practices at issue here would not survive scrutiny under *Turner*, if in fact that standard is applicable.”).
unconstitutional.\textsuperscript{35} Additionally, under \textit{Bell}, even if a condition is not punitive, it may be unconstitutional if a court finds that it “appears excessive in relation” to the government's proffered alternative purpose.\textsuperscript{36} In contrast, prison regulations restricting convicts’ access to counsel must be “reasonably related to legitimate penological interests” \textsuperscript{37} and are unconstitutional if they “unjustifiably obstruct the availability of professional representation.”\textsuperscript{38}

The BOP’s Legal Email monitoring policy affects both convicted prisoners’ right of access to the courts and pretrial detainees’ Sixth Amendment right to counsel. As explained below, that policy raises serious constitutional concerns and is vulnerable to challenge under the four-factor \textit{Turner} test, and therefore even more vulnerable under the more demanding \textit{Bell} formulation as applied to pretrial detainees.

\textbf{A. The BOP Lacks a Legitimate Interest in Monitoring Inmates’ Legal Email}

The BOP lacks a legitimate interest in monitoring inmates’ Legal Email because doing so is excessive in relation to the government’s interest in safeguarding institutional security. Moreover, the BOP cannot justify its policy on the basis of reducing administrative burdens and costs, because an unmonitored Legal Email system would reduce administrative burdens and costs. In fact, the BOP’s current Legal Email monitoring policy diminishes prison security and increases administrative burdens and costs as compared to an unmonitored Legal Email system because it increases the amount of traditional letter mail, unmonitored attorney telephone calls, and in-person attorney visits. Thus, the BOP cannot justify its Legal Email monitoring policy on the basis of maintenance of institutional security or reduction of administrative burdens and costs.

For more than 40 years, courts have held that prison officials are prohibited from reading attorney-client letter mail.\textsuperscript{39} However, they can and do “inspect” legal mail to ensure it does not contain drugs or other physical contraband.\textsuperscript{40} Unlike letter mail, email communications cannot contain drugs or other contraband.\textsuperscript{41} One of the BOP’s stated reasons for implementing TRULINCS was to “reduce the opportunities for illegal drugs or contraband to be introduced into Bureau facilities through inmate mail.”\textsuperscript{42} Thus, the BOP cannot justify monitoring emails between inmates and their attorneys on the basis of preventing the introduction of illegal drugs and contraband.

\textsuperscript{35} \textit{Bell}, 441 U.S. at 539.
\textsuperscript{36} \textit{Id.} at 538–39.
\textsuperscript{37} \textit{Turner}, 482 U.S. at 91; see also \textit{Benjamin}, 264 F.3d at 178 n. 10 (explaining that Turner only applies in the case of convicts, not pretrial detainees, because “the standard [Turner] promulgated depends on ‘penological interests.’ Penological interests are interests that relate to the treatment (including punishment, deterrence, rehabilitation, etc... of persons convicted of crimes.”).
\textsuperscript{40} See, e.g., \textit{Al-Amin} v. \textit{Smith}, 511 F.3d 1317, 1325–26 (11th Cir. 2008).
\textsuperscript{41} TRULINCS does not support file attachments like pictures or videos, so TRULINCS emails could not contain digital contraband either.
While an unmonitored Legal Email system would present several apparent security concerns, traditional forms of unmonitored legal communication present the same concerns and actually pose a greater security threat. First, unmonitored Legal Email could contain contraband information, such as escape plans. Similarly, unmonitored Legal Email raise concerns regarding verification that the communication was actually sent to or from inmates’ attorneys. However, traditional legal mail can also contain escape plans or be fraudulently sent by other individuals using an attorney’s return mailing address. Moreover, detecting such contraband information or fraud can be difficult in the case of traditional legal mail because it cannot lawfully be read by prison officials, and because prisoners can permanently destroy the contraband or fraudulent mail. As discussed in Section VI., an unmonitored Legal Email system would be more secure than traditional legal mail because: (1) the email system would preserve a permanent electronic record of each email, which could be retrieved and read under the right circumstances; and (2) unlike traditional legal mail, a Legal Email system can ensure the authenticity of the information’s origin and that the information has not been tampered with by using digital signatures, which are nearly impossible to counterfeit and attest to both the contents of the information and the identity of the signer.43

Moreover, as detailed in Section III. C., lack of a confidential Legal Email system increases prisons’ administrative burdens because it increases the amount of more-burdensome traditional communications. Traditional legal mail burdens prison staff because each piece of mail must be collected, inspected—but not read—and distributed to inmates. Further, prison officials must be trained on how to properly “inspect” traditional legal mail without reading it. Each unmonitored attorney telephone call and in-person-attorney-visit must be scheduled by prison administrators. Then, at the specified date and time, prison staff must transport the inmate from her cellblock to the room where the call or visit is scheduled to occur. Transporting inmates from their cellblocks to other areas of the prison increases security problems in numerous ways. First, it facilitates the transmission of illegal drugs and contraband around the prison. Second, in the event of a security breach resulting in a prison lockdown while the inmate is outside of her cellblock, locating the inmate and transporting her back to her cellblock poses serious administrative challenges and security threats.44 Thus, providing an unmonitored Legal Email system will decrease the number of unmonitored telephone calls and in-person visits, and correspondingly promote prison security.

Thus, reconfiguring TRULINCS to support unmonitored attorney-client communications would be universally beneficial, as it would protect the sanctity of attorney-inmate emails, while promoting security and reducing burdens imposed on prison staff by other forms of confidential attorney-inmate communication.

44 Tr. of Ahmed Conference, *supra* note 12, at 19:5-11 (Judge Irizarry comments on her work to reduce attorney wait times, and notes that “heaven forbid there should be any security problem at the time, they may never get to see their client that day.”).
B. Alternative Means of Confidential Communication are Inadequate

Unlike all existing alternatives—traditional legal mail, unmonitored telephone calls, and in-person attorney visits—an unmonitored Legal Email system would allow inmates and their attorneys to efficiently communicate in confidence.

As detailed in Section II. A., unmonitored telephone calls are procedurally difficult and time-consuming to set up; traditional postal legal mail can take two or more weeks for an inmate to receive because most prisons do not accept expedited mail delivery; and in-person visits are especially burdensome, because attorneys are often forced to wait several hours for their client to be produced by the prison, in addition to time spent traveling to and from the facility and passing through security. Additionally, an unmonitored Legal Email system would be more secure than traditional legal mail and “unmonitored” telephone calls. Traditional legal mail can be accidentally read by prison guards during inspection, and a recent report by The Intercept revealed that one company that provides telephone services to prisons across the country has recorded and stored at least tens of thousands of telephone conversations between inmates and attorneys that were supposed to be unmonitored.

Thus, neither unmonitored telephone calls, traditional postal mail, nor in-person visits are adequate alternatives to the ease and speed of unmonitored email communications.

C. Providing an Unmonitored Legal Email System Would Positively Impact Prison Staff, Inmates, and Allocation of Scarce Prison Resources

Providing confidential email access to inmates and their attorneys would positively impact prison staff, inmates, and allocation of scarce prison resources by reducing the amount of more-burdensome traditional legal mail, unmonitored attorney phone calls and in-person attorney visits. Additionally, as described in Section III. A., confidential email would enhance the “central objective of prison administration, safeguarding institutional security.” Lastly, while implementation of a confidential Legal Email system would require in initial investment, the reduction in more burdensome traditional communications would quickly lead to significant cost-savings for the BOP.

First, an unmonitored Legal Email system would greatly reduce the administrative burden on prison guards and officials associated with unmonitored telephone calls and in-person visits. Each unmonitored telephone call and in-person visit must be arranged and scheduled by prison administrators. Prison staff must also transport inmates from their cells to the secure meeting room for each unmonitored call or in-person visit. Thus, unmonitored Legal Email would greatly reduce administrative burdens on prison staff associated with unmonitored telephone calls and in-person visits between inmates and their attorneys.

45 Id. at 16:5–13.
46 Id. at 16:14–16.
47 Id. at 19:5–11.
Second, an unmonitored Legal Email system would greatly reduce the administrative burden on prison guards and officials associated with delivery and inspection of legal mail. Every letter sent or received by an inmate must be delivered and, in most prisons, inspected by a guard in the presence of the inmate. Further, each officer must be trained on how to properly inspect inmates’ mail to ensure that it remains unread. An unmonitored Legal Email system would reduce the amount of letter mail that must be delivered and inspected, freeing guards to focus on matters that promote prison safety.

Lastly, an unmonitored Legal Email system would preserve limited prison resources. While reconfiguring TRULINCS would require an initial investment, the long-term cost savings would be substantial. For example, if the unmonitored Legal Email system led to a reduction of one unmonitored telephone call or in-person attorney visit per inmate per month, each requiring approximately one hour of administrative work by prison staff, then the 743-inmate Manhattan Correctional Center (MCC) would save 8,916 man-hours per year. If the average MCC guard makes $22 per hour, then an unmonitored email system would save MCC approximately $194,853 per year.

IV. RECONFIGURING TRULINCS TO PROVIDE FOR SECURE, UNMONITORED LEGAL EMAIL WOULD BE RELATIVELY SIMPLE AND INEXPENSIVE

Reconfiguring TRULINCS to provide for unmonitored Legal Emails would be relatively simple and inexpensive. For example, from a programming perspective, reconfiguring TRULINCS to support an email encryption program similar to Pretty Good Privacy (PGP), or other popular email encryption programs, would not be difficult or expensive. Software developers have estimated that, based on publicly-available information about the system, TRULINCS could be reconfigured in a matter of months at a cost of less than $100,000.

PGP is a data encryption and decryption program that provides cryptographic privacy and authentication for data communication. PGP encryption is an asymmetric scheme that uses a pair of “keys” for encryption: a “public key” that encrypts plaintext to ciphertext, and a corresponding “private key” for decryption. Each user has unique public and private keys, which are simply a series of random numbers and letters. Anyone with a copy of a user’s public key can encrypt information that can only be decrypted with that user’s private key. However, the term “public key” is a misnomer, as users’ public keys are not automatically

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52 Telephone Interview with Mike Wrather, CTO/Managing Partner at Athletez.com (February 22, 2015); Telephone Interview with Dustin Houck, BAS Senior Consultant at Grant Thornton (March 8, 2015).
53 Introduction to Cryptography, supra note 44.
54 Id. Data that can be read and understood without any special measures is called plaintext.
55 Id. Encrypting plaintext results in unreadable gibberish called ciphertext.
56 Id.
known or available to the public at large, but instead must “published” or sent to each person wishing to send the user an encrypted message. Each user also has a “private key” that only the user knows. The same plaintext encrypts to different ciphertext using different public keys, and only the recipient’s private key can decrypt messages encrypted with the user’s corresponding public key.\(^{58}\)

PGP can also ensure the authenticity of the information’s origin by using digital signatures.\(^{59}\) The sender digitally signs the message with his private key, so when the recipient verifies the message with her own public key, she can confirm that the message was sent from the person in question.\(^{60}\) This ensures that the message was sent by a specific person and has not been tampered with. A digital signature serves the same purpose as a handwritten signature. However, a digital signature is superior to a handwritten signature in that it is nearly impossible to counterfeit, plus it attests to the contents of the information as well as to the identity of the signer.\(^{61}\)

In layman’s terms, to use PGP encryption, users must install PGP software on their computer, and then swap their “public keys” with anyone they wish to communicate with using encrypted email. In the case of inmates and their attorneys using TRULINCS, for added security the “public key” and “private key” can be assigned by an independent third party such as the court or a third party administrator. Sending an encrypted message would simply require several clicks, a password, and sometimes, copying and pasting. Moreover, because the public and private keys would be issued by a third party, if the origins of a purported attorney email were ever in question, prosecutors could petition the court to have the content of the message reviewed.

From the government’s perspective, providing confidential Legal Emails and preventing their review unless a court grants authorization to do so should be preferable to unmonitored phone calls or in-person visits because the email is preserved and can be retrieved and read under the right circumstances. Thus, reconfiguring TRULINCS to support PGP encryption, or a similar encryption or filtering program, would be universally beneficial, as it would protect the sanctity of attorney-inmate emails, while substantially reducing burdens imposed on institutional staff by other forms of confidential attorney-inmate communication.

V. THE BOP SHOULD VOLUNTARILY CHANGE ITS LEGAL EMAIL MONITORING POLICY AND IMPLEMENT A CONFIDENTIAL LEGAL EMAIL SYSTEM BECAUSE DOING SO WOULD IMPROVE THE QUALITY OF JUSTICE, BENEFIT THE BOP AND AVOID A CONSTITUTIONAL CHALLENGE

In recent years, the total number of federal inmates and the proportion of inmates to BOP staff have greatly increased. These population changes have greatly increased the burden on BOP staff, which in turn increases the barriers that attorneys face when trying to communicate

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\(^{58}\) Id.

\(^{59}\) Introduction to Cryptography, supra notes 44 and 53.

\(^{60}\) Id.

\(^{61}\) Id.
efficiently with their incarcerated clients. Implementing an unmonitored Legal Email system would significantly decrease the burdens on prison staff, thereby conserving BOP resources while protecting the fundamental right of all pretrial detainee defendants to adequate defense counsel.

Between 1995 and 2010, the annual number of disposed criminal cases in federal district court increased by 120%, from 45,635 to 100,622. During that same time period, the annual number of federal defendants detained pretrial increased by 184%, from 27,004 to 76,589. In other words, the percentage of defendants detained prior to case disposition increased from 59% in 1995 to 76% in 2010. Additionally, during the same period, the ratio of inmates to BOP staff members increased from 3.6 inmates per BOP staff member in 1995 to 5.75 inmates per BOP staff member in 2010.

These changes in the total inmate population and the ratio of inmates to BOP staff further increase the administrative burdens imposed by the BOP’s current email system, and undermine the right of every federal pretrial detainee to meaningful Sixth Amendment representation. Traditional communication media is burdensome for both BOP staff and defense counsel because each confidential communication requires that BOP staff facilitate each specific communication. This is inefficient compared to a wholly confidential Legal Email system, which would not require BOP staff to schedule a specific date, time and place for the communication to occur (as compared to unmonitored telephone calls and in-person visits) or to deliver and inspect the communication (as compared to traditional legal mail).

The BOP should voluntarily implement a confidential Legal Email system. Such a system would not only benefit the BOP by increasing prison safety, preserving resources, and reducing administrative burdens, but would also ensure that the BOP is not unreasonably interfering with the right of pretrial detainee defendants to receive adequate Sixth Amendment representation.

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62 A disposition is the act of terminating a federal criminal prosecution through a guilty plea or trial conviction, dismissal, or acquittal. The defendant is no longer under supervision of the federal pretrial authority after disposition.
65 Id.
66 U.S. DEPT. OF JUSTICE, Fed. Prison Sys., FY 2013 PERFORMANCE BUDGET, CONGRESSIONAL SUBMISSION 3 (2013), available at http://www.justice.gov/sites/default/files/jmd/legacy/2014/06/28/fy13-bop-se-justification.pdf (chart entitled “Total BOP Inmate and Staff Levels” demonstrates that between 1997 and 2013, the number of BOP staff increased from approximately 30,000 to approximately 40,000, while the number of inmates increased from approximately 110,000 to approximately 230,000).
VI. CONCLUSION

One decade ago, the BOP launched TRULINCS as a pilot program.\footnote{FEDERAL BUREAU OF PRISONS, REQUEST FOR RECORDS DISPOSITION AUTHORITY, TRUST FUND LIMITED INMATE COMPUTER COMMUNICATION SYSTEM (TRULINCS) (Mar. 22, 2006), available at http://www.archives.gov/records-mgmt/rcs/schedules/departments/department-of-justice/rg-0129/n1-129-06-008_sf115.pdf.} The purpose of TRULINCS is to allow inmates to “send electronic messages to securely, efficiently and economically maintain contact with persons in the community.”\footnote{U.S. DEPARTMENT OF JUSTICE, PROGRAM STATEMENT: TRULINCS 1 (2009), available at http://www.bop.gov/policy/progstat/5265_013.pdf.} As currently configured, TRULINCS serves this purpose well for inmates’ families, friends, and other contacts, but not for their most important contacts of all: their attorneys. In effect, therefore, TRULINCS provides inmates a secure, efficient, and cost effective method for communicating with all “persons in the community” other than the one person with whom they have a fundamental right to communicate. This raises Sixth Amendment concerns, as described above, since an unreasonable interference with a defendant’s ability to consult counsel is itself an impairment of the right.\footnote{Benjamin, 264 F.3d at 185; see also Wolfish, 573 F.2d at 133 (prison regulations restricting pretrial detainees’ contact with their attorneys are unconstitutional where they “unreasonably burdened the inmate’s opportunity to consult with his attorney and to prepare his defense”).}

Regardless of whether the categorical refusal to permit confidential attorney-client email communication violates the Sixth Amendment, the BOP’s monitoring of communications between inmates and their attorneys is simply wrong. The BOP cannot read inmates’ legal mail or eavesdrop on their unmonitored attorney phone calls and in-person attorney visits—and they should not be able to monitor their Legal Emails either. The BOP’s monitoring policy interferes with lawyers’ ability to provide efficient and ethical representation, and thereby degrades the quality of justice meted out to federal inmates, especially indigent pretrial detainees. In today’s world, traditional communication media are clearly inadequate as compared to the efficiency and cost effectiveness of email communications. Thus, the BOP should provide inmates and their attorneys the ability to communicate confidentially via email.

To date, the BOP’s Legal Email monitoring policy has not been directly challenged in court. However, at least six federal district courts have addressed the issue of federal prosecutors reading emails between pretrial detainees and their attorneys.\footnote{See, Memorandum and Order re 25 Motion in Limine As to Tushar Walia at 28–29, United States v. Walia, No. 1:14-cr-00213 (E.D.N.Y. July 25, 2014); FTC v. Nat’l Urological Grp., Inc., No. 1:04-CV-3294, 2014 WL 3893796, at *1 (N.D. Ga. May 14, 2014); United States v. Fumo, 655 F.3d 288, 294 (3d Cir. 2011); Transcript of Conference, United States v. Saade, No. 11-CR-111, 7:11-14 (NRB) (S.D.N.Y. September 26, 2011); Opinion and Order at 2–3, United States v. Asaro, No. 1:14-cr-0026 (E.D.N.Y. July 17, 2014); Tr. of Ahmed Conference.} Because of the automated privilege waiver, each court held that attorney-client privilege does not apply to TRULINCS emails between inmates and their attorneys.\footnote{Saade and Ahmed.}

Nevertheless, two district judges were so troubled by the government’s actions that they prohibited prosecutors from reviewing TRULINCS emails between attorneys and their clients in
those cases. In one, in response to the prosecutor’s defense of the government’s policy, the Court opined that attorney-client TRULINCS emails are subject to the same Sixth Amendment protections as traditional communications:

You don’t have the right to eavesdrop on an attorney-client meeting in a prison or out of a prison, and it seems to me that you don’t have the right to open up mail between counsel and an inmate or an inmate and counsel … I don’t see why it should make a difference whether the mode of communication is more modern or more traditional.

In the other, after ordering the government to employ taint teams to remove all attorney-client TRULINCS emails before producing the remainder of defendant’s emails to the prosecuting U.S. Attorney, the district judge articulated a strong policy argument for why the BOP should reconfigure TRULINCS to provide for unmonitored attorney-client emails:

[F]rankly, I don’t understand why the BOP would not be willing to look into a technological fix that eliminates the need for them to have to go through the hassle of sorting e-mails, why the government, why the Department of Justice wouldn’t be interested in a technological fix that eliminates the cost of taint teams on every single case. Talk about penny-wise and pound-foolish. I couldn’t see a clearer example of it.

Until the BOP accepts responsibility for providing inmates and their attorneys the ability to communicate confidentially via email, its Legal Email monitoring policy will continue to diminish the quality of legal proceedings in criminal cases in federal court, cause financial and administrative burdens for the BOP and defense attorneys, and impair the reputation and reality of justice in the federal criminal justice system.

Carol A. Sigmond
President
New York County Lawyers Association
February 2016

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73 Tr. of Saade Conference at 10:8-12.
74 Tr. of Ahmed Conference at 20:18–25.
1. **Summary of Resolution(s)**

The Resolution urges the Federal Bureau of Prisons to change its policy regarding the monitoring and reading of email communications between attorneys and their incarcerated clients. The Resolution relies on the assertion that emails between attorneys and their incarcerated clients are not meaningfully different from traditional letter mail between attorneys and their incarcerated clients, which has long been protected by the attorney-client privilege. This Report argues that email communications actually pose less of a security risk than traditional letter mail, because unlike letter mail, emails cannot secrete contraband such as illegal drugs. If the Federal Bureau of Prisons were to reconfigure their email system by using popular encryption software, authenticating the identity of the sender would be more reliable than traditional letter mail. Additionally, the software can be programmed to preserve a permanent copy of all emails, which can be retrieved and reviewed by the court under proper circumstances. Thus, the Resolution provides strong policy and constitutional arguments for providing emails between attorneys and their incarcerated clients the same confidentiality protections as traditional letter mail.

2. **Approval by Submitting Entities**

The NYCLA Civil Rights & Liberties Committee approved the Resolution with Report on December 5, 2014. The NYCLA Board of Directors approved the Resolution with Report on March 9, 2015. The NYCLA Executive Committee approved the final Resolution with Report on July 23, 2015, pursuant to authority granted to it by the Board.

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

No.

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

The Resolution is consistent with and builds upon the cybersecurity principles previously developed by the ABA’s Cybersecurity Legal Task Force and adopted by the Board of Governors in November 2012, especially Principle 3—“[l]egal and policy environments must be modernized to stay ahead of or, at a minimum, keep pace with technological advancements”—and Principle 4—“[p]rivacy and civil liberties must remain a priority when developing cybersecurity law and policy.” The Resolution is also consistent with ABA Model Rule of Professional Conduct 1.6 (“Confidentiality of Information”), which prohibits lawyers from

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revealing confidential client information unless the client gives informed consent or one or more narrow exceptions apply. In addition, the Resolution is generally consistent with and would build upon other existing ABA policies (1) supporting the attorney-client privilege and the work product doctrine and opposing governmental policies, practices, or procedures that would erode those protections,76 and (2) opposing new federal agency regulations on lawyers engaged in the practice of law where the effect would be to undermine the confidential lawyer-client relationship, the attorney-client privilege, or traditional state court regulation of lawyers. Lastly, the Resolution is also consistent with ABA Model Rule of Professional Conduct 1.4, which requires attorneys to promptly communicate with incarcerated clients regarding important case matters, such as whether to accept or reject proffered plea bargains, which can only be made by the client.

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

Not applicable.


Not applicable.

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

In consultation with the ABA Governmental Affairs Office, the NYCLA Civil Rights & Liberties Committee leaders would prepare communications to the Federal Bureau of Prisons and/or comment letters to relevant federal agencies, and may meet with agency staff to urge adoption of regulations consistent with the Resolution. Task Force leaders may also reach out to law firms, bar associations, other legal groups, and the courts in order to educate them about the growing problem of the Federal Bureau of Prisons and prosecutors monitoring and reading emails between attorneys and their incarcerated clients.

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

None.


Not applicable.

10. Referrals.

The proposed Resolution with Report is being co-sponsored by the ABA Criminal Justice Section. The proposed Resolution with Report was sent to the Chairs and staff liaisons of the ABA Criminal Justice Section and Civil Rights Litigation Committee for input. NYCLA received and incorporated comments from the ABA Criminal Justice Section on the Resolution with Report. NYCLA also sent the Resolution with Report to the ABA Standing Committee on Ethics and Professional Responsibility and the Judicial Division.

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

Elliot Dolby-Shields  
Co-Chair NYCLA Civil Rights & Liberties Committee  
Law Office of Elliot Dolby-Shields, P.C.  
235 West 137th Street, No. 2F  
New York, New York 10030  
Phone: (585) 749-2089  
Email: edshieldslaw@gmail.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 email address).

Carol A. Sigmond  
Cohen Seglias Pallas Greenhall & Furman PC  
45 Broadway, 4th Floor  
New York, NY 10006  
Telephone: 212-981-2927  
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EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution encourages the Federal Bureau of Prisons (“BOP”) to voluntarily end its policy and practice of monitoring all email communications between attorneys and their incarcerated clients to permit attorneys and their incarcerated clients to communicate confidentially via email.

2. Summary of the Issue that the Resolution Addresses

The BOP provides all inmates with email access through the Trust Fund Limited Communication Systems (“TRULINCS”). Inmates naturally communicate with their attorneys via email. The BOP, however, maintains a policy of monitoring all emails, including emails between attorneys and their inmate clients. Further, the BOP does not provide any alternative form of unmonitored email communication for attorneys to communicate with their incarcerated clients. There is no meaningful difference between email and traditional letter mail. Letter mail between attorneys and their incarcerated clients has been provided constitutional protection for decades, preventing prison officials and prosecutors from reading such communications. Because there is no meaningful difference between emails and traditional letter mail, and because the benefits of unmonitored emails to inmates, their attorneys, and the BOP is substantial, the BOP’s policy obstructs inmates’ access to counsel and is ripe for constitutional challenge.

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

By adopting the proposed Resolution, the ABA will play a leading role in urging the United States government and other governmental bodies to amend or supplement existing policies in order to prevent the monitoring and reading of emails between attorneys and their incarcerated clients, which should be provided the same constitutional protection as traditional letter mail.

4. Summary of Minority Views

The minority view is that since attorneys and their incarcerated clients are forced to sign an acknowledgment that their email communications are subject to monitoring prior to using TRULINCS, attorneys and their incarcerated clients waive any claim that their email communications are protected by the attorney-client privilege. Since such mandatory waivers have been upheld in the context of telephone calls between attorneys and their incarcerated clients, the minority argues that such mandatory waivers are constitutional in the context of emails between attorneys and their inmate-clients as well.
RESOLUTION

RESOLVED, That the American Bar Association supports constitutional equality for women, and urges the extension of legal rights, privileges and responsibilities to all persons, regardless of sex.

FURTHER RESOLVED, That the American Bar Association reaffirm its support of and affirmatively act toward the goal of the ratification of the Equal Rights Amendment to the U.S. Constitution.

FURTHER RESOLVED, That the American Bar Association calls on all bar associations to support and take up the pursuit of ratification of the Equal Rights Amendment to the United States Constitution.
The proposed Equal Rights Amendment states,

**Section 1.** Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

**Section 2.** The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

**Section 3.** This amendment shall take effect two years after the date of ratification.

Article V of the Constitution prescribes how an amendment can become a part of the U.S. Constitution. While there are two ways, only one has ever been used. All 27 successful amendments have been ratified after **two-thirds of the House and Senate** approved of the proposal and send it to the states for a vote. Then, **three-fourths of the states** (38 out of 50) were required to affirm the proposed amendment.¹

**ERA Background**

The ERA was originally presented in 1923 by Alice Paul, a leader in the women’s suffrage movement who held three law degrees. The current text is modeled after the 19th Amendment, which Paul submitted it in 1943.

While many aspects of the law have evolved to offer rights and protections to many in our society, basic legal protection against sex discrimination has not yet been realized and affirmed in the Constitution, even given the considerations of the 14th Amendment. The ERA would make clear that discrimination based on sex is not allowed in the courts. Its adoption would further send a strong message to lawmakers that the highest law of the land does not tolerate disparate treatment of men and women.

Adoption of this resolution would mobilize the nation’s largest lawyers organization, and hopefully activate the local, county and state bar associations around the country, to pressure public officials to make this necessary change that champions the defense of liberty and the pursuit of justice that informs the democratic question for a “more perfect union.” Through a chorus of voices in the legal profession the mission of advancing equality under the law can be fulfilled.

The ERA has a long, storied history in United States political discourse. A nearly successful effort to enact the amendment occurred in the 1970’s when the amendment reached a zenith of having the necessary congressional approval in both houses and the

¹ In addition, a Constitutional Convention called by two-thirds of the legislatures of the several states can propose as many amendments as it deems necessary; those amendments must be approved by three-fourths of the states to be adopted, U.S. Const. Art. V.
affirmation of 35 out of 38 states. It ultimately failed to receive any further support. Later, five states de-affirmed their prior approvals between 1973-79.

The current version of the ERA gained passage by the required two-thirds majority on March 22, 1972.

President Richard Nixon endorsed the ERA's approval upon its passage by the 92nd Congress. The congressional approvals, including an extension resolution, contained an expiration clause, requiring that the ERA ultimately be adopted on or before June 30, 1982.

As of that original deadline, the ERA had been ratified by the following states:

- Hawaii (March 22, 1972)
- New Hampshire (March 23, 1972)
- Delaware (March 23, 1972)
- Iowa (March 24, 1972)
- Idaho (March 24, 1972)
- Kansas (March 28, 1972)
- Nebraska (March 29, 1972)
- Texas (March 30, 1972)
- Tennessee (April 4, 1972)
- Alaska (April 5, 1972)
- Rhode Island (April 14, 1972)
- New Jersey (April 17, 1972)
- Colorado (April 21, 1972)
- West Virginia (April 22, 1972)
- Wisconsin (April 26, 1972)
- New York (May 18, 1972)
- Michigan (May 22, 1972)
- Maryland (May 26, 1972)

- Massachusetts (June 21, 1972)
- Kentucky (June 26, 1972)
- Pennsylvania (Sept. 27, 1972)
- California (Nov. 13, 1972)
- Wyoming (Jan. 26, 1973)
- South Dakota (Feb. 5, 1973)
- Oregon (Feb. 8, 1973)
- Minnesota (Feb. 8, 1973)
- New Mexico (Feb. 28, 1973)
- Vermont (March 1, 1973)
- Connecticut (March 15, 1973)
- Maine (Jan. 18, 1974)
- Montana (Jan. 25, 1974)
- Ohio (Feb. 7, 1974)
- North Dakota (March 19, 1975)
- Indiana (Jan. 24, 1977)

2 This supplemented President John F. Kennedy's endorsement of the provision in an October 21, 1960, letter to the chairman of the National Woman's Party
3 The original 1979 deadline was extended under the 95th Congress by House Joint Resolution No. 638 (H. J. Res. 638, 95th Cong., 1st Sess. (1977)), introduced by NY Representative Elizabeth Holtzman. Beginning in 1917, Congress has usually (but not always) imposed deadlines on proposed amendments. While the Constitution does not expressly provide for a deadline on the state legislatures' or state ratifying conventions' consideration of proposed amendments. In Dillon v. Gloss, 256 U.S. 368 (1921), the Supreme Court affirmed that Congress can provide a deadline for ratification. But Cf. Coleman v. Miller, 307 U.S. 433 (1935), in which the Court modified Dillon considerably, holding that the question of timeliness of ratification is a political and non-justiciable one, leaving the issue to Congress's discretion. It would appear that the length of time elapsing between proposal and ratification is irrelevant to the validity of the amendment. For example, the 27th Amendment was proposed in 1789 and ratified more than 200 years later in 1992. On May 20, 1992, both houses of Congress adopted concurrent resolutions accepting the 27th Amendment's unorthodox ratification process as having been successful and valid.
Affirmations were later rescinded by five of those states as follows:

- Nebraska (March 15, 1973 – Legislative Resolution No. 9)
- Tennessee (April 23, 1974 – House Joint Resolution No. 371 and Senate Joint Resolution No. 29)
- Idaho (Feb. 8, 1977 – Senate Joint Resolution No. 133 and House Concurrent Resolution No. 10)
- Kentucky (March 17, 1978 – House (Joint) Resolution No. 2 and House (Joint) Resolution No. 20)
- South Dakota (March 1, 1979 – Senate Joint Resolution No. 1 and Senate Joint Resolution No. 2)

South Dakota’s own ratification of the ERA would only be valid up until March 22, 1979, and any ratification activities transpiring after that date anywhere else would be considered by South Dakota to be null and void.

(It is important to note that the U.S. Constitution is silent regarding a state’s authority to rescind its ratification of a proposed, but not yet adopted, constitutional amendment.)

On Dec. 23, 1981, in Idaho v. Freeman, 529 F. Supp. 1107 (1981), the United States District Court for the District of Idaho ruled that the rescissions—all of which occurred before the original 1979 ratification deadline—were valid and that the ERA’s deadline extension was unconstitutional. The National Organization for Women appealed the ruling. However, the acting solicitor general reported to the Court that the administrator of general services concluded the ERA had not received the required number of ratifications, so “the Amendment has failed of adoption no matter what the resolution of the legal issues presented here.” He urged the Court to dismiss the complaint. On Oct. 4, 1982, in NOW v. Idaho, 459 U.S. 809 (1982), the U.S. Supreme Court vacated the ruling in Idaho v. Freeman and declared the entire matter moot on the grounds that the ERA was dead for the reason given by the administrator of general services.

There remains considerable academic and political disagreement on whether the ERA can be revised and ratified by achieving ratifications of an additional three states’ under the 35- of 38-state tally noted above; to wit, a “three-state strategy.” That strategy is discussed in a 1997 article called “The Equal Rights Amendment: Why the Era Remains Legally Viable and Properly Before the States” in the William & Mary Journal of Women and the Law. In 2013, a report of the Library of Congress’s Congressional Research Service (Thomas H. Neale, The Proposed Equal Rights Amendment: Contemporary Ratification Issues, Congressional Res. Serv., (May 9, 2013)) examined the legislative history and provided an analysis of the factors affecting its viability.

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Proponents of the three-state strategy have promoted ratification resolutions in the legislatures of most of the 15 states that never ratified the ERA approved by Congress in 1972, but no approval has been forthcoming.

**Going Forward to Success - ERA 2020**

While the ERA has been introduced in every session of Congress since 1982, it has not achieved a critical mass to propel it to success.

Its time has come and, as thought leaders on legal issues, lawyers can be the agents of that change. This association has long studied and supported the fundamental underpinnings of the ERA. It supported ratification of the proposed 27th Amendment to the Constitution initially in Feb. 1972 and again in Aug. 1974.

This resolution would directly advance those previously stated goals. Additionally, it speaks to the ABA’s general policies, such as Goal III for the Association, which states: “Promote full and equal participation in the association, our profession, and the justice system by all persons.” This is the opportunity to finish the job of delivering on the basic and fundamental right of equality based on sex under the law.

Respectfully submitted,

Miles S. Winder III, President
New Jersey State Bar Association

February 2016
GENERAL INFORMATION FORM

Submitting Entity: New Jersey State Bar Association

Submitted By: Miles S. Winder, III, President

1. **Summary of Resolution(s).** This resolution seeks the affirmation of the American Bar Association’s support of the ratification of the Equal Rights Amendment to the U.S. Constitution. Further, it asks other legal entities to consider same, and, if approved, act to that effect.

2. **Approval by Submitting Entity.** The New Jersey State Bar Association authorized this action at its Oct. 16, 2015 Board of Trustees meeting.

3. **Has this or a similar resolution been submitted to the House or Board previously?** Yes, many years ago, see answer #4.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** The ABA supported ratification of the proposed 27th Amendment to the Constitution initially in Feb. 1972 and again in Aug. 1974. This resolution would directly advance those previously stated goals. Additionally, support of this effort speaks to Goal III of the association, to provide equal opportunities for women and minorities.

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) The Equal Rights Amendment was originally presented in 1923. It was nearly approved in the 1970s, garnering support in 35 (of the necessary 38) states. Some states de-affirmed their prior approval. It has since been reintroduced in every session of Congress, most recently in the 117th Congress, in which two types of ERA legislation has been introduced. One seeks the traditional ratification process and a second proposes the “three-state strategy.” Both are pending.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** The NJSBA will work with the ABA to use all available, existing resources, including but not limited to social media, communications, and government affairs.

8. **Cost to the Association.** (Both direct and indirect costs) Direct costs are not anticipated, but additional time and energy of the existing government affairs program may be sought, if adopted.
9. **Disclosure of Interest.** (If applicable) N/A

10. **Referrals.** Referred to the Commission on Women, NCBP, NABE and the Diversity Center.

11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address) Kate Coscarelli, senior managing director of communications and media relations, New Jersey State Bar Association, One Constitution Square, New Brunswick NJ 08901, 732-937-7548 or kcoscarelli@njsba.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.) Thomas H. Prol, President-Elect NJSBA, 60 Blue Heron Road, Sparta NJ 07871, 973-862-9817 or tprol@lcrlaw.com; Wayne J. Positan, New Jersey Delegate, 103 Eisenhower Parkway, Roseland NJ 07068, or wpositan@lumlaw.com.
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution seeks the affirmation of the American Bar Association’s support of the ratification of the Equal Rights Amendment to the U.S. Constitution. Further, it asks other legal entities to consider same, and, if approved, act to that effect.

2. Summary of the Issue that the Resolution Addresses

Ratification of the ERA was originally presented by Alice Paul in 1923. It was nearly successfully enacted in the 1970s, but fell short. While many aspects of the law have evolved to offer rights and protections to many in our society, basic legal protection against sex discrimination has not yet been realized and affirmed in the Constitution, even given the considerations of the 14th Amendment. The ERA would make clear the legal status of sex discrimination in the courts and would send a clear message to lawmakers that the highest law of the land does not tolerate men and women being treated as separate classes.

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

Adoption of this resolution would mobilize the nation’s largest lawyers organization, and hopefully activate the local, county and state bar associations around the country, to pressure public officials to make this necessary change that champions the defense of liberty and the pursuit of justice that informs the democratic question for a “more perfect union.” Through a chorus of voices in the legal profession the mission of advancing equality under the law can be fulfilled.

4. Summary of Minority Views

Some believe it is not necessary given other laws on discrimination and court decisions.
RESOLVED, That the American Bar Association urges lawyers and all interested parties to increase the informed and voluntary use of alternative dispute resolution (ADR) processes as an effective, efficient and appropriate means to resolve health care disputes.
REPORT

I. INTRODUCTION

During the past few decades, the legal profession has embraced an increasingly wide array of dispute resolution processes to address their clients’ problems. With the enactment of health care reform, increased federal regulation of diverse aspects of the nation’s medical care delivery system, and the ever increasing use of technology in providing health care, there are a multitude of health care disputes that span all aspects of the provision of health care. The structure of healthcare delivery across the nation is changing with increasing emphasis on successful outcomes and reducing costs. Providers are becoming increasingly integrated in a variety of arrangements of increasing integration and interdependence as a means of accomplishing these goals. These complex relationships, vital to health care delivery but often with competing goals, may give rise to conflict.

Disputes and conflict arise in almost every facet of health care and span all settings – hospitals, physician’s offices, home health agencies, hospices, health insurance company’s claims departments, and providers’ corporate headquarters. Issues include family disputes in a hospital, denial of claims for reimbursement, disagreements when physician practices are bought and sold, and hospital merger and acquisition. In addressing each of these conflicts and disputes, ADR can play a useful role. While there are no collected statistics reporting the precise use of ADR in healthcare disputes, anecdotal evidence suggests that the health care industry and the legal profession with an interest in health care have lagged behind others in embracing the broad array of dispute resolution techniques to address conflicts and resolve disputes.

Health care spending represents a significant part of the nation’s economy. In 2013 the United States spent $2.9 trillion on health care or about $9,255 per person. Health care spending remains at 17.4 percent of the economy. Every American has a stake in our health care system – and how its conflicts and disputes are resolved.

What is ADR?

The ADR processes used most commonly in health care disputes include mediation and binding arbitration. Mediation is a voluntary dispute resolution process; all parties consent to participate in good faith in an effort to reach a mutually agreeable resolution of their dispute.

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2 Morreim, H., Conflict Resolution in Health Care, AHLA Connections (January 2014).
The mediator is a neutral and facilitates the negotiation process by asking questions and exploring creative means to accomplish the objectives of both parties. Some mediators engage in an evaluative process, point out strengths and weaknesses of the respective litigants, and proactively afford each party the mediator’s opinion or assessment of the relevant issues focused on the likelihood of success if the parties process to litigation. Yet others emphasize a problem-solving approach based on the parties’ most important goals.

Arbitration, on the other hand, is a dispute resolution process in which a neutral party, *i.e.*, the arbitrator, hears a dispute between one or more parties somewhat like a judge in a courtroom and, after considering all relevant evidence, renders an award or decision in favor of one of the parties. Arbitration decisions may be either binding or non-binding based on the terms of the arbitration agreement entered into by the parties. Binding arbitration decisions are generally enforceable by a court.

The Resolution is not intended to change the existing ABA Resolution 111, adopted by the House of Delegates in February 2009 that opposed the use of mandatory, binding, pre-dispute arbitration agreements between nursing homes and patients. In addition, nothing in this Report should be construed as taking a position regarding mandatory pre-dispute arbitration of employment disputes. The Resolution focuses on the voluntary use of dispute resolution techniques where the parties mutually agree to resolve their disputes through ADR. Neither the Resolution nor Report endorses the issue of mandatory, binding pre-dispute arbitration agreements.

ADR, however, is not limited to mediation and arbitration. ADR techniques extend to pre-dispute facilitated discussions where a neutral will facilitate early resolution of a dispute. Other forms of dispute resolution include early neutral evaluation, settlement conferences, private judging or fact finding.

Traditional ADR brings the parties together in person. In person ADR remains commonly used to mediate, arbitrate, or otherwise resolve many disputes. However, technology is increasingly used in ADR. Online dispute resolution, the application of information and communications technology, has come to dispute resolution. It takes advantage of our ability to use the Internet -- accessed by a variety of devices, our computer, smartphone, to communicate and resolve disputes easily and quickly. ADR also includes other electronic means of communication, including video conferencing and text based, asynchronous conversations.

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6 See, American Jurisprudence, Second Edition §6 Mediation (database Updated February 2015). Also see, Mediation Rules, Office of the Circuit Executive, United States Court of the Appeals for the District of Columbia Circuit, Civil Rule 84.2 (a) Description.
10 The eBay/PayPal electronic dispute resolution system is a good example of ADR used on an almost exclusively electronic basis.
An array of ADR techniques is broad and can serve many useful roles. Conflict management can address conflicts in a variety of contexts where there is no litigation in mind whatsoever. Processes labeled as focused or guided discussions led by peers in the nation’s high schools address many conflicts experienced by adolescents and young adults. Individuals engaged in collaborative problem solving address a variety of conflicts arising in hospitals involving patients and their families. It is acknowledged that litigation will continue to be appropriate in a variety of contexts. Effective dispute resolution requires the agreement of the parties to enter into the process. Nothing in this report suggests that parties cannot file and pursue litigation whenever appropriate.

Finally, ADR is commonly accepted by nearly all courts across the nation at all levels and has become “mainstream” practice—a means of offering litigants “different options and opportunities for resolving their disputes.”

II. HEALTH CARE DISPUTES AMENABLE TO ADR

Many different types of private and public health care disputes are amenable to resolution through ADR. Court sponsored programs, private professional organizations offering mediation and arbitration services, and programs offered by health care providers offer a multitude of ADR services. In the health care arena the major areas of disputes may be cataloged as follows:

- Payor/Provider claims/network disputes

Disputes between providers and health insurance companies are becoming more and more common. In the healthcare industry, payors and providers often have claims for both underpayment and overpayment arising from ongoing contracts or other healthcare services that are litigated where lawyers may wish to consider dispute resolution, where appropriate. Issues include coverage, coding, billing, claims payment, contract interpretation, risk sharing, and/or administrative issues, including exclusion of providers from limited provider networks. Disputes extend to management services companies, e.g., laboratory billing disputes, and third party vendors offering ancillary services such as durable medical equipment and physical or occupational therapy.

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Individual health claims are generally addressed through internal health insurance company appeal procedures and many states offer a right of appeal to a state insurance agency appeals process. Many large claims for denial of benefits on grounds of lack of medical necessity, cosmetic or experimental/investigative procedures, or denial of coverage of “new technology” treatment may be litigated in the courts where dispute resolution may provide a useful role.

• Medicare Reimbursement disputes

Hospital Medicare Part A Inpatient Prospective Payment System (IPPS) disputes or appeals from annual cost reports span a wide range of issues with enormous financial consequences for providers, principally acute care hospitals. Commonly appealed issues include the disproportionate share payment (DSH), reimbursement for bad debts, wage index, graduate medical resident and allied health education expenses, and capital costs. Cases have high dollar value.  

Presently, over 9,000 Medicare IPPS administrative provider appeals are pending before the Provider Reimbursement Review Board. Disputes between providers and Medicare Administrative Contractors (MACs) representing HHS are infrequently mediated. ADR can be expanded in this area.

• ERISA Litigation

Participants or beneficiaries in an employee benefit plan subject to the Employee Retirement Income Security Act (ERISA) may sue to “recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.” This cause of action provides typical contract remedies such as recovery of accrued benefits, declaratory judgments to clarify plan benefits, and injunctions against future denials of benefits. Class action lawsuits may be brought against the plan denying coverage/benefits, the plan administrator, the employer/sponsor, third-party insurers and administrators and plan fiduciaries.

The Employee Benefits Security Administration (EBSA), U.S. Department of Labor, has substantial enforcement responsibility for ensuring the integrity of private employee benefit plans. In FY 2014, the ESBA initiated 2,541 cases resulting in monetary fines or other corrective action. Where voluntary remedies are insufficient, the Department of Labor initiates litigation. In FY 2014, 107 cases were brought in federal courts. All these disputes might be more quickly and less expensively resolved through ADR.

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• National and international contract disputes involving drugs patented by pharmaceutical companies and associated issues

Issues include breach of contract, patent/trademark infringement, licensing, and IT; disputes common to commercial claims including joint venture, partnership, distribution, and manufacturing. 17 Notwithstanding their complexity, and perhaps due to their difficulty, many would benefit from ADR.

• Physician practice/Provider business disputes

Employment contracts, purchase agreements, partnership agreements, repayment of loans, non-compete, non-solicitation, and anti-theft clauses, fiduciary duty obligations, managed services organization (MSO) contracts, space sharing agreements, corporate and LLC formation, employment law, worker’s compensation issues, and shareholder issues are among the disputes that arise in physician practices. These physician disputes may escalate into unpleasant exchanges of charge and counter-charge, none of which is in the interest of any party. These disputes may be resolved by ADR in the interest of all outside a public forum. 18

• Accountable Care Organization (ACO) disputes

There are presently over 600 ACOs serving 14% of the nation’s population and the number is growing as a result of the new Medicare Shared Savings Program. Issues include quality of care, 19 shared cost programs, conflicts among providers in the ACO and their relationships with commercial payors, termination/withdrawal or restriction of participating physicians due to poor performance and other reasons, reimbursement and financial incentives, use of quality metrics/clinical practice guidelines, evidence based medicine standards, calculation of patient utilization and cost, and access to data. 20 Myriad issues associated with ACOs present additional opportunities for ADR.

20 See, Ronai, St., The Patient Protection and Affordable Care Act’s Accountable Care Act’s Organization Program: New Healthcare Disputes and the Increased Need for ADR Services, Dispute Resolution Journal, August/October 2011, available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CCsQFjAFoBQ&url=https://www.adr.org/cs/idcplg%3FIdcService%3DGET_FILE%26dDocName%3DADRSTG_011022%26RevisionSelectionMethod%3DLatestReleased&ei=F1IDVYX3E-OIsASZ8IFo&ved=0CCsQFjAFoBQ&usg=AFQjCNEDAgzePyPq599OmpGfe8KjDo-VPQ.
Disputes over the dissolution/sale/merger or acquisition of a hospital, medical practice or other health care entity

Contract and other disputes regarding physician practices arise in a variety of contexts including the retirement of physicians and the sale or closing of practices; 21 contract disputes when physician practices are sold and consolidated with hospitals, shareholder agreement buy out provisions and other features of such agreements, 22 sale or dissolution of practices consistent with Stark safe harbor provisions; covenants not to compete; disputes over fair market value; conversion of hospitals from not for profit to for profits status, including real estate restrictions; Medicare loss on sale claims for reimbursement with high dollar stakes. The need for litigants to resolve these business disputes quickly may strongly recommend the use of ADR.

Medical staff, credentialing and peer review disputes

Medical staff disputes arise as physicians interact with hospitals and other health care providers. “Sour relations” escalating to litigation can arise from provider appointments and credentialing, termination or threatened termination of privileges, changes in by-laws, the expanding use of technology, including electronic medical records, performance of medical staff responsibilities; 23 addressing the needs of disruptive or impaired health care professionals; conducting peer review and quality assurance; taking corrective personnel actions; providing fair hearings for medical and allied health professional staffs; peer review communications and records confidentiality; National Practitioner Data Bank querying and reporting; peer review immunities; the effect of hospital business upon medical staff membership and privilege, and such mundane matters as the hospital’s physician call schedule or adding staff to a department absent consultation with current staff members. These disputes are susceptible to resolution by a range of ADR techniques. 24

Medical malpractice

Numerous commentators frequently note that ADR can be helpful in resolving medical malpractice disputes. 25 Where appropriate and properly used, ADR can resolve malpractice claims in a more efficient, cost effective manner than litigation and permit the use of techniques to be utilized that are not available in litigation. A physician’s apology can, among other factors,

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facilitate resolution of these cases that have long been the subject of controversy among physicians, lawyers, and patients. 26

- **Qui tam and False Claims Act (FCA) cases – Federal and state**

  Whistleblowers are filing *qui tam* lawsuits 27 and federal 28 and state 29 agencies are engaging in widespread investigations and other activities to address the commonly recognized problem of fraud in health care. Overpayment is an increasingly important issue as the Affordable Care Act and the Fraud Enforcement and Recovery Act (FERA) imposed False Claims Act liability for overpayments, including any overpayment held for more than 60 days and expanded government authority to address kickbacks; claims of Medicare fraud including over-billing, mis-billing, and billing for services not provided; FCA quality of care amendments, anti-kickback provisions, and other regulatory violations may make FCA cases fertile ground for dispute resolution.

- **Employment disputes in provider settings**

  Employment related disputes actionable under federal and/or state law may be amenable to a variety of ADR techniques.

- **Long Term care – Skilled Nursing Facilities (SNFs), Long Term Care Hospitals (LTCHs), and Hospice Care**

  Billing and quality of care issues continue to be the subject of federal and state audits, investigations and enforcement actions. They represent special opportunities for mediation beginning at the investigation stage and, if necessary, culminating at the litigation phase and during enforcement proceedings. SNFs and LTCHs are subjected to numerous allegations of abuse and inadequate treatment of patients including preventable injuries and hospitalizations. In addition, billing issues arise from the facilities’ interactions with the Medicare, State Medicaid programs, and private payors. The HHS OIG latest work plan found that SNFs billed one-quarter of all 2009 claims in error, resulting in $1.5 billion in inappropriate Medicare payments. There are licensing and certification disputes arising over standards of care and participation in federal and state programs. Finally, dispute resolution can be considered in addressing conflicts arising from end of life and other treatment decisions. These conflicts and disputes between providers, patients, and the Federal and State governments represent opportunities principally for mediation.


27 There are many qui tam lawsuits in the health care area. See, e.g., Mintz Levin *Qui Tam Update*, May 2014, available at https://www.healthlawyers.org/Events/Programs/2014/Documents/MintzLevin.pdf.


• **Home Health Care Agencies (HHAs)**

HHAs provide health care services to beneficiaries pursuant to both Medicare and Medicaid. Likewise, adult day health care programs provide health, therapeutic, and social services and activities to program participants. Beneficiaries enrolled must meet eligibility requirements, and services must be furnished in accordance with a plan of care that meets regulatory requirements. Medicaid allows payments for adult day health care through various authorities, including home and community-based services (HCBS) waivers. These programs present coverage, billing, and regulatory issues that are tailor made for ADR.

• **HIPAA/Privacy and Security – compliance**

The health care industry now leads all business sectors in breaches of protected health information subjecting patients to undue risks of identity theft and other harm. Breaches are occurring all across the health insurance industry from major health insurance companies to the nation’s most renowned hospitals. Each breach results in the filing of significant litigation and plaintiffs are beginning to erode the prevailing standards that no relief can be afforded to patients unless each shows some demonstrable harm resulting from the breach. As a result, defendants have real incentives to resort to ADR to mitigate damages and protect against reputational harm by resolving claims quickly.

• **Recovery Audit Contractors (RACs), Program Safeguard Contractors (PSCs) and Zone Program Integrity Contractors (ZPICs) – investigation and enforcement activities**

Recovery Audit Contractors (RACs), Program Safeguard Contractors (PSCs) and Zone Program Integrity Contractors (ZPICs) carry out benefit integrity activities for Medicare Parts A and B, and a Medicare Drug Integrity Contractor (MEDIC) carries out benefit integrity activities for Medicare Parts C and D. ZPICs and PSCs are required to detect and deter fraud and abuse in Medicare Part A and/or Part B in their jurisdictions. They conduct investigations; refer cases to law enforcement; and take administrative actions, such as referring overpayments to claims processors for collection and return to the Medicare program. Unpaid alleged overpayments are referred to the IRS for collection. These investigation and/or enforcement activities provide additional opportunities for the use of ADR.

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III. ADVANTAGES OF ADR

ADR has many advantages. Like any legal proceeding, the mediator or arbitrator must lead or facilitate the process in a manner that provides the parties with the advantages of the process. While any process can be abused, if implemented appropriately, ADR holds out these potential benefits. The advantages are summarized as follows.

• Cost efficient, less expensive than protracted, adversarial litigation

There is little disagreement that litigation can be an expensive, time consuming way of resolving many disputes. While litigation is necessary when statutes are unclear, a novel theory is advanced to support a legal claim, or a precedent is needed to clarify an important legal principle, it need not be an automatic response to every dispute or conflict. These considerations apply to the entire range of health care disputes. Many health care disputes implicate the complexity inherent in state and federal regulations that control nearly all aspects of the nation’s health care delivery system. Others involve medical and scientific data and information. Such litigated disputes often give rise to the “battle of the experts” where the competing sides seek to convince the judge, jury or both by expensive, compensated by-the-hour experts. Discovery further increases the cost and protracted nature of litigated health care disputes.

Mediation can streamline this potentially expensive, protracted process by identifying the parties’ goals either before the filing of any lawsuit or at any step in the process, including after the trial. Years of litigation, discovery, motions and argument, trials, and appeals can be replaced by voluntary discussions among the parties facilitated by a neutral. Viewed from any vantage, mediation can shorten the process whenever initiated -- and can result in low cost resolution of disputes when initiated before a complaint is even filed. Arbitration can likewise streamline the process by focusing the parties, limiting discovery, including depositions, and avoiding strict application of the rules of evidence, and other formalities imposed by a court. If properly administered, arbitration will seldom take as long, consume as many resources, or result in the “quagmire” of court litigation. Both mediation and arbitration can accommodate the parties’ time and scheduling requirements, and other needs. ADR does not suffer the consequences of a crowded docket.

• Ability to choose the neutral with expertise in health care

The selection of a neutral with expertise in the health care can facilitate the resolution of the dispute by focusing the parties on the core of the dispute. Selecting an individual with knowledge of the relevant health care regulatory scheme, state or federal, that governs nearly all aspects of the medical delivery system, facilitates the prompt and timely resolution of health care disputes. A knowledgeable neutral in the regulatory, scientific, and/or technical aspects of the

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34 Id.
dispute can use this knowledge to facilitate the resolution of the dispute. There is no need to educate the judge or jury. Neutrals are also effective in the resolution of differences arising among physicians in a group practice when one member fails to meet the expectations of another physician. Neutrals with experience in reimbursement, e.g., diagnostic codes, length of stay, and other reimbursement rules and regulations, can readily resolve complex reimbursement disputes governed by rules few understand and appreciate.

- **Ability to create novel solutions afforded by the flexibility of the process**

  In mediation, the parties make all decisions. The parties’ ability to control the process permits them to agree to remedies that may not be available through litigation but serve to meet their needs. In a medical malpractice case, among other factors, a physician’s apology to the grieving parents of a deceased child can be a powerful tool of settlement.  

- **Maintain long term relationships while resolving a dispute**

  ADR offers parties to a dispute a means of minimizing emotional, high stakes risks commonly associated with adversarial litigation. Mediation is entirely voluntary, lacks the formalities associated with court proceedings, is held in private, and can lead to confidential agreements resolving disputes absent widespread media attention. In arbitration, the parties can agree to the components of the process to a large degree, maintain their ability to promote privacy and confidentiality, and avoid most of the pit-falls of high risk public in-court litigation. All these factors may serve to maximize the parties’ ability to maintain professional and business relationships essential to their long term success. On the other hand, mediation may help mend frayed personal relationships that erupt as families address issues associated with the hospitalization or loss of a loved one.

- **No or limited discovery**

  Generally, mediation does not contemplate discovery. Mediation can commence before any discovery has been taken, be adjourned to permit any necessary fact finding, or take place

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35 Todres, J., Toward Healing and Restoration for All: Reframing Medical Malpractice Reform, 39 Conn. L. Rev. 667, 686 (2006) (“[a] study published in Lancet, the leading British medical journal, found that as many as 37% of medical malpractice plaintiffs reported that they would not have filed lawsuits if their doctors had sincerely apologized instead of stonewalling.”).


after all discovery has been completed. Absent discovery, mediation can permit the parties to discuss the facts and present their respective positions. The discussion may assist the resolution of the matter by permitting the parties to candidly express their respective views – a useful process since nothing said or done in mediation can be later used in court.

In arbitration, it is not unusual for parties to limit the scope and timing of discovery. Arbitration rules also serve to limit discovery. For example, Rule 22 of the AAA Healthcare Payor Provider Arbitration Rules limits discovery to one deposition absent the parties’ agreement or the arbitrator’s approval. Like the Federal Rule of Civil Procedure, these rules require disclosures to shorten and facilitate the resolution of the case. JAMS has issued a list of factors for arbitrators to use when evaluating discovery requests such as the nature of the dispute, whether the parties agree to the scope of discovery, the relevance and reasonableness of the requested discovery, the presence of genuine privilege and confidentiality concerns, and the relative need of the parties. The College of Commercial Arbitrators has issued a protocol urging arbitrators to actively manage and shape the arbitration process and “avoid unnecessary discovery.” Discovery disputes can be resolved informally by the arbitrator and, in many cases, there is no need for motions to compel discovery.

- Privacy and confidentiality

A formal ADR process is generally viewed as confidential and, as a result, advances the parties’ privacy interests. Rules of state, federal court, and mediation programs operated by private organizations and entrepreneurs promise or require the parties’ agreement that the proceedings be private and confidential, including the requirement that nothing used in mediation may be used outside the process or in court. Arbitration may differ to the degree that the arbitration proceeding may lead to judicial action, including an action challenging an award or its enforcement. As such, some information in arbitration may ultimately become

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38 Some commentators have observed that formal discovery may be required to assist mediation or arbitration during the course of the dispute resolution, especially where highly complex scientific or forensic issues are in dispute and that discovery may establish facts essential to the successful resolution of the dispute.

39 AAA Healthcare Payor Provider Arbitration Rules, Rule 22 (2014) available at https://www.adr.org/cs/ideplg%3FldcService%3DGET_FILE%26dDocName%3DADRSTG_004106%26RevisionSelectionMethod%3DLatestReleased&rct=j&frm=1&q=&esrc=s&sa=U&ei=cewJVf6nLYzhzATHmlHgDQ&ved=0CBQQFjAA&usg=AFQjCNEOimMQBmL0QvDXmxq7WvTlw652BXA.

40 Id., Rule 23.


43 See, Washington Courts, Mandatory Mediation, Rule SPR 94.08.3m (Confidentiality); Rules of the Supreme Court of the State of New Hampshire, Rule 12-A. Mediation, § 11 (2015).

44 See, Office of the Circuit Executive, United States Court of the Appeals for the District of Columbia Circuit, Civil Rule 84.9 (a) Confidentiality.

45 See, e.g., JAMS International Mediation Rules (Privacy) (Mediation sessions are private.”).

46 See, e.g., JAMS Arbitration Rules, Rule 26 (Confidentiality)(Confidentiality shall be maintained “except as may be necessary to prepare for or conduct the arbitration hearing on the merits, or except as may be necessary in connection with a court application for a preliminary remedy, a judicial challenge to an Award or its enforcement ….”).
public in a court related proceeding; however, information exchanged in mediation will be protected either by the agreement of the parties or the rules of the mediation.

- **Enforceability or binding nature of agreements**

  The parameters and enforceability of an agreement made pursuant to ADR is subject to agreement of the parties except arbitration may be entered into with a pre-arbitration contractual obligation that the award is binding. Arbitration can, of course, be non-binding in other circumstances. In ADR, the nature of the “judgment” is flexible and can be designed to meet the needs of the parties.

**IV. ABA POLICY**

In recent years, the ABA House of Delegates has adopted a number of policies regarding the use of ADR to resolve health care conflicts and disputes and others of general application to the area. ABA policies include the following:

Resolution 118, Adopted by the ABA House of Delegates in August 1977

The resolution endorsing the use of arbitration for resolving medical malpractice disputes under circumstances whereby the agreement to arbitrate is entered into only after a dispute has arisen.

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Resolution 101, Adopted by the ABA House of Delegates in August 1998

This resolution adopted the “black letter” of the Model Rules for Mediation and Client-Lawyer Disputes which recommends that jurisdictions establish a mediation program by providing a model for such programs.

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Resolution 103, Adopted by the House of Delegates in August 1998

This Resolution adopted a new ADR-related policy calling for giving patients enhanced rights vis-a-vis managed health plans. The Resolution supports the right of all

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49 See, e.g., American Arbitration Association, Non-Binding Arbitration Services and Rules, available at https://www.adr.org/aaa/faces/services/disputeresolutionservices/arbitration/nonbindingarbitration;jsessionid=2f8VhfSit74zhlTgdxsHRxj3Gr6mnpRcKZLQ8ny5xjWSp2rTJ4lr-8177727107_’_afrLoop=1607098693232181_’_afrWindowMode=0_’_afrWindowId=3Dnull%26_afrLoop%3D1607098693232181%26_afrWindowMode%3D0%26_adf.ctrl-state%3Dywugrc6jk_4.

consumers to a fair and efficient process for resolving differences with managed health care plans, health care providers, and institutions that serve such plans and providers.

* * *

Resolution 114, Adopted by the House of Delegates in February 1999

This Resolution reiterated and expanded Resolution 103 and called for federal, state, and territorial legislation establishing ADR as one remedy for resolving disputes between patients and group health plans, as part of a process that includes a rigorous system of internal review and an independent system of external review of benefit payment requests, adverse coverage determinations, and medical necessity determinations.

* * *

Resolutions 106, Adopted by the House of Delegates in February 1999

Resolution 106 supported the enactment of federal legislation to allow patients to bring state court actions against managed health care plans. In that Resolution, the ABA supported and encouraged the use of ADR mechanisms prior to the filing of such causes of action.

* * *

Resolution 111, Adopted by the House of Delegates in February 2009

Resolution 111 opposed the use of mandatory, binding, pre-dispute arbitration agreements between nursing homes and patients.

The Resolutions and related Reports are available at:
http://www.americanbar.org/directories/policy.html

V. CONCLUSION

This Resolution is intended to call attention to the use of a broad array of dispute resolution processes in the resolution of health care disputes and to encourage its use and further use by lawyers and other interested parties as a means of resolving the expanding number of health care disputes all across the industry in an effective, efficient, and low cost basis.

Respectfully submitted,

Howard Herman, Chair
Section of Dispute Resolution
February 2016
1. **Summary of Resolution**

During the past few decades, the legal profession has embraced an increasingly wide array of dispute resolution processes to address their clients’ problems. With the enactment of health care reform, increased federal regulation of diverse aspects of the nation’s medical care delivery system, and the ever-increasing use of technology in the provision of health care, there are a multitude of health care disputes that span all aspects of the provision of health care. The structure of healthcare delivery across the nation is changing with increasing emphasis on successful outcomes and reducing costs. Providers are becoming increasingly integrated in a variety of arrangements of increasingly interdependence as a means of accomplishing these goals. Such complex relationships to achieve competing goals may give rise to conflict when the maintenance of such relationships is vital to the delivery of care to patients. The Report acknowledges the appropriateness of litigation but emphasizes that ADR can be a useful tool in resolving health care disputes.

2. **Approval by Submitting Entities**

The Section of Dispute Resolution adopted on August 1, 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?**

Resolution 101, Adopted by the ABA House of Delegates in August 1998

This resolution adopted the “black letter” of the Model Rules for Mediation and Client-Lawyer Disputes which recommends that jurisdictions establish a mediation program by providing a model for such programs.

* * *

Resolution 103, Adopted by the House of Delegates in August 1998

This Resolution adopted a new ADR-related policy calling for giving patients enhanced rights vis-a-vis managed health plans. The Resolution supports the right of all
consumers to a fair and efficient process for resolving differences with managed health care plans, health care providers, and institutions that serve such plans and providers.

* * *

Resolution 114, Adopted by the House of Delegates in February 1999

This resolution reiterated and expanded Resolution 103 and called for federal, state, and territorial legislation establishing ADR as one remedy for resolving disputes between patients and group health plans, as part of a process that includes a rigorous system of internal review and an independent system of external review of benefit payment requests, adverse coverage determinations, and medical necessity determinations.

* * *

Resolutions 106, Adopted by the House of Delegates in February 1999

Resolution 106 supported the enactment of federal legislation to allow patients to bring state court actions against managed health care plans. In that resolution, the ABA supported and encouraged the use of ADR mechanism prior to the filing of such causes of action.

* * *

Resolution 111, Adopted by the House of Delegates in February 2009 (Boston, MA)

Resolution 111 opposed the use of mandatory, binding, pre-dispute arbitration agreements between nursing homes and patients.

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

This Resolution encourages the expanded use of the broad array of dispute resolution techniques to address the potential increase in disputes and conflicts arising from the enactment of health care reform, increased federal regulation of diverse aspects of the nation’s medical care delivery system, and the ever-increasing use of technology in the provision of health care. In health care today, there are a multitude of health care disputes that span all aspects of the provision of health care. The structure of healthcare delivery across the nation is changing with increasing emphasis on successful outcomes and reducing costs. Providers are becoming increasingly integrated in a variety of arrangements of increasing integration and interdependence as a means of accomplishing these goals. Such complex relationships to achieve competing goals may give rise to conflict when the maintenance of such relationships is vital to the delivery of care to patients. ADR can be among the useful tools to resolve all of these disputes.

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 the courts, practitioners, health care providers, and posted on the ABA website. In addition, further “educational opportunities” should be developed.

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 have been sent to the following Sections: Administrative Law and Regulatory Practice, Antitrust Law, Business Law, Criminal Justice, Environment, Energy and Resources, Family Law, Health Law, Individual Rights and Responsibilities, Intellectual Property, International Law, Labor and Employment, Litigation, Public Contract Law, Public Utility, Communications & Transportation Law, Real Property, Science and Technology, State and Local Government Law, Taxation and TIPS. It was also sent to the Senior Lawyer, Young Lawyer and Judicial Divisions and Commission on Law and Aging.

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

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Howard Herman, Chair  
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12. **Contact Name and Address Information.** (Who will present the report to the House?)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution encourages the expanded use of the broad array of dispute resolution techniques to address the potential increase of disputes and conflicts arising from the enactment of health care reform, increased federal regulation of diverse aspects of the nation’s medical care delivery system, and the ever-increasing use of technology in the provision of health care. In health care today, there are a multitude of health care disputes that span all aspects of the provision of health care. The structure of healthcare delivery across the nation is changing with increasing emphasis on successful outcomes and reducing costs. Providers are becoming increasingly integrated in a variety of arrangements of increasing interdependence as a means of accomplishing these goals. Such complex relationships to achieve competing goals may give rise to conflict when the maintenance of such relationships is vital to the delivery of care to patients. ADR can be among the useful tools to resolve all of these disputes.

2. Summary of the Issue that the Resolution Addressed

With health care reform and the changing structure of the delivery of health care, increased use of technology and increasing federal and state regulation of healthcare, ADR can be a useful tool in addressing potential disputes and conflict arising from the present day, constant changes in healthcare.

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

The Resolution encourages the expanded use of the broad array of dispute resolution techniques as one means to promote the cost efficient, more timely resolution of a wide range of health care disputes across all health care settings.

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.
RESOLVED, That the American Bar Association amends the black letter of Rule 5.5 of the ABA Model Rules of Professional Conduct as follows (insertions underlined, deletions struck through):

RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates, are not services for which the forum requires pro hac vice admission; and when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

(2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

For purposes of paragraph (d) only, the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and the foreign lawyer or foreign in-house counsel must be subject to effective regulation and discipline by a duly constituted professional body or a public authority, or, in its discretion, be otherwise authorized by this highest court of appellate jurisdiction to practice in this jurisdiction as an in-house counsel.

FURTHER RESOLVED, That the American Bar Association amends the ABA Model Rule for Registration of In-House Counsel and the Commentary (deletions struck through, additions underlined), dated February 2016.

Model Rule for Registration of In-House Counsel

GENERAL PROVISIONS:

A. A lawyer who is admitted to the practice of law in another United States jurisdiction or is a foreign lawyer, who is employed as a lawyer and has a continuous presence in this jurisdiction by an organization, the business of which is lawful and consists of activities other than the practice of law or the provision of legal services, and who has a systematic and continuous presence in this jurisdiction as permitted pursuant to Rule 5.5(d)(1) of the Model Rules of Professional Conduct, shall register as in-house counsel within [180 days] of the commencement of employment as a lawyer or if currently so employed then within [180 days] of the effective date of this Rule, by submitting to the [registration authority] the following:

1) A completed application in the form prescribed by the [registration authority];

2) A fee in the amount determined by the [registration authority];

3) Documents proving admission to practice law and current good standing
in all jurisdictions, U.S. and foreign, in which the lawyer is admitted to practice law.

4) If the jurisdiction is foreign and the documents are not in English, the lawyer shall submit an English translation and satisfactory proof of the accuracy of the translation; and

5) An affidavit from an officer, director, or general counsel of the employing entity attesting to the lawyer’s employment by the entity and the capacity in which the lawyer is so employed, and stating that the employment conforms to the requirements of this Rule.

For purposes of this Rule, a “foreign lawyer” is a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation and discipline by a duly constituted professional body or a public authority. For purposes of this Rule only, the [state’s highest court of appellate jurisdiction] may, in its discretion, allow a lawyer lawfully practicing as in-house counsel in a foreign jurisdiction who does not meet the above requirements to register as an in-house counsel after consideration of other criteria, including the lawyer’s legal education, references, and experience.

SCOPE OF AUTHORITY OF REGISTERED LAWYER:

B. A lawyer registered under this Rule shall have the rights and privileges otherwise applicable to members of the bar of this jurisdiction with the following restrictions:

1. The registered lawyer is authorized to provide legal services to the entity client or its organizational affiliates, including entities that control, are controlled by, or are under common control with the employer, and for employees, officers and directors of such entities, but only on matters directly related to their work for the entity and only to the extent consistent with Rule 1.7 of the Model Rules of Professional Conduct [or jurisdictional equivalent];

2. The registered lawyer shall not:
   a. Except as otherwise permitted by the rules of this jurisdiction, appear before a court or any other tribunal as defined in Rule 1.0(m) of the Model Rules of Professional Conduct [or jurisdictional equivalent]; or
   b. Offer or provide legal services or advice to any person other than as described in paragraph B.1., or hold himself or herself out as being authorized to practice law in this jurisdiction other than as described in paragraph B.1; and
   c. If a foreign lawyer, provide advice on the law of this or another jurisdiction of the United States except on the basis of advice from a lawyer who is duly licensed and authorized to provide such advice.

PRO BONO PRACTICE:

C. Notwithstanding the provisions of paragraph B above, a lawyer registered under
this Rule is authorized to provide pro bono legal services through an established not-
for-profit bar association, pro bono program or legal services program or through
such organization(s) specifically authorized in this jurisdiction.

OBLIGATIONS:

D. A lawyer registered under this Rule shall:

1. Pay an annual fee in the amount of $_____________;
2. Pay any annual client protection fund assessment;
3. Fulfill the continuing legal education requirements that are required of
   active members of the bar in this jurisdiction;
4. Report within [___] days to the jurisdiction the following:
   a. Termination of the lawyer’s employment as described in paragraph
      A.5)4.;
   b. Whether or not public, any change in the lawyer’s license status in
      another jurisdiction, whether U.S. or foreign, including by the
      lawyer's resignation;
   c. Whether or not public, any disciplinary charge, finding, or sanction
      concerning the lawyer by any disciplinary authority, court, or other
      tribunal in any jurisdiction, U.S. or foreign.

LOCAL DISCIPLINE:

E. A registered lawyer under this Rule shall be subject to the [jurisdiction’s Rules of
   Professional Conduct], [jurisdiction’s Rules of Lawyer Disciplinary Enforcement],
   and all other laws and rules governing lawyers admitted to the active practice of law
   in this jurisdiction. The [jurisdiction’s disciplinary counsel] has and shall retain
   jurisdiction over the registered lawyer with respect to the conduct of the lawyer in this
   or another jurisdiction to the same extent as it has over lawyers generally admitted in
   this jurisdiction.

AUTOMATIC TERMINATION:

F. A registered lawyer’s rights and privileges under this Rule automatically
   terminate when:

1. The lawyer’s employment terminates;
2. The lawyer is suspended or disbarred or the equivalent thereof in any
   jurisdiction or any court or agency before which the lawyer is admitted, U.S. or foreign; or
3. The lawyer fails to maintain active status in at least one jurisdiction, U.S.
   or foreign.

REINSTATEMENT:

G. A registered lawyer whose registration is terminated under paragraph F.1. above,
   may be reinstated within [___] months of termination upon submission to the
   [registration authority] of the following:

1. An application for reinstatement in a form prescribed by the [registration
   authority];
2. A reinstatement fee in the amount of $____________;
3. An affidavit from the current employing entity as prescribed in paragraph A.5.

SANCTIONS:

H. A lawyer under this Rule who fails to register shall be:

1. Subject to professional discipline in this jurisdiction;
2. Ineligible for admission on motion in this jurisdiction;
3. Referred by the [registration authority] to this [jurisdiction’s bar admissions authority]; and
4. Referred by the [registration authority] to the disciplinary authority or to any duly constituted organization overseeing the lawyer’s profession, or that granted authority to practice law in the jurisdictions of licensure, U.S. and/or foreign.

Comment

[1] Paragraph A of this Rule provides that the [state’s highest court of appellate jurisdiction] may, in its discretion, allow someone who does not meet the Rule’s other definitional requirements of a foreign lawyer, but who is lawfully practicing as in-house counsel in their home foreign jurisdiction, to register. The exercise of such discretion by the court may be necessary, because some foreign jurisdictions may not permit otherwise qualified in-house counsel to be members of or admitted to the bar. Lawyers in such foreign jurisdictions who are employed as in-house counsel may be required to relinquish any bar membership or admission while so employed or they may never have obtained such admission or membership status.

[2] Paragraph F of this Rule sets forth three circumstances that result in automatic termination of in-house counsel’s registrations status. In situations where a court has exercised its discretion pursuant to Paragraph A of this Rule, a registered foreign in-house counsel lacking bar admission or licensure in that individual’s home country cannot “fail to maintain active status” as set forth in Paragraph F(3). There is no active status in existence. Absent the circumstances set forth in Paragraph F(2), the triggering event to terminate registration status of such foreign in-house counsel would be the termination of employment of that individual by the employer as set forth in Paragraph F(1).
The Regulation of Foreign Lawyers, and in Particular Foreign In-House Counsel, in the U.S.: Proposals for a Better and More Comprehensive Framework

I. Introduction

Several ABA Model Rules address the licensing of or authorization for practice by foreign lawyers in the U.S. These ABA policies are conditioned on those lawyers being able to certify that they are a “member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority.” As such, the ABA policies dealing with foreign in-house counsel de facto exclude over 70% of foreign lawyers, particularly lawyers from civil law jurisdictions, who are either not required or not even legally allowed to be members of the bar when practicing as in-house counsel. For example, a lawyer admitted to the practice of law in France, upon going in-house, has to surrender her bar admission status, and consequently, does not fall under the current ABA definition of foreign lawyer. As a result, U.S. corporations are constrained in their hiring of legal talent from the majority of countries around the world, and foreign-based companies are equally constrained from seconding foreign lawyers from such countries to work in the U.S. Because these in-house lawyers do not meet the requirements for being authorized to practice as and being registered as foreign in-house lawyers in the U.S., the state supreme courts cannot effectively regulate them and U.S. client employers cannot rely on the protection of the attorney-client privilege for the legal advice they receive from these employed lawyers.

II. Abstract

The ABA has had a long-standing practice of recognizing the importance and value associated with the practice of foreign law and allowing foreign legal practitioners to engage in practice, on a limited basis, in the U.S. Indeed, as early as 1993, the ABA House of Delegates approved the adoption of the Model Rule for the Licensing of Legal Consultants (currently the ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants) to support the work of foreign lawyers in this country. As of October 6, 2015, 32 states and the District of Columbia had adopted a rule authorizing and regulating the practice of foreign legal consultants.

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1 The ABA Model Rule for Temporary Practice by Foreign Lawyers, Rule 5.5(d) of the ABA Model Rules of Professional Conduct, the ABA Model Rule for Registration of In-House Counsel, the ABA Model Rule on Pro Hac Vice Admission, and the ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants can be viewed at http://www.americanbar.org/groups/professional_responsibility/policy.html.

2 Id.
Between August 2012 and February 2013, following a three and one-half year study of how globalization and technology are transforming the practice of law and how the regulation of lawyers, including foreign lawyers, should be updated in light of those developments, the ABA Commission on Ethics 20/20 submitted ten Resolutions for adoption by the House of Delegates.

Specifically regarding foreign lawyers, the Commission examined the practice authority of foreign-trained lawyers in the U.S. who are asked to advise clients on foreign or international law issues. As the Commission noted in its report, "one important practical effect of globalization is that clients regularly expect lawyers in firms of all sizes to handle matters that involve multiple jurisdictions, domestic and international." The Commission further recognized that "clients are encountering an increasing number of legal issues and problems that implicate foreign or international law and for which the assistance of foreign lawyers can be valuable."

The Commission went on to propose three related Resolutions that, with appropriate client protections, would allow clients to utilize the expertise of foreign counsel. One Resolution proposed to add foreign lawyers to the ABA Model Rule on Pro Hac Vice Admission so as to provide authorization for them to appear pro hac vice (subject to a number of limitations). A second Resolution sought to add authorization for foreign lawyers to serve as in-house counsel from a continuous and systematic presence in the U.S. via amendments to Model Rule of Professional Conduct 5.5, and a third Resolution sought companion amendments to the ABA Model Rule for the Registration of In-House Counsel. The House of Delegates adopted all of these Resolutions, which were developed with the goal of responding to the increasing number of foreign companies with substantial operations and offices in the U.S., as well as U.S. companies with substantial operations abroad, which often find that the foreign legal advice they want of lawyers from non-U.S. jurisdictions can be offered more efficiently and effectively if those lawyers relocate to a corporate office in the U.S.

In urging adoption of these Resolutions, the Ethics 20/20 Commission noted that foreign lawyers (including foreign legal consultants) are already engaged as in-house counsel within the U.S., but are subject to little oversight. Accordingly, the Commission concluded that adding foreign lawyers to both Model Rule 5.5 (to authorize foreign lawyers to serve as in-house counsel from a continuous and systematic presence in the U.S.) and the Model Rule for the Registration of In-House Counsel would achieve the benefit of ensuring that those lawyers are identifiable, subject to monitoring, and accountable for their conduct. These Resolutions were also aimed at ensuring that the foreign lawyers are subject to the professional conduct rules of the jurisdiction where they are employed, contribute to the client protection fund, are subject to sanctions if they are required.

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4 ABA Commission on Ethics 20/20 Introduction and Overview in Report to ABA House of Delegates, February 2013, p.5.
fail to register or do not comply with the professional conduct rules, and comply with continuing legal education requirements.

All these Resolutions have one element in common: they utilize the definition of foreign lawyer as used in longstanding ABA policy, including the ABA Model Rule for the Licensing and Practice by Foreign Legal Consultants, which a number of state supreme courts have adopted. Under such definition, a foreign lawyer is "a member in good standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as attorneys or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority." However, this definition does not account for the unique way in which foreign lawyers are permitted to practice in-house in most foreign countries. Thus, the goal of regulating these foreign lawyers as authorized U.S. in-house lawyers is not being maximized because in many of these in-house foreign lawyers do not meet the criteria under the current rules. A recent informal survey conducted by the Litigation Committee of the ABA Section of International Law of 70 jurisdictions across the world, from Europe to Asia to Africa and the Americas, shows that, in many countries, in-house counsel are not admitted to practice (or admitted to the bar) as we traditionally view practice licensure in the U.S., and therefore they are not subject to regulation and discipline by a professional body or a public authority in the way that their U.S. counterparts are. At the same time, many of these jurisdictions impose comparable, if not more stringent, educational requirements than those required in the U.S. for lawyers to be authorized to practice, whether in-house or in private practice. As a result, there is a need to address, in the current versions of Model Rule 5.5 and the Model Rule for Registration of In-House Counsel, this discreet but very real issue that is unique to foreign in-house counsel and their clients.

Model Rule 5.5 (d) is where the limited practice authority for in-house counsel (foreign and domestic) who have a systematic and continuous presence in the U.S. office of their employer is provided. As noted in Comment [17] to Model Rule 5.5, such in-house counsel may also be subject to registration requirements. Not all jurisdictions that have adopted the provisions of Model Rule 5.5(d), however, require registration as provided for in the Model Rule for Registration of In-House Counsel. Further, the registration requirements set forth in the Model Rule for Registration of In-House Counsel are intended to apply to those situations where in-house counsel is practicing via a systematic and continuous presence in the jurisdiction, not a temporary (fly-in-fly-out) presence.

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5 See: http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/201h.authcheckdam.pdf. That same definition is adopted for the licensing of Foreign Legal Consultants in New York. In support of his application as a foreign lawyer, the candidate must, under both the ABA Rule and the NY State Rule, produce certain evidence of his or her status as a foreign lawyer, in the form of "a certificate from the professional body or public authority in such foreign country having final jurisdiction over professional discipline, certifying as to the applicant's admission to practice and the date thereof, and as to his or her good standing as such attorney or counselor at law or the equivalent." See: https://www.law.northwestern.edu/career/lm/documents/NY_FLC_rules.pdf.

This Report supports amending ABA Model Rule 5.5 and the ABA Model Rule for Registration of In-House Counsel to include language specifying that the court of highest appellate jurisdiction may, in its discretion, allow foreign in-house lawyers who do not meet the ABA definition of foreign lawyer because they cannot be “members of the bar” to be able to practice as in-house counsel in the U.S. and to be so registered. These courts possess the inherent authority to regulate the practice of law and the legal profession, as long recognized by the ABA, and such an exercise of discretion would be within their purview. The proposed amendments would not only bring these foreign lawyers under the regulatory umbrella, but they also would offer better protection for the advice provided by these foreign lawyers to U.S.-based clients and, thus, to clients relying on such advice. One of the cornerstones is the protection afforded to their communications by the attorney-client privilege. This protection is engrained in the status of an attorney, whether such attorney practices in private practice or in-house, or whether such attorney has obtained all licensing requirements. This privilege belongs to the client and protects his communications with his attorneys in connection with the giving of legal advice. It is important to allow these foreign lawyers to become authorized U.S. lawyers so that there is no question that the privilege applies.

III. The Intrinsic Limitations of the ABA Definition of Foreign Lawyer With Regard to Foreign In-House Counsel

A. In-House Counsel and the Fluctuating Concept of "Admission to Practice"

As noted above, the definition of a foreign lawyer provides that the individual must be:

"a member in good standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority".7

In a number of foreign countries, unlike the U.S. model, the legal profession is not unified. Different professions of the law cohabitate and there is not a one-way path to becoming a lawyer. A number of countries do not allow members of the bar to practice in-house and remain members of the bar during that time, while a large majority of in-house legal practitioners started their career in-house and never took a bar exam or engaged in law firm practice. As such, they never went through the process of a formal admission after taking a bar exam, the way it is typically done in the U.S., and yet they are all considered lawyers in these foreign jurisdictions. These lawyers derive their authority to practice law as lawyers not from bar admission, or bar membership, but from the law directly. The survey that was compiled in support of this Resolution shows that the requirement that a foreign lawyer be admitted as such to practice, and produce a certificate of good standing in the bar from his country of origin as a condition to being eligible to practice and be registered as a foreign in-house lawyer in the U.S., would de facto exclude approximately 70% of foreign lawyers, mostly from civil law jurisdictions, from the benefit of such protection and regulation.

7 Supra note 1.
B. Regulation and Discipline of Foreign In-House Lawyers

Under the ABA definition, a foreign lawyer must also be subject to effective regulation and discipline by a duly constituted professional body or a public authority.

Because in many foreign countries in-house lawyers are not members of the bar in the same way they are in the U.S., they are not subject to regulation and discipline in the same way either. In countries where the profession of lawyer is unified, such as the UK and most common law jurisdictions, all lawyers, whether employed in private practice or in-house, are members of a single body and subject to regulation and discipline. In others, such as France, Italy or Sweden, only lawyers in private practice are members of the bar. Lawyers employed in-house would typically be members of a national association of in-house lawyers, such as AFJE in France, or another foreign equivalent, which has restrictive conditions for admitting members and recognizing the legal status of an in-house legal practitioner, as well as a code of ethics by which lawyers must abide. They often do not, however, have the authority to regulate or discipline these lawyers. Neither does the national bar organization, if such organization, as in France, does not have the statutory authority to regulate lawyers other than those employed in private practice. And yet, the legal status of all these lawyers, whether they work in private practice or in-house, is recognized by the law of the foreign country, and so is their ability to give legal advice and draft legal documents.

In its current drafting, the ABA definition of foreign lawyer, which links the status of a lawyer to his or her regulation or discipline by a duly constituted professional body, as is the case in the U.S., is again too restrictive with regard to the unique position of foreign in-house counsel, and fails to account for the fact that the vast majority of foreign in-house practitioners are not regulated or disciplined as such by a duly established organization such as the bar, even though they are subject to a number of duties and laws, such as the duty to maintain confidentiality, by virtue of their status as lawyers. If these lawyers, who cannot be members of the bar, were to breach those duties, they could be subject to prosecution and sanctions. These sanctions, however, would be imposed by the courts, not a bar, and come directly from the law, not from a duly established professional body. The strict interpretation of the ABA definition would exclude de facto all lawyers who are currently employed as in-house attorneys in most foreign countries, who are most likely to apply for authorization to practice as foreign in-house lawyers in the U.S.

C. The Proposed Amendments to Model Rule of Professional Conduct 5.5 and to the Model Rule for Registration of In-House Counsel

For the reasons set forth above, the Section of International Law recommends that Model Rule 5.5 and the Model Rule for Registration of In-House Counsel be amended as follows (additions are in underlined and deletions struck through):

Model Rule 5.5(e):
For purposes of paragraph (d) only, the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and the foreign lawyer or foreign in-house counsel must be subject to effective regulation and discipline by a duly constituted professional body or a public authority, or, in its discretion, are otherwise authorized by [this highest court of appellate jurisdiction] to practice in this jurisdiction as an in-house counsel.

Model Rule For the Registration of In-House Counsel (at the end of Paragraph A):

For purposes of this Rule, a “foreign lawyer” is a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation and discipline by a duly constituted professional body or a public authority. For purposes of this Rule only, the [state’s highest court of appellate jurisdiction] may, in its discretion, allow a lawyer lawfully practicing as in-house counsel in a foreign jurisdiction who does not meet the above requirements to register as an in-house counsel after consideration of other criteria, including the lawyer’s legal education, references, and experience.

In particular, where the lawyer is not, in the foreign jurisdiction, allowed to be or remain (as applicable) a member of the bar while practicing in-house, the court, in looking to the legal education, references and experiences of the applicant for registration status, may consider the following criteria in determining whether to grant the request:

(a) The legal education (i.e. foreign equivalent of a U.S. JD degree) of the individual;
(b) The professional experience of the individual, including the number of years that the individual has worked as in-house counsel;
(c) The individual’s passing of the foreign jurisdiction's bar examination;
(d) The individual's prior admission to the foreign bar, or other duly constituted authority;
(e) The individual’s disciplinary record (including prosecution or sanctions as described above), if any, while admitted to the foreign bar or during the course of the individual’s employment as in-house counsel;
(f) The individual’s eligibility to join or rejoin the foreign bar upon ceasing to be employed in-house; and
(g) The individual's understanding of the Model Rules of Professional Conduct.

To further explain why the language regarding the courts’ discretion is being added to enhance clarity for those seeking practice authorization under the Registration Rule or for those seeking to enforce it, the Section proposes a new Comment [1]. That new Comment states:
[1] Paragraph A of this Rule provides that the [state’s highest court of appellate jurisdiction] may, in its discretion, allow someone who does not meet the Rule’s other definitional requirements of a foreign lawyer, but who is lawfully practicing as in-house counsel in their home foreign jurisdiction, to register. The exercise of such discretion by the court may be necessary, because some foreign jurisdictions may not permit otherwise qualified in-house counsel to be members of or admitted to the bar. Lawyers in such foreign jurisdictions who are employed as in-house counsel may be required to relinquish any bar membership or admission while so employed or they may never have obtained such admission or membership status.

In addition, the Section proposes amending Section F of the Model Rule for Registration of In-House Counsel that addresses when registration status automatically terminates. The Section proposes that paragraph F(2) read as follows to ensure consistency with Model Rule 5.5(d):

F. The registered lawyer’s rights and privileges under this Rule automatically terminate when:
   1. The lawyer’s employment terminates;
   2. The lawyer is suspended or disbarred or the equivalent thereof in any jurisdiction; or
   3. The lawyer fails to maintain active status in at least one jurisdiction, U.S. or foreign.

To further clarify when the registration status would automatically terminate for in-house counsel granted registration status pursuant to the court’s discretion, the Section proposes new Comment [2], which states:

[2] Paragraph F of this Rule sets forth three circumstances that result in automatic termination of in-house counsel’s registrations status. In situations where a court has exercised its discretion pursuant to Paragraph A of this Rule, a registered foreign in-house counsel lacking bar admission or licensure in that individual’s home country cannot “fail to maintain active status” as set forth in Paragraph F(3). There is no active status in existence. Absent the circumstances set forth in Paragraph F(2), the triggering event to terminate registration status of such foreign in-house counsel would be the termination of employment of that individual by the employer as set forth in Paragraph F(1).

D. The Proposed Amendments Also Afford Better Protection of the Attorney-Client Privilege

Amending the current model rules on the authorization and registration of foreign in-house lawyers in the U.S. also would offer better protection to the advice provided by these foreign lawyers to their U.S.-based clients.
One of the cornerstones of the licensing of lawyers in the U.S. is the protection afforded to their communications by the attorney-client privilege. This protection is engrained in the status of an attorney, whether such attorney practices in private practice or in-house. Such privilege equally should extend to the advice given by foreign in-house lawyers in the U.S. so that U.S.-based clients relying on such advice can confidently seek out such advice without fear of their communications with those foreign lawyers being subject to disclosure.\(^8\)

Such a privilege, with some variations in the scope and degree of protection, also attaches to the communication of foreign lawyers with their clients in their home jurisdiction. However, longstanding case law, in Europe in particular, has questioned such privilege attaching to legal advice given by in-house lawyers, the argument being advanced by the European Court of Justice being that in-house counsel, by virtue of their employment relationship and exclusive affiliation to one client only, i.e. their employer, lacks the independence that would otherwise be expected of lawyers giving advice to a number of clients on a non-exclusive basis. There are a number of political calls at the national and EU level to put an end to this situation, which severely undermines both the authority of in-house counsel and the protection of clients relying on such advice in Europe. This also poses a number of very practical risks for U.S. lawyers, particularly U.S.-based in-house counsel involved in communications with EU-based in-house counsel, including the risk U.S. lawyers take that their communications will be subject to an order of disclosure by a court of law in the EU, without the ability of these lawyers to successfully claim the protection of the attorney-client privilege before such court. Likewise, a U.S. in-house counsel who provides legal advice to an EU-based client or in-house colleague, knowing that such legal advice may not be subject to the attorney-client privilege in the EU, may not be able to claim the protection of the U.S. attorney-client privilege.

The issue of the lack of privilege for in-house counsel communications in the EU is not an issue that is linked to the lawyer’s regulated status in countries where in-house lawyers are also members of a bar. It is an issue that is linked to their employment status. Therefore, when foreign in-house lawyers come to the U.S. to practice and start giving legal advice to U.S-based clients, it may very well be argued in case of an EU dispute that these foreign lawyers’ legal advice may not be subject to the attorney-client privilege in the EU, and may not be able to claim the protection of the U.S. attorney-client privilege.

\(^8\) This is not to suggest that in every jurisdiction a lawyer must be licensed in order for the privilege to apply. The Standard Rule of the Federal Rule of Evidence defines a “lawyer” as a person licensed to practice law in any state or nation. Moreover the privilege extends not only to lawyers but to confidential communications with persons reasonably believed by the client to be authorized to practice law in any state or nation, Standard 503(a)(2). Many states, including Florida, California, Arkansas, Oregon, Idaho, Delaware, and Texas have adopted this rule. For instance, Florida Statute (“Fla. Stat.”) 90.502 expressly regulates the lawyer-client privilege: “(1) For purposes of this section:

(a) A “lawyer” is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(…) This subsection does not affect the qualification and admission of lawyers to practice in Florida, which is regulated and administered by the Florida Bar.” Notably, the adoption of this rule is not universal across the U.S. Thus, it is suggested that the Model Rules be amended to broaden the categories of foreign lawyers who may serve as in-house counsel so that there is no issue that the lawyer participating in the communication is a lawyer for purposes of determining the application of the privilege.
Conversely, if some of the obligations those lawyers derive from being licensed and registered as in-house lawyers in the U.S. are that they: are subject to the professional conduct rules of the jurisdiction where they are employed, contribute to the client protection fund, are subject to sanctions if they fail to register or do not comply with the professional conduct rules, and comply with continuing legal education requirements, one could also argue that one of the key benefits a registered and properly licensed foreign in-house lawyer would gain from such status is the ability for their client to claim the benefit afforded to their foreign in-house lawyer's legal advice by the U.S. rules on the attorney-client privilege.

IV. Conclusion

For the reasons highlighted in this Report, it is recommended that Model Rule 5.5 and the ABA Model Rule for the Registration of In-House Counsel be amended to include the discretion of a court of highest appellate jurisdiction to license to practice in the U.S. a foreign in-house lawyer, who otherwise, due to his or her country’s rules, would not fall under the current definition of foreign lawyer. Allowing such discretion will ensure not only that such competent and trained foreign in-house lawyers are legally able and, as a result, encouraged to seek registration in the U.S., but also that U.S.-based clients would effectively receive the full benefit of these regulations and the freedom to choose the foreign in-house lawyer who best fits their needs, including better protection of the attorney-client privilege.

Respectfully Submitted,

Lisa J. Savitt
Chair, ABA Section of International Law

February 2016
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GENERAL INFORMATION FORM

Submitting Entity: Section of International Law

Submitted By: Lisa Savitt, Chair, Section of International Law

1. **Summary of Resolution(s).**
   Under Model Rule 5.5 (d), a foreign lawyer is "a member in good standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as attorneys or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority." However, this definition does not account for the unique way in which foreign lawyers are permitted to practice in-house in most foreign countries.

   This Report supports amending ABA Model Rule 5.5 and the ABA Model Rule for Registration of In-House Counsel to include language specifying that the court of highest appellate jurisdiction may, in its discretion, allow foreign in-house lawyers who do not meet the ABA definition of foreign lawyer because they cannot be “members of the bar” to be able to practice as in-house counsel in the U.S. and to be so registered. These courts possess the inherent authority to regulate the practice of law and the legal profession, as long recognized by the ABA, and such an exercise of discretion would be within their purview. The proposed amendments would not only bring these foreign lawyers under the regulatory umbrella, but they also would offer better protection for the advice provided by these foreign lawyers to U.S.-based clients and, thus, to clients relying on such advice. One of the cornerstones is the protection afforded to their communications by the attorney-client privilege.

2. **Approval by Submitting Entity.**
   The Council of the Section of International Law approved this recommendation and resolution at its Meeting on October 20, 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?**
   Several ABA Model Rules address the licensing of or authorization for practice by foreign lawyers in the U.S. These ABA policies are conditioned on those lawyers being able to certify that they are a “member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority.” As such, the ABA policies dealing with foreign in-house counsel de facto exclude over 70% of foreign lawyers, particularly lawyers from civil law jurisdictions, who are either not required or not even legally allowed to be members of the bar when practicing as in-house counsel. In particular, this Report supports amending ABA Model Rule 5.5 and the ABA Model Rule for Registration of In-House Counsel to include language specifying that the court of highest appellate jurisdiction may, in its
discretion, allow foreign in-house lawyers who do not meet the ABA definition of foreign lawyer because they cannot be “members of the bar” to be able to practice as in-house counsel in the U.S. and to be so registered. The court, looking to the legal education, references and experiences of the applicant for registration status, may consider the several criteria in determining whether to grant the request. Thus, the Section proposes to add a new Comment specifying that grant of discretion to the courts is necessary because some foreign jurisdictions may not permit otherwise qualified in-house counsel to be members of or admitted to the bar. In addition, the Section proposes amending Section F of the Model Rule for Registration of In-House Counsel that addresses when registration status automatically terminates. To further clarify when the registration status would automatically terminate for in-house counsel granted registration status pursuant to the court’s discretion, the Section proposes new Comment setting forth three circumstances that result in automatic termination of in-house counsel’s registrations status. Amending the current model rules on the authorization and registration of foreign in-house lawyers in the U.S. also would offer better protection to the advice provided by these foreign lawyers to their U.S.-based clients.

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.**
   If this recommendation and resolution are approved by the House of Delegates, Model Rule 5.5 and the ABA Model Rule for the Registration of In-House Counsel will include the discretion of a court of highest appellate jurisdiction to license to practice in the U.S. a foreign in-house lawyer, who otherwise, due to his or her country’s rules, would not fall under the current definition of foreign lawyer. Allowing such discretion will ensure not only that such competent and trained foreign in-house lawyers are legally able and, as a result, encouraged to seek registration in the U.S., but also that U.S.-based clients would effectively receive the full benefit of these regulations and the freedom to choose the foreign in-house lawyer who best fits their needs, including better protection of the attorney-client privilege.

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

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

This Resolution and Report was developed by a joint working group comprised of representatives from the following entities: Task Force on International Trade in Legal Services (ITILS); Standing Committee on Professional Discipline; Standing Committee on Ethics and Professional Responsibility; Business Law Section; Litigation Section; National Organization of Bar Counsel; Tort Trial and Insurance Practice Section, Judicial Division, and the Section of Legal Education and Admissions to the Bar. The Standing Committee on Professional Discipline, the Standing Committee on Ethics and Professional Responsibility, and ITILS agreed to co-sponsor in time for the filing deadline.

Further referrals are being undertaken to the following entities: Litigation Section, Business Law Section, National Organization of Bar Counsel, Tort Trial and Insurance Practice Section, Judicial Division, Section of Legal Education and Admissions to the Bar.

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

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution
This Report supports amending ABA Model Rule 5.5 and the ABA Model Rule for Registration of In-House Counsel to include language specifying that the court of highest appellate jurisdiction may, in its discretion, allow foreign in-house lawyers who do not meet the ABA definition of foreign lawyer because they cannot be “members of the bar” to be able to practice as in-house counsel in the U.S. and to be so registered.

2. Summary of the Issue that the Resolution Addresses
Under Model Rule 5.5 (d), a foreign lawyer is "a member in good standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as attorneys or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority." However, this definition does not account for the unique way in which foreign lawyers are permitted to practice in-house in most foreign countries. This Report supports amending ABA Model Rule 5.5 and the ABA Model Rule for Registration of In-House Counsel to include language specifying that the court of highest appellate jurisdiction may, in its discretion, allow foreign in-house lawyers who do not meet the ABA definition of foreign lawyer because they cannot be “members of the bar” to be able to practice as in-house counsel in the U.S. and to be so registered. These courts possess the inherent authority to regulate the practice of law and the legal profession, as long recognized by the ABA, and such an exercise of discretion would be within their purview. The proposed amendments would not only bring these foreign lawyers under the regulatory umbrella, but they also would offer better protection for the advice provided by these foreign lawyers to U.S.-based clients and, thus, to clients relying on such advice. One of the cornerstones is the protection afforded to their communications by the attorney-client privilege.

3. Please Explain How the Proposed Policy Position will address the issue
With the proposed resolution, Model Rule 5.5 and the ABA Model Rule for the Registration of In-House Counsel will include the discretion of a court of highest appellate jurisdiction to license to practice in the U.S. a foreign in-house lawyer, who otherwise, due to his or her country’s rules, would not fall under the current definition of foreign lawyer. Allowing such discretion will ensure not only that such competent and trained foreign in-house lawyers are legally able and, as a result, encouraged to seek registration in the U.S., but also that U.S.-based clients would effectively receive the full benefit of these regulations and the freedom to choose the foreign in-house lawyer who best fits their needs, including better protection of the attorney-client privilege.

4. Summary of Minority Views
None.
RESOLVED, That the American Bar Association adopts the ABA Model Regulatory Objectives for the Provision of Legal Services, dated February, 2016.

ABA Model Regulatory Objectives for the Provision of Legal Services

A. Protection of the public
B. Advancement of the administration of justice and the rule of law
C. Meaningful access to justice and information about the law, legal issues, and the civil and criminal justice systems
D. Transparency regarding the nature and scope of legal services to be provided, the credentials of those who provide them, and the availability of regulatory protections
E. Delivery of affordable and accessible legal services
F. Efficient, competent, and ethical delivery of legal services
G. Protection of privileged and confidential information
H. Independence of professional judgment
I. Accessible civil remedies for negligence and breach of other duties owed, and disciplinary sanctions for misconduct
J. Diversity and inclusion among legal services providers and freedom from discrimination for those receiving legal services and in the justice system

FURTHER RESOLVED, That the American Bar Association urges that each state’s highest court, and those of each territory and tribe, be guided by the ABA Model Regulatory Objectives for the Provision of Legal Services when they assess the court’s existing regulatory framework and any other regulations they may choose to develop concerning non-traditional legal service providers.
REPORT

I. Background on the Development of ABA Model Regulatory Objectives for the Provision of Legal Services

The American Bar Association’s Commission on the Future of Legal Services was created in August 2014 to examine how legal services are delivered in the U.S. and other countries and to recommend innovations that improve the delivery of, and the public’s access to, those services.¹ As one part of its work, the Commission engaged in extensive research about regulatory innovations in the U.S. and abroad. The Commission found that U.S. jurisdictions are considering the adoption of regulatory objectives to serve as a framework for the development of standards in response to a changing legal profession and legal services landscape. Moreover, numerous countries already have adopted their own regulatory objectives.

The Commission concluded that the development of regulatory objectives is a useful initial step to guide supreme courts and bar authorities when they assess their existing regulatory framework and any other regulations they may choose to develop concerning non-traditional legal service providers. Given that supreme courts in the U.S. are beginning to consider the adoption of regulatory objectives and given that providers of legal assistance other than lawyers are already actively serving the American public, it is especially timely and important for the ABA to offer guidance in this area.

This Report discusses why the Commission urges the House of Delegates to adopt the accompanying Resolution.

II. The Purpose of Model Regulatory Objectives for the Provision of Legal Services

The Commission believes that the articulation of regulatory objectives serves many valuable purposes. One recent article cites five such benefits:

First, the inclusion of regulatory objectives definitively sets out the purpose of lawyer regulation and its parameters. Regulatory objectives thus serve as a guide to assist those regulating the legal profession and those being regulated. Second, regulatory objectives identify, for those affected by the particular regulation, the purpose of that regulation and why it is enforced. Third, regulatory objectives assist in ensuring that the function and purpose of the particular [regulation] is transparent. Thus, when the regulatory body administering the [regulation] is questioned—for example, about its interpretation of the [regulation]—the regulatory body can point to the regulatory objectives to demonstrate compliance with function and purpose. Fourth, regulatory objectives can help define the parameters of the [regulation] and of public debate about proposed [regulation]. Finally, regulatory objectives may help the legal profession when it is called upon

¹ Additional information about the Commission, including descriptions of the Commission’s six working groups, can be found on the Commission’s website as well as in the Commission’s November 3, 2014 issues paper. That paper generated more than 60 comments.
to negotiate with governmental and nongovernmental entities about regulations affecting legal practice.  

In addition to these benefits, the Commission believes Model Regulatory Objectives for the Provision of Legal Services will be useful to guide the regulation of an increasingly wide array of already existing and possible future legal services providers.  

The legal landscape is changing at an unprecedented rate.  In 2012, investors put $66 million dollars into legal service technology companies.  By 2013, that figure was $458 million.  

One source indicates that there are well over a thousand legal tech startup companies currently in existence.  

Given that these services are already being offered to the public, the Model Regulatory Objectives for the Provision of Legal Services will serve as a useful tool for state supreme courts as they consider how to respond to these changes.

A number of U.S. jurisdictions have articulated specific regulatory objectives for the lawyer disciplinary function.  

At least one U.S. jurisdiction (Colorado) is considering the adoption of regulatory objectives that are intended to have broader application similar to the proposed ABA Model Regulatory Objectives for the Provision of Legal Services.  

In addition, the development and adoption of regulatory objectives with broad application has become increasingly common around the world.  Nearly two dozen jurisdictions outside the U.S. have adopted them in the past decade or have proposals pending.  

Australia, Denmark, England, India, Ireland, New Zealand, Scotland, Wales, and several Canadian provinces are examples.

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3 As noted by the ABA Standing Committee on Paralegals in its comments to the Commission, paralegals already assist in the accomplishment of many of the Commission’s proposed Regulatory Objectives.  


5 https://angel.co/legal  

6 For example, in Arizona “the stated objectives of disciplinary proceedings are: (1) maintenance of the integrity of the profession in the eyes of the public, (2) protection of the public from unethical or incompetent lawyers, and (3) deterrence of other lawyers from engaging in illegal or unprofessional conduct.”  In re Murray, 159 Ariz. 280, 282, 767 P.2d 1, 3 (1988).  In addition, the Court views “discipline as assisting, if possible, in the rehabilitation of an errant lawyer.”  In re Hoover, 155 Ariz. 192, 197, 745 P.2d 939, 944 (1987).  

California Business & Professions Code Section 6001.1 states that “[T]he protection of the public shall be the highest priority for the State Bar of California and the board of trustees in exercising their licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.”  

The Illinois Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois (ARDC) adopted the following: “The mission of the ARDC is to promote and protect the integrity of the legal profession, at the direction of the Supreme Court, through attorney registration, education, investigation, prosecution and remedial action.”  

7 A Supreme Court of Colorado Advisory Committee is currently developing, for adoption by the Court, “Regulatory Objectives of the Supreme Court of Colorado.”  

These Model Regulatory Objectives for the Provision of Legal Services are intended to stand on their own. Regulators should be able to identify the goals they seek to achieve through existing and new regulations. Having explicit regulatory objectives ensures credibility and transparency, thus enhancing public trust as well as the confidence of those who are regulated.\footnote{As Professor Laurel Terry states in comments she submitted in response to the Commission’s circulation of a draft of these Regulatory Objectives, if “a regulator can say what it is trying to achieve, its response to a particular issue – whatever that response is – should be more thoughtful and should have more credibility. It seems to me that this is in everyone’s interest.”}

From the outset, the Commission has been transparent about the broad array of issues it is studying and evaluating, including those legal services developments that are viewed by some as controversial, threatening, or undesirable (e.g., alternative business structures). The adoption of this Resolution, however, does not predetermine or even imply a position on those issues by the ABA. If and when any other issues come to the floor of the House of Delegates, the Association can and should have a full and informed debate about them.

The Commission intends for these Model Regulatory Objectives for the Provision of Legal Services to be used by supreme courts and their regulatory agencies. As noted in the Further Resolved Clause of this Resolution, the Objectives are offered as a guide to supreme courts. They can serve as such for new regulations and the interpretation of existing regulations,\footnote{Existing court rules providing for alternatives to discipline programs exemplify how the Objective of ensuring the efficient, competent and ethical delivery of legal services should be read to encompass the need to confront legal services provider impairments in the most effective manner for the good of the legal system. \textit{See, e.g.}, Rule 11(G) of the ABA Model Rules for Lawyer Disciplinary Enforcement.} even in the absence of formal adoption. As with any ABA model, a supreme court may choose which, if any, provisions to be guided by, and which, if any, to adopt.

Although regulatory objectives have been adopted by legislatures of other countries due to the manner in which their governments operate, they are equally useful in the context of the judicially-based system of legal services regulation in the U.S., which has been long supported by the ABA.

Regulatory objectives can serve a purpose that is similar to the Preamble to the Model Rules of Professional Conduct. In jurisdictions that have formally adopted the Preamble, the Rules provide mandatory authority, and the Preamble offers guidance regarding the foundation of the black letter law and the context within which the Rules operate. In much the same way, regulatory objectives are intended to offer guidance to U.S. jurisdictions with regard to the foundation of existing legal services regulations (e.g., unauthorized practice restrictions) and the purpose of and context within which any new regulations should be developed and enforced in the legal services context.

\section*{III. Relationship to the Legal Profession’s Core Values}

Regulatory objectives are different from the legal profession’s core values in at least two respects. First, the core values of the legal profession are (as the name suggests) directed at the
“legal profession.” By contrast, regulatory objectives are intended to guide the creation and interpretation of a wider array of legal services regulations, such as regulations covering new categories of legal services providers. For this reason, some duties that already exist in the Model Rules of Professional Conduct (e.g., the duty of confidentiality) are restated in the Model Regulatory Objectives for the Provision of Legal Services to emphasize their importance and relevance when developing regulations for legal services providers who are not lawyers. Second, while the core values of the legal profession remain at the center of attorney conduct rules, they offer only limited, though still essential, guidance in the context of regulating the legal profession. A more complete set of regulatory objectives can offer U.S. jurisdictions clearer regulatory guidance than the core values typically provide.

The differing functions served by regulatory objectives and core values mean that some core values are articulated differently in the context of regulatory objectives. For example, the concept of client loyalty is an oft-stated and important core value, but in the context of regulatory objectives, client loyalty is expressed in more specific and concrete terms through independence of professional judgment, competence, and confidentiality.

IV. Recommended ABA Model Regulatory Objectives for the Provision of Legal Services

The Commission developed the Model Regulatory Objectives for the Provision of Legal Services by drawing on the expertise of its own members, discussing multiple drafts of regulatory objectives at Commission meetings, reviewing regulatory objectives in nearly two dozen jurisdictions, and reading the work of several scholars and resource experts. The Commission also sought input and incorporated suggestions from individuals and other entities, including

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11 See ABA House of Delegates Recommendation 10F (adopted July 11, 2000), available at http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdi precom10f.html. This recommendation lists the following as among the core values of the legal profession: the lawyer’s duty of undivided loyalty to the client; the lawyer’s duty competently to exercise independent legal judgment for the benefit of the client; the lawyer’s duty to hold client confidences inviolate; the lawyer’s duty to avoid conflicts of interest with the client; the lawyer’s duty to help maintain a single profession of law with responsibilities as a representative of clients, an officer of the legal system, and a public citizen having special responsibilities for the quality of justice; and the lawyer’s duty to promote access to justice.

12 The Commission notes that there also are important professionalism values to which all legal services providers should aspire. Some aspects of professionalism fold into the Objectives related to ethical delivery of services, independence of professional judgment and access to justice. Others may not fit neatly into the distinct purpose of regulatory objectives for legal services providers, just as they do not fall within the mandate of the ethics rules for lawyers.

13 The Commission includes representatives from the judiciary and regulatory bodies, academics, and practitioners.

ABA Standing Committee on Discipline and the ABA Standing Committee on Ethics and Professional Responsibility.

Respectfully submitted,

Judy Perry Martinez, Chair
Andrew Perlman, Vice-Chair
Commission on the Future of Legal Services

February 2016
GENERAL INFORMATION FORM

Submitting Entity: ABA Commission on the Future of Legal Services

Submitted By: Judy Perry Martinez, Chair

1. Summary of Resolution(s).

The Commission on the Future of Legal Services seeks adoption of ABA Model Regulatory Objectives for the Provision of Legal Services by the House of Delegates. The Commission further requests that the House recommend that each state’s highest court, and those of each territory and tribe, be guided by clearly identified regulatory objectives such as those contained in the proposed ABA Model Regulatory Objectives for the Provision of Legal Services. Given that supreme courts in the U.S. are beginning to consider the adoption of regulatory objectives and given that providers of legal assistance other than lawyers are already actively serving the American public, it is especially timely and important for the ABA to offer guidance in this area.

It is important for regulators to be able to easily identify the goals they seek to achieve through existing and new regulations. The adoption of ABA Model Regulatory Objectives for the Provision of Legal Services would create a valuable framework to guide the courts in the face of the burgeoning access to justice crisis and fast paced change affecting the delivery of legal services in order that the courts can assess their existing regulatory framework and any other regulations they may choose to develop concerning non-traditional legal service providers. Use of ABA Model Regulatory Objectives for the Provision of Legal Services also will help courts continue to ensure credibility and transparency in the regulatory process, which enhances not only the public’s trust in judicial regulation, but also the confidence of those who are regulated.

2. Approval by Submitting Entity.

The Commission on the Future of Legal Services approved the filing of this Resolution at its meeting on September 25 and 26, 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?

This Resolution is consistent with existing and longstanding ABA policies supporting state-based judicial regulation and does not affect them.

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

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

   The Policy Implementation Committee of the Center for Professional Responsibility has in place the procedures and infrastructure to successfully implement any policies relating to the regulation of the legal profession that are adopted by the House of Delegates. The Policy Implementation Committee works with the Conference of Chief Justices as part of its process. The Commission on the Future of Legal Services has been in communication with Center for Professional Responsibility volunteer leadership and the Center Director in anticipation of the implementation effort. The Policy Implementation Committee has been responsible for the successful implementation of the recommendations of the ABA Commission on Ethics 20/20, Ethics 2000 Commission, the Commission on Multijurisdictional Practice and the Commission to Evaluate the Model Code of Judicial Conduct. The Commission will also engage the ABA Legal Services Division regarding the implementation effort should the House adopt the Resolution.

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

   None

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

10. **Referrals.**

    On September 29, 2015 the Commission released for comment to all ABA entities, state and local bar associations, and affiliated entities a draft of this Resolution and the accompanying draft Report. In addition, the Commission consulted with the ABA Standing Committee on Professional Discipline and Standing Committee on Ethics and Professional Responsibility at an earlier stage during its study of regulatory objectives. The Commission carefully considered the feedback from those entities in the development of this Resolution.

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

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

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EXECUTIVE SUMMARY

1. **Summary of the Resolution**

The Commission on the Future of Legal Services is proposing for House of Delegates adoption ABA Model Regulatory Objectives for the Provision of Legal Services. The Commission also requests that the House adopt the part of the Resolution that recommends that each state’s highest court, and those of each territory and tribe, be guided by clearly identified regulatory objectives such as those contained in the proposed ABA Model Regulatory Objectives for the Provision of Legal Services.

The adoption of ABA Model Regulatory Objectives for the Provision of Legal Services would create a valuable framework to guide the courts as they, in the face of the burgeoning access to justice crisis and fast paced change affecting the delivery of legal services assess their existing regulatory framework and any other regulations they may choose to develop concerning non-traditional legal service providers. Use of ABA Model Regulatory Objectives for the Provision of Legal Services would also help courts continue to ensure credibility and transparency in the regulatory process, and that enhances not only the public’s trust in judicial regulation, but also the confidence of those who are regulated.

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

The ABA Commission on the Future of Legal Services was created in August 2014 to examine how legal services are delivered in the U.S. and other countries and to recommend innovations that improve the delivery of, and the public’s access to, those services. As one part of its multifaceted work, the Commission engaged in extensive research about regulatory developments in the U.S. and abroad. The ABA has long supported state-based judicial regulation; its policies doing so do not, however, set forth a centralized framework of broad and explicit regulatory objectives to serve as a guide for such regulation. This Resolution, if adopted, would fill this policy void and serve as a useful tool to help courts easily identify the explicit goals they seek to achieve when they assess their existing regulatory framework and any other regulations they may choose to develop concerning non-traditional legal service providers. Given that supreme courts in the U.S. are beginning to consider the adoption of broad regulatory objectives, and given that providers of legal assistance other than lawyers are already actively serving the American public, the Commission believes that it is timely and important for the ABA to offer guidance in this area.

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

The adoption of ABA Model Regulatory Objectives for the Provision of Legal Services would create the valuable and needed framework to help courts as they, in the face of the burgeoning access to justice crisis and fast paced change affecting the delivery of legal services: (1) assess their existing regulatory framework and (2) identify and implement regulations related to legal services beyond the traditional regulation of the legal profession. While allowing for jurisdictional flexibility, the centralized framework set forth in the ABA Model Regulatory Objectives for the Provision of Legal Services would also facilitate jurisdictional consistency.
Use of ABA Model Regulatory Objectives for the Provision of Legal Services would also help courts continue to ensure credibility and transparency in the regulatory process, which enhances not only the public’s trust in judicial regulation, but also the confidence of those who are regulated.

4. **Summary of Minority Views**

From the outset, the Commission on the Future of Legal Services has been committed to and implemented a process that is transparent and open. The Commission has engaged in broad outreach and provided full opportunity for input into its work. Inherent in any undertaking of this scope and complexity is the recognition that there will be disagreements about the approach to issues as well as the substance of proposals.

On September 29, 2015 the Commission released for comment to all ABA entities, state and local bar associations, and affiliated entities a draft of this Resolution and the accompanying draft Report. At the time this Executive Summary was filed with the House of Delegates, the Commission was aware only that the following disagree with the Resolution:

The New Jersey State Bar Association has expressed its belief that the Resolution is contrary to the profession’s core values and promotes a tiered system of justice.

Larry Fox filed comment in opposition in his individual capacity.
RESOLVED, That the American Bar Association urges Congress to amend 5 U.S.C. §552(a)(1) of the Freedom of Information Act (FOIA) to require that when a standard drafted by a private organization is exempted from Federal Register publication because it has been “incorporated by reference” (IBR) into a substantive rule of general applicability, the rulemaking agency must ensure meaningful free public availability of the incorporated text, such as through online access in a centralized online location or access in all government depository libraries.

FURTHER RESOLVED, That the American Bar Association urges Congress to amend 5 U.S.C. §553, the Administrative Procedure Act’s rulemaking provisions, to require meaningful free public availability of a proposed IBR standard’s text during the public comment period.

FURTHER RESOLVED, That the American Bar Association urges Congress to ensure that private organizations, where appropriate, have access to compensation for financial losses attributable to making their standards publicly available.
REPORT

I. INTRODUCTION AND BACKGROUND

For over two centuries, the United States has maintained a constitutive tradition of meaningful free access to our binding laws: that all citizens should be able to see the law is bedrock. Since the 1800s, Congress has provided free public access to federal statutes and, since the 1930s, to federal regulations as well, through a network of state and territorial libraries, followed by the creation of the Federal Depository Library System. Congress further deepened the tradition by requiring the Government Printing Office to make available universal online access to statutes and regulations and then requiring online public access to other government documents and materials in the Electronic Freedom of Information of Act Amendments in 1996 and the e-Government Act of 2002.

For numerous federal rules, however, public access is far from assured; these rules can be difficult to find and costly to read. The Freedom of Information Act generally requires Federal Register publication for all agency “substantive rules of general applicability” and “statements of general policy or interpretations of general applicability.” However, it allows, in the so-called “incorporation by reference” provision of 5 U.S.C. § 552(a)(1), that “matter reasonably available to the class of persons affected thereby [may be] deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.”

To save resources and build on private expertise, federal agencies have, on numerous occasions, worked with private organizations, incorporating privately drafted standards by reference into thousands of federal regulations. The Office of the Federal Register (OFR) must approve all agency incorporations by reference, but the Freedom of Information Act provides no further specifics on what level of access might be understood to make a particular standard “reasonably available” and thus eligible for incorporation by reference. Meanwhile, OFR has declined to define “reasonably available” in its regulations, despite its statutory responsibility to approve agency

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2 44 U.S.C. § 4102(b)(2006) (capping recoverable costs as “incremental costs of dissemination” and requiring no-charge online access in government depository libraries). The GPO charges no fee whatsoever for online access.
5 Id.
incorporations. 6 See 1 C.F.R. 51.7(a). Research also has revealed no public consideration by OFR of access charges to incorporated standards. 7

The Code of the Federal Register (C.F.R.) presently contains nearly 9,500 agency incorporations by reference of standards. These “IBR rules” have the same legal force as any other government rule. Some IBR rules incorporate material from other federal agencies or state entities, but thousands of these rules are privately drafted standards prepared by so-called “standards development organizations,” or “SDOs.” 8 Standards development organizations range from the Society of Automotive Engineers to the American Petroleum Institute. As the Office of the Federal Register has explained, “[t]he legal effect of incorporation by references is that the material is treated as if it were published in the Federal Register and CFR. This material, like any other properly issued rule, has the force and effect of law. . . mak[ing] privately developed technical standards Federally enforceable.” 9

Federal agencies seek to use privately-drafted IBR standards on subjects ranging from toy safety, 10 crib, toddler bed, and stroller safety, safety standards for vehicle windshields (so they withstand fracture), 11 placement requirements for cranes on oil drilling platforms on the Outer Continental Shelf, 12 and food additive standards, 13 to

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6 See Incorporation by Reference, 79 Fed. Reg. 66,267, 66,270 (Nov., 7, 2014) (final rule). Beyond that, the OFR Director is to assess whether incorporation would “substantially reduce the volume of material published in the Federal Register,” and whether the material is “usable,” considering “the completeness and ease of handling of the publication; and . . . [w]hether it is bound, numbered, and organized.” 1 C.F.R. 51.7(a). In the digital age, these requirements now would seem to serve little purpose.

7 E.g. Consumer Product Safety Commission, Children’s Gasoline Burn Prevention Act Regulation, 80 Fed. Reg. 16,961, 16,962-63 (Mar. 31, 2015) (OFR approval of incorporation by reference of ASTM F2517-15 despite lack of free access); www.astm.org (charging $43 for standard; unavailable in reading room). As of November, 2014, an agency requesting approval of incorporation by reference must itself discuss how the materials are “reasonably available to interested parties.” 1 C.F.R. 51.5(a)(1), but it is unclear whether the OFR will make any independent determination on that question or simply defer to the agency.


9 http://www.archives.gov/federal-register/cfr/ibr-locations.html#why. In some instances, as discussed below, a regulated entity might be able to argue that the lack of public access undermines notice sufficiently to prevent federal enforcement.

10 E.g., 16 C.F.R. §§ 1505.5, 1505.6 (CPSC requirements for electrically operated toys, including toys with heating elements, intended for children’s use, incorporating by reference National Fire Protection Association and ANSI standards)

11 49 C.F.R. § 571.2015.


operating storage requirements for propane tanks, aimed at limiting the tank’s potential to leak or explode. Executive policy, embodied in Circular A-119, now encourages agencies to contribute funds to private standards drafting as well as informal agency staff participation in the SDO process.

Meanwhile, public access to such standards can be extremely difficult, as it is typically impeded by privately set access charges. Unlike the U.S. Code and the rest of the C.F.R., there is no assured free access to IBR rules either online or in the nearly 1800 government depository libraries. Under OFR’s approach, these standards can be freely read by the public in the Washington, D.C. reading room of the Office of the Federal Register, but only by written request for an appointment. Apart from this, OFR refers the public to the SDO. These IBR standards accordingly are strewn across many individually-maintained private websites. SDOs also can set a fee for access, typically one that far exceeds the transactions costs, such as copying costs, of making a standard available.

Membership in an SDO usually affords discounted access to its standards, but such memberships are costly; for example, the American National Standards Institute charges $750 per year. Otherwise, access to an individual standard can range from $40 to upwards of $1000. The incorporated safety standard for seat belts on earthmoving equipment such as bulldozers is currently priced at $72; the incorporated safety standard for hand-held infant carriers is $43, and the current edition of the Food Chemical Codex, which the FDA has incorporated by reference into food additive standards, is priced at $499. As Professor Emily Bremer has reported, the average price for just one incorporated pipeline safety standard is $150, while a complete set of IBR standards implementing the Pipeline and Hazardous Materials Safety Act cost nearly $10,000 as of September 2014. The cost of reading the two newly-incorporated-by-

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16 See 29 CFR 1926.602(a)(2)(i) (incorporating Society of Automotive Engineers Standard J386-1969); standards.sae.org/j386_196903/. The price of $72 is for the current revision of Standard J386. It is unclear whether the 1969 version can be accessed at all on SAE’s website.

17 See 16 C.F.R. 1225.2 (incorporating by reference ASTM F 2050-13a); www.astm.org. The standard is inexplicably absent from the online reading room ASTM maintains for government-incorporated standards.

18 See 21 C.F.R. 172.185(a) (test methods standard for TBHQ in the food additive); https://store.usp.org/OA_HTML/ibeCCtpItmDspRte.jsp?item=344067.

reference standards for the packaging and transportation of radioactive material, to avoid radiation leakage in transit, is $213.\textsuperscript{20}

The SDOs have no obligation to make standards available at any price, and some standards, particularly older ones, are now simply unavailable from the SDOs. On the other hand, SDOs occasionally charge more for an older version that an agency has incorporated by reference into binding law—a reflection of the newly conferred monopoly value—than for the SDO’s current version of those same standards.\textsuperscript{21}

As publicly-filed comments and other public sources indicate, the fees charged for IBR rules significantly obstruct citizens and entities from seeing the text of this law. Regulated entities needing access to incorporated standards are often small businesses for whom the mass of necessary standards may be a significant cost.\textsuperscript{22} For example, as the Modification and Replacement Parts Association commented in response to the petition for rulemaking, “The burden of paying high costs simply to know the requirements of regulations may have the effect of driving small businesses and competitors out of the market, or worse endanger the safety of the flying public by making adherence to regulations more difficult due to fees . . . .”\textsuperscript{23}


\textsuperscript{21} For example, the American Herbal Products Association charges $250 for a digital-rights-protected copy of the first edition of its Herbs of Commerce, use of which is a legal obligation under FDA regulations; the more recent second edition, a “must-have” for anyone in the business but not yet made legally obligatory, can be bought as a book for $99. Peter Strauss, Private Standards Organizations and Public Law, 22 Wm. & Mary Bill Rts. J. 497 (2013).

\textsuperscript{22} Public comments filed with the Office of Federal Register made this problem clear. The National Propane Gas Association, an organization whose members are overwhelmingly (over 90%) small businesses, commented in response to OFR’s notice of proposed rule that the costs of acquiring access “can be significant for small businesses in a highly regulated environment, such as the propane industry.” See Comments of Robert Helminiak, National Propane Gas Ass’n, OFR 2013-0001-0019 (Dec. 30, 2013), at 1; Comments of Jerry Call, American Foundry Society, NARA-12-0002-0147 (June 1, 2012), at 1-2 (“Obtaining IBR material can add several thousands of dollars of expenses per year to a small business, particularly manufacturers . . . . [T]he ASTM foundry safety standard alone cross references 35 other consensus standards and that is just the tip of the iceberg on safety standards.”); Comments of National Tank Truck Carriers, NARA-2012-0002-0145 (small businesses “have no option but to purchase the material at whatever price is set by the body which develops and copyrights the information. . . . [W]e cite the need for many years for the tank truck industry to purchase a full publication from the Compressed Gas Association just to find out what the definition of a ‘dent’ was. . . . HM241 could impact up to 41,366 parties and . . . there is no limit on how much the bodies could charge . . . .“); Comments of American Foundry Society, NARA-2012-0002-0147 (“$75 is not much for a standard, but a typical small manufacturer, including a foundry, may be subject to as many as 1000 standards. The ASTM foundry safety standard alone cross-references 35 other consensus standards and that is just the tip of the iceberg . . . “).

\textsuperscript{23} See Comment of the Modification & Replacement Parts Ass’n 14 (Regulations.Gov, filed June 1, 2012), available at
And given the access fees charged, members of the public affected by regulatory frameworks relying upon IBR rules likely cannot afford to read these standards. For example, a staff attorney at Vermont Legal Aid filed a public comment indicating that the costs of accessing IBR rules interfered with the ability of Medicare recipients to know their rights.24

In a positive development, some of the many SDOs have begun to create online reading rooms in which IBR rules can be viewed without payment of a fee. But standards are still very hard to locate, not consistently available, and readers must identify themselves, waive a variety of rights, and even agree to objectionable conditions, including broad indemnification and forum selection clauses, in order to see the text of the rules. And SDOs uniformly reserve the right to revoke the access at will. This insufficiently assures meaningful public access.

Agency use of IBR rules raises two particularly pressing issues. The first is the lack of consistent and meaningful public access to the text of these binding federal rules. While IBR rules are not formally secret, the financial obstacles that must be overcome to read the text undermine any notion of meaningful public availability. Second, the lack of access to proposed IBR rules, as well as supporting data, undermines the public’s right to comment on proposed agency rules under the Administrative Procedure Act.

The present resolution would put the ABA on record in support of the principle of meaningful public access to law, as well as public participation in federal regulation. The ABA should speak now for two reasons: First, as described below, the Office of the Federal Register has recently declined an opportunity to use its Freedom of Information Act implementation powers to effectuate these principles. Second, agency use of privately-drafted rules is likely to increase, given continuing agency resource constraints, as well as executive and congressional policy favoring agency use of privately drafted rules in preference to “government-unique” rules.25 Unfortunately, neither policy has

http://www.regulations.gov/contentStreamer?objectId=09000064810266b8&disposition=attachment&contentType=pdf

24 E.g., Comments of Jacob Speidel, Senior Citizens Law Project, Vermont Legal Aid, OFR-2013-0001-0037 (Jan. 31, 2014), at 1 (price precludes “many Vermont seniors” from accessing materials). See also Comments of Robert Weissman, Public Citizen, OFR 2013-0001-0031 (Jan. 31, 2014), at 1 (reporting on behalf of multiple nonprofit, public interest organizations that “free access . . . will strengthen the capacity of organizations like ours to engage in rulemaking processes, analyze issues, and work for solutions to public policy challenges . . .and strengthen citizen participation in our democracy”); Comments of George Slover and Rachel Weintraub, Consumers Union and Consumers Federation of America, OFR 2013-0001-0034 (Jan. 31, 2014) (noting importance of transparent standards to identify products that are not in compliance with applicable standards so as to notify the agency and alert consumers).

directly engaged the resulting public access problems. Only Congressional action will remedy this unsatisfactory situation. A clear and strong statement by the ABA on the topic should help prompt such action.

II. DISCUSSION

A. The Bedrock Principle of Public Access to the Law Should Be Reaffirmed in the IBR Rules Setting

IBR rules are not formally “secret”—access is not prohibited outright. Self-evidently, however, the cost of reading it, together with the difficulty of finding it, render these standards inaccessible to the public. At root, there must be meaningful free access to all incorporated rules, if the evils of “secret law” that the Freedom of Information Act was established to resist are to be avoided. In the words of Columbia Law Professor Peter Strauss, joined by numerous other professors: “[I]n the age of information, secret law, that the public must pay for to know, is unacceptable.” The ABA accordingly should resolve that the Freedom of Information Act be clarified to ensure meaningful levels of free public access to all binding law.

1. As the authors and owners of the law, the public has a right to know it

First, free public access to the law is essential in a democratic society. As the 5th Circuit explained in *Veeck v. Southern Bldg. Code Cong. Int’l*, free public access to the law serves “the very important and practical policy that citizens must have free access to the laws which govern them” if they are to be able to conform their conduct to them. *Veeck* relied principally on the Supreme Court’s holding in *Banks v. Manchester* that “[i]t is against sound public policy to prevent [free access to judicial opinions], or to suppress and keep from the earliest knowledge of the public the statutes.” As explained in *Veeck*, these justifications are not simply “due process” arguments. Rather, they rest on the idea that “public ownership of the law means precisely that ‘the law’ is in the ‘public domain’ for whatever use the citizens choose to make of it.”

This “right to know” accrues to all citizens, not just those who must conform their conduct to the law. Broad public access to IBR material, is as important as access by directly regulated entities. “Th[e] ‘metaphorical concept of citizen authorship’” requires free public access to the law as a foundation to a legitimate democratic society. “The
citizens are the authors of the law, and therefore its owners, regardless of who actually
drafts the provisions, because the law derives its authority from the consent of the public,
expressed through the democratic process."31 Thus, even those who need not conform
their conduct to regulatory requirements have a right to know. As public comments filed
to the Office of the Federal Register and the Office of Management and Budget make

clear, the public has an interest in reading IBR material.32

Ready access to standards that have been incorporated by reference is necessary
for citizens to know what their government is doing and to hold the government
accountable for serving – or not serving – the public interest. As President Obama stated
in his Memorandum on Transparency and Open Government, on January 21, 2009:
“Transparency promotes accountability and provides information for citizens about what
their Government is doing.” This transparency, including public access to the content of
regulations, is a critical safeguard against agency capture and other governance problems.
Transparency regarding the content of IBR standards is particularly important when that
material has been prepared, in the first instance, by private organizations rather than
governmental agencies – as when, for example, natural gas pipeline safety rules and
offshore oil drilling rules incorporate standards drafted by the American Petroleum
Institute, and even when motor vehicle safety standards incorporate standards drafted by
the Society of Automotive Engineers. We note that regulatory standards created by
industry associations such as the API, compared with professionally focused
organizations such as ASME, the American Society of Mechanical Engineers, may raise
particular concerns warranting public awareness. Still, this is not to criticize any
particular standard or organization, but to emphasize that transparency and ready access
are critical to ensuring that the government makes proper use of all incorporated material
and that adopted standards do, in fact, protect the public interest as required by statute.
And as the 5th Circuit pointed out in Veeck, citizens need access to the law not only to
guide their actions and to hold the government accountable, but “to influence future
legislation” and to educate others.33

31 Veeck, 293 F.3d at 799 (quoting Building Officials & Code Adm. v. Code Technology,
628 F.2d 730, 734 (1st Cir. 1980)).
32 See supra note 24 (Vermont Legal Services comment); NARA-12-0002-0140
(Consumers Union, emphasizing the need for free access to standards to notify the CPSC and
warn consumers regarding unsafe products); OMB-2012-0003-0074 (public interest organizations,
including environmental, watchdog, and library organizations, emphasizing need for free access
to engage government and public on range of public policy issues); NARA-12-0002 (“A
concerned Citizen,” noting that knowledge of airbag standards allows citizen to be “a more
educated consumer”). Public comments on access issues were filed in an Office of the Federal
Register rulemaking on whether to revise its criteria for revising IBR rules; comments also were
As of October 2015, Circular A-119 remains unrevised.
33 293 F.3d at 799.
2. Limits on public access raise constitutional difficulties

The current system may raise constitutional difficulties by allowing agencies to reference incorporated material, when the public must pay to see that material. (Travel to a Washington, D.C., reading room will not, for most, be a viable alternative.) First, impediments to a regulated entity’s ability to access government standards raises due process concerns. As noted, small businesses have complained that the access fees charged to read the text of the law can be a significant obstacle to their ability to learn their legal obligations. In the context of whether to sustain a changed agency interpretation of a rule, the Supreme Court has endorsed “the principle that agencies should provide regulated parties ‘fair warning of the conduct [a regulation] prohibits or requires,’” and that due process thus bars the imposition of sanctions upon someone who could not have received notice of his or her obligations.34

The current use by agencies of incorporated private material without meaningful public access is constitutionally suspect for a second reason as well. The public cannot discuss or criticize the government’s decisions if the substance of those decisions is not available. As the Supreme Court noted in refusing to uphold a statute that would close criminal trials, “‘a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.’ [This] serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.”35 The potential significant charges to read IBR standards raises heightened constitutional concerns, because the thousands of IBR standards are wide-ranging in subject, affecting numerous industries, and quasi-legislative in character, with broad and prospective effect. An assurance of free access only in a Washington, D.C. reading room is insufficient. The obstacles to access that must be overcome -- the charges and travel impediments -- effectively deny the public’s right to know and discuss government actions. Legislative history accompanying the Freedom of Information Act draws the same link: “‘The right to speak and the right to print, without the right to know, are pretty empty.’” See H. Rept. No. 1497, 89th Cong., 2d Session 2 (1966) (quoting Dr. Harold Cross). Significant access charges for regulatory standards are a real obstacle to knowing their content, and indeed, the Supreme Court has invalidated much smaller

charges as inconsistent with similar core principles of democratic government, such as the right to vote.\textsuperscript{36}

3. **IBR rules must be broadly available; assuring meaningful free access only to regulated entities is insufficient**

The need for public notice of the contents of federal regulations goes well beyond the regulated entities tasked with complying with them. Congress enacts regulatory statutes specifically to guard wide swaths of the public, and the public accordingly has a specific interest in the content of rules. Consumers of food and toys, parents who wish to purchase infant carriers, strollers, walkers, or infant bath seats, those who rely on ocean fishing for their livelihood, or neighbors of a pipeline or propane tank – all of these individuals are obviously affected by these standards, and should be entitled to notice of them. For one last example, the Department of Transportation Pipeline and Hazardous Materials Safety Administration requires natural gas pipeline operators to institute “public awareness programs” to provide public information and public communications regarding spills according to an IBR standard of the American Petroleum Institute. 49 C.F.R. § 192.616 (incorporating API Standard 1162). Community members who reside near natural gas pipelines at risk from a spill are obviously affected by the scope of public communication requirements. Standards such as these must be meaningfully available both to pipeline operators and to the community. The content of these standards can affect individual choices of which toys or infant carriers to buy, where to live, and whether to file public comments with the regulating agency or write one’s member of Congress. In short, regulatory beneficiaries have a cognizable stake in these standards, and the content of the standards can affect their conduct. They therefore need notice of the text as well; meaningful public access without cost has to be understood as essential.

4. **The public must be able to locate the law.**

Public access principles require not only the provision of meaningful free access to the text of the law, but that the law be reasonably easy to locate. IBR rules are referenced in the Code of Federal Regulations, but the text of the rules is often very hard to find. IBR rules are distributed across a wide variety of differently-organized websites, and neither the online CFR nor Federal Register typically contains any sort of specific link to the IBR rule’s text. The current distribution of IBR rules in numerous locations

\textsuperscript{36} Cf. Harper v. Virginia Bd. Of Elections, 383 U.S. 663, 666-68 (1966) (invalidating state $1.50 poll tax as effective denial of right to vote). OFR’s approval of IBR rules under this system of private fees may also raise equal protection concerns, given the central importance, in a democracy, of public access to the law’s text. In other settings, the courts have relied on equal protection grounds to invalidate comparable fees imposed upon participation in government. Harper v. Virginia Bd. Of Elections, supra; Lubin v. Panish, 415 U.S. 710, 717–18 (1974) (striking down $701 filing fee requirement for California election, given “our tradition . . . of hospitality toward all candidates without regard to their economic status.”). For many rules, moreover, budget constraints may be connected with substantive interests; access constraints will distinctively, systematically disadvantage those interests. For example, consumers will likely have smaller budgets than manufacturers; neighbors to a pipeline will likely have smaller budgets than the pipeline operator.
makes each obscure, raising the same sorts of concerns that prompted the passage of the Federal Register Act.37 Further, although agencies are required to “summarize” in the preamble to a final rule “the material it incorporates by reference,”38 that summary does not include the full text, and in any event, preambles are published neither in the Code of Federal Regulations nor on agency websites containing regulations. The ABA accordingly should resolve not only that meaningful levels of free access be provided to IBR rules, but that such access enable the public to readily find the text of those rules.

5. Current law as implemented has failed to ensure sufficient public access to the law

One might think that these interests would already be protected under the Freedom of Information Act’s Section 552, which requires, as a condition of Office of Federal Register approval of incorporation by reference, that incorporated material be “reasonably available” to the “class of persons affected thereby.” 5 U.S.C. § 552(a)(1). Indeed, the legislative history accompanying 5 U.S.C. § 552’s incorporation by reference provisions made clear its concern with widespread public access, not simply that the IBR material would not be formally secret: “Any member of the public must be able to familiarize himself with the enumerated items . . . by the use of the Federal Register, or the statutory standards mentioned above will not have been met.” S. Rep. No. 1219, 88th Cong., 2d Sess. 5 (1964) (emphasis added).

Arguments could be made that the Freedom of Information Act’s “reasonably available” language, particularly in this age of information, already requires meaningful levels of free access to all incorporated standards not only to regulated entities, but to regulatory beneficiaries and the public at large. Implementation, however, has fallen far short of this understanding. In November 2013, the Office of the Federal Register began a rulemaking on its “incorporation by reference” approval procedures in response to a 2012 rulemaking petition led by Columbia Law School Professor Peter L. Strauss and joined by numerous law professors. The petition had asked OFR to approve IBR rules only if free read-only access to the text were provided to the public.39 Despite embarking on a rulemaking, OFR ultimately declined to significantly revise its approach.40 The Office of Federal Register has continued to approve the incorporation by reference of standards that remain difficult to locate and expensive to read.

38 1 CFR 51.5(a)(2); 1 CFR 51.5(b)(3) (2015).
40 Rather than requiring any greater public access to the text of incorporated standards, OFR essentially reaffirmed the status quo, adding only a requirement that the rulemaking agency seeking approval of an incorporation by reference explain “the ways that the materials it incorporates by reference are reasonably available to interested parties” and “summarize” the incorporated material. See 1 C.F.R. 51.5(b)(2), (3).
Accordingly, Congressional action to clarify the requirements of the Freedom of Information Act and the Administrative Procedure Act is now critical.

6. Other concerns do not justify sacrificing the bedrock principle of ensuring meaningful public access to the law

SDOs typically favor and sometimes even seek having their privately drafted standards adopted as the law of the land, and agencies undoubtedly find it useful to draw upon this stock of standards. But SDOs also have raised concerns that agreeing to meaningful free public access will result in undercompensation for the cost of preparing these standards even if SDOs can still sell books of standards to the public.

These standards surely can be valuable, and SDOs consistently claim a copyright in them. The ABA need not resolve that the considerations that mandate meaningful public availability of incorporated standards necessarily require invalidation of the SDOs’ copyrights in those standards. The doctrine governing whether copyright persists in text that is first developed by private-sector entities and subsequently adopted into law is complex and fact-specific, and accordingly is beyond the scope of the Resolution.41 Very often, so little of a full SDO standard is incorporated by reference as to constitute fair use, and to defeat any claim that publication of the incorporated material would diminish the value of the whole. Agencies can be encouraged to minimize the extent of their incorporations to this end. Moreover, legislation to implement this resolution could also address the issue, such as by clarifying the continuing validity of copyrights in IBR materials made publicly available as recommended here or by addressing compensation an agency could offer an SDO for the use of its privately drafted standards.42 Some SDOs


42 Though the law in this area is far from clear, an agency that republishes the text of a copyright-protected standard, over the drafting organization’s objection and with harm to the standard’s commercial value, could, under some circumstances, lose a “fair use” claim and instead face copyright infringement liability or even liability for taking property without just compensation. 28 U.S.C. § 1498(b) (2006); see generally Office of Legal Counsel, U.S. Department of Justice, Whether and Under What Circumstances Government Reproduction of Copyrighted Materials is a Noninfringing “Fair Use” Under Section 107 of the Copyright Act of 1976, 1999 WL 3390240 (1999), at * 3-4 (“The case law provides very little guidance, [but] there is no basis for concluding that the photocopying . . . by the federal government automatically . . . constitutes a fair use.”); id. at *11 (concluding that although government photocopying can be “nonfringing,” there is no ‘per se’ rule protecting government reproduction of copyrighted material). Perhaps because of the potential legal risks, we are unaware of cases in which agencies have published the text of standards over the objection of the SDO. Cf. Office of Management and Budget Circular A-119, 63 Fed. Reg. 8555 (Feb. 19, 1998) (calling on an agency publishing a voluntary standard to “observe and protect the rights of the copyright holder and any other similar obligations”).
affirmatively seek incorporation by reference of their standards; others receive financial contributions from agencies specifically to finish a particular standard that the agency can then incorporate; some may benefit because there is a larger market for either their current or superseded standards.

Providing some level of meaningful free public access to these standards, such as through online access or in government depository libraries, does seem unlikely to impair the future development of these standards or the ability of agencies to incorporate them. As noted, some SDOs have recently set up free online reading rooms for their standards that have been incorporated by reference. These actions blunt any concern that the supply of voluntary consensus standards on which agencies can draw will be significantly impacted if some level of free public access to the text is required. SDOs will still be able to earn revenue by selling books of standards, and demand may increase as a result of government incorporation of such standards. In addition, there may be other solutions to this concern, whether through agency negotiation with SDOs or payments to them. Agencies already can and do contribute funds to the SDO standards development process, and executive policy encourages agency staff participation in the SDO process.43

Agencies should seek the SDO’s agreement to meaningful public access prior to utilizing a privately drafted standard. Under some circumstances, it may be appropriate for an agency to offer an SDO compensation for use of a standard as part of reaching an agreement.44 Accordingly, the Resolution urges Congress to provide for such compensation.

On the other hand, it is abundantly clear that requiring individuals to pay a significant fee, or to travel to Washington, D.C., to see the text of the binding law, substantially burdens public access. The potential need in some cases for agencies to offer compensation to the drafters of private standards to ensure public access to the text should not defeat the obligation of government agencies to make legally binding regulations available to the public.


Both the NTTAA and OMB Circular A-119 affirmatively encourage agency staff participation in the SDO processes that develop standards, see Pub. L. 104-113, sec. 12(d)(2) (Mar. 7, 1996), and Circular A-119 also contemplates financial contributions to the SDO process. While this may be sensible, in the absence of public access to SDO materials, it can have two problematic consequences. First, it leaves understanding of supporting science and rationales in private hands, thus evading the APA's public notice-and-comment rulemaking process not only by concealing what is being proposed, but also by hiding the support for it. Second, it creates the appearance, and potentially the reality, of agency staff promoting a regulatory agenda in an effectively ex parte context.

44 Such opportunity for compensation, if Congress were to make it available, should not be understood to foreclose an SDO’s ability to seek compensation by other means if necessary. See supra note 41.
The Resolution does not suggest any specific resolution of these concerns. Instead, the ABA should simply resolve that Congress enact legislation that at its core bars the outcome that requires a reader to pay significant fees in order to read the binding law of the land.

B. To effectuate the statutory right to participate in rulemaking, the Administrative Procedure Act should be clarified to ensure that the public receives meaningful access to the substance of a proposed IBR rule.

As well-established elements of the rulemaking process require, an agency’s notice of proposed rule must be published in the Federal Register with the detail needed to facilitate a meaningful opportunity to comment.45 These procedural requirements, which are fundamental to ensuring the continued validity and legitimacy of agency rulemaking, require that “interested persons” must be able to participate in rulemaking by submitting “data, views, or arguments” -- public comments--to the agency.46 An “interested person” cannot meaningfully exercise his or her right to comment without access to the substance of the standard on which comment is to be filed.47 Requiring an “interested person” to pay a fee to learn the content of a proposed rule is a significant obstacle impeding that person’s right to comment under Section 553(c).

III. Conclusion

In short, the ABA should resolve—simply—three propositions. First, the ABA should resolve that the Freedom of Information Act be clarified to require meaningful levels of free public access to the text of all binding law. That meaningful free public access could be provided online, for example, or in depository libraries. To ensure that the public can readily locate IBR standards, the access ought to be in a centralized location. If not the government depository library system or live online links in the Code of Federal Regulations, IBR standards at least should be available through a single federally-maintained website. To the extent any disruption would be triggered by this Resolution—perhaps an agency might have to negotiate some level of public access as a condition of incorporating a particular standard by reference or provide compensation to an SDO for financial losses occasioned by the use of its standard—the impact is worth bearing in order to bring FOIA’s standard of “reasonable availability” into the Information Age and to effectuate the bedrock principle that the law, in a democracy, must be meaningfully available to the public.

And second, no standard should become part of binding federal regulatory law without the public being assured of the full opportunity to participate normally afforded

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46 5 U.S.C. § 553(c).
by section 553 of the Administrative Procedure Act. Therefore, the ABA should resolve that section 553 be clarified to require meaningful free public availability, during the public comment period, of a proposed IBR standard’s text.  

Finally, the ABA should resolve that, in order to effectuate these critical principles, Congress should ensure that agencies are able, where appropriate and necessary, to compensate private organizations for financial losses attributable to making their standards publicly available.

Respectfully submitted,

Jeff Rosen, Chair  
Section of Administrative Law and Regulatory Practice

February 2016

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48 Although 5 U.S.C. § 553(b)(3) formally authorizes an agency merely to give notice of a “description of subjects and issues involved,” as a practical matter agency notices of proposed rule generally contain text the agency is proposing to promulgate. (Advance notices of proposed rulemaking are more frequently phrased in general terms.) The ABA accordingly should resolve that the text of proposed IBR rules also be made publicly available to make meaningful the right to comment.
GENERAL INFORMATION FORM

Submitting Entity: Section of Administrative Law and Regulatory Practice

Submitted By: Jeff Rosen, Section Chair

1. Summary of Resolution(s).

To effectuate the bedrock principle of public access to the law, the resolution urges Congress to strengthen the Freedom of Information Act and Administrative Procedure Act to ensure meaningful free public access to the text of all binding federal rules. The resolution responds to the current use in federal rules, by agencies, of thousands of privately drafted standards that the public must pay to view. The resolution also urges Congress to ensure meaningful free public availability of a proposed standard’s text during the public comment period.

2. Approval by Submitting Entity.

The Council of the Section of Administrative Law and Regulatory Practice voted to approve the resolution on November 10, 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 are directly relevant.

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.

Policy could be implemented by legislative action.

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

None.
9. **Disclosure of Interest.** (If applicable)
   N/A

10. **Referrals.**

    Business Law Section  
    Civil Rights and Social Justice Section  
    Government and Public Sectors Lawyers Division  
    Intellectual Property Law Section  
    Science & Technology Law Section

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

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution

To effectuate the bedrock principle of meaningful public access to the law, the resolution urges Congress to strengthen public availability to the text of all federal regulations. Meaningful free access should be afforded both when agencies propose adoption of these standards and after promulgation as final rules.

2. Summary of the Issue that the Resolution Addresses

Federal agencies currently “incorporate by reference” thousands of outside standards into binding federal regulations. Free public access to the text is reliably provided only in the Office of the Federal Register’s reading room in Washington, D.C. Otherwise a reader may be required to pay substantial access fees set by drafting organizations, significantly obstructing public access, particularly by individuals and small businesses. The right to comment on an agency’s proposed “incorporation by reference” of such standards into federal regulations is also impeded by the lack of public access to the text.

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

The resolution urges Congress to amend the Freedom of Information Act to ensure meaningful levels of free public availability to all federal regulations, including text that is “incorporated by reference.” Such public access could be afforded through centralized online access, for example, or in government depository libraries. The resolution also urges Congress to amend the Administrative Procedure Act’s rulemaking provisions to require meaningful free public availability of such text during the public comment period.

As a safeguard against the (probably remote) possibility that the prospect of free public access might induce a drafting organization to decline to make its standard available for incorporation, the report also recommends that Congress should ensure that agencies have access to the ability to compensate such organizations where appropriate.

4. Summary of Minority Views

None identified.
RESOLVED, That the American Bar Association urges Congress to amend the rulemaking provisions of the Administrative Procedure Act (“APA”). Specifically, Congress should:

1. Codify the requirement that an agency fully disclose data, studies, and other information upon which it proposes to rely in connection with a rulemaking, including factual material that is critical to the rule that becomes available to the agency after the comment period has closed and on which the agency proposes to rely;

2. Provide for the systematic development by the agency in each rulemaking of a rulemaking record as a basis for agency factual determinations and a record for judicial review. The record should include any material that the agency considered during the rulemaking, in addition to materials required by law to be included in the record, as well as all comments and materials submitted to the agency during the comment period. The record should be accessible to the public via an online docket, with limited exceptions allowed, such as for privileged, copyrighted, or sensitive material;

3. Establish a minimum comment period of 60 days for “major” rules as defined by the Congressional Review Act, subject to an exemption for good cause;

4. Clarify the definition of “rule” by deleting the phrases “or particular” and “and future effect”; update the term “interpretative rules” to “interpretive rules”; and substitute “rulemaking” for “rule making” throughout the Act;

5. Authorize a new presidential administration to (i) delay the effective date of rules finalized but not yet effective at the end of the prior administration while the new administration examines the merits of those rules, and (ii) allow the public to be given the opportunity to comment on whether such rules should be amended, rescinded or further delayed;

6. Promote retrospective review by requiring agencies:

   a. When promulgating a major rule, to publish a plan (which would not be subject to judicial review) for assessing experience under the rule that describes (i) information the agency believes will enable it to assess the effectiveness of the rule in accomplishing its objectives, potentially in conjunction with other rules or other program activities, and (ii) how the agency intends to compile such information over time;
b. On a continuing basis, to invite interested persons to submit, by electronic means, suggestions for rules that warrant review and possible modification or repeal;

7. Add provisions related to the Unified Regulatory Agenda that would require each participating agency to (i) maintain a website that contains its regulatory agenda, (ii) update its agenda in real time to reflect concrete actions taken with respect to rules (such as initiation, issuance or withdrawal of a rule or change of contact person), (iii) explain how all rules were resolved rather than removing rules without explanation, (iv) list all active rulemakings, and (v) make reasonable efforts to accurately classify all agenda items. All agencies with rulemaking plans for a given year should also participate in the annual Regulatory Plan published in the spring Unified Agenda. These provisions should not be subject to judicial review;

8. Repeal the exemptions from the notice-and-comment process for “public . . . loans, grants [and] benefits” and narrow the exemptions for “public property [and] contracts” and for “military or foreign affairs functions”; and

9. Require that when an agency promulgates a final rule without notice–and-comment procedure on the basis that such procedure is impracticable or contrary to the public interest, it (i) invite the public to submit post-promulgation comments and (ii) set a target date by which it expects to adopt a successor rule after consideration of the comments received; provided that:

   a. If the agency fails to replace the interim final rule with a successor rule by the target date, it should explain its failure to do so and set a new target date;

   b. The adequacy of the agency’s compliance with the foregoing obligation would not be subject to judicial review, but existing judicial remedies for undue delay in rulemaking would be unaffected; and

   c. The preamble and rulemaking record accompanying the successor rule should support the lawfulness of the rule as a whole, rather than only the differences between the interim final rule and the successor rule.

FURTHER RESOLVED, That the American Bar Association recommends that federal agencies experiment with reply comment processes in rulemaking, such as by (a) providing in advance for a specific period for reply comments; (b) re-opening the comment period for the purpose of soliciting reply comments; or (c) permitting a reply only from a commenter who demonstrates a particular justification for that opportunity, such as a specific interest in responding to specified comments that were filed at or near the end of the regular comment period.
REPORT

The Administrative Procedure Act (APA) has been in effect for almost seventy years. The rulemaking process has evolved in many ways not anticipated in 1946. This evolution has been driven both by innovations in administrative practice and by a burgeoning body of case law. While the basic chassis of the APA has been shown to be fundamentally sound, a variety of updates to the APA’s rulemaking provisions deserve serious consideration. This Report outlines nine recommendations for such updates on which a broad consensus exists within the Section of Administrative Law and Regulatory Practice. It also explains a related recommendation to encourage the use of “reply comment” processes in rulemaking.

I. Codify the requirement that an agency fully disclose data, studies, and information upon which it proposes to rely in connection with a rulemaking

The opportunity to comment on the factual basis for proposed rules is fundamental to the democratic legitimacy of the rulemaking process. Empirical studies and other factual material often have an important impact on how an agency weighs competing concerns in drafting a final rule. We therefore urge amending the APA to require that agencies provide the public with an opportunity to comment on factual material upon which the agency proposes to rely in connection with a rulemaking.

The APA currently requires agencies to give notice of “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” A series of court decisions has interpreted this provision to require agencies to disclose the factual basis for a proposed rule. This is critical to commenting effectively and is a standard feature of modern administrative practice. Yet the requirement is not explicit in the current APA and is still occasionally called into question in the courts. That makes codification highly desirable.

To that end, we advocate adding a provision to 5 U.S.C. § 553 to require agencies, by means of a docket (discussed immediately below), to provide public notice of, and access to, all data, studies, and other information considered or used by the agency in connection with its determination to propose the rule that is not protected from disclosure.

Agencies should also be required to provide the public with an opportunity to respond to factual material which becomes available to the agency after the comment period has closed, which is critical to the rule, and on which the agency proposes to rely.

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These requirements would strike an appropriate balance between ensuring that the public has an opportunity to comment meaningfully on proposed rules and not unduly delaying the rulemaking process.

II. Specify requirements for a “record” and “docket” for informal rulemaking

A court cannot review an agency rule without a record. Given the attention devoted in administrative case law and scholarship to judicial review of rulemaking, it is surprising that the APA does not require agencies to retain a record for judicial review. To date, the courts have filled this omission. The judicial review provisions of the APA refer to a “record,” and the Supreme Court has long interpreted this provision to apply to informal rulemaking.

The necessity for agencies of maintaining a rulemaking record is therefore firmly established in administrative practice but not in the APA. The ABA has long supported codifying this requirement. To that end, we advocate adding a provision to 5 U.S.C. § 553 providing that agencies must preserve the “whole record” upon which they based an informal rule. Such codification would clarify the legal responsibilities of agencies and provide guidance to courts.

The record should include any material that the agency considered during the rulemaking, in addition to materials required by law to be included in the record, as well as all comments and materials submitted to the agency during the comment period.

The record should be accessible to the public via a docket that the agency should establish for each rulemaking. This disclosure requirement should not be absolute. For instance, agencies should be allowed to withhold privileged information and to comply with applicable copyright protections. Agencies should ensure that all relevant information is placed in the docket for a proposed rule no later than the date when the notice of proposed rulemaking is published, or as soon as possible if the agency comes into possession of the information at a later date. All information submitted in connection with comments on the proposal should also be placed promptly into the docket. An agency’s failure to place information that it possesses into the docket on a timely basis could justify extending the comment period. Given the functional migration of agency dockets to the Internet via www.regulations.gov, this provision should also clarify that such dockets must exist in both electronic and physical form.

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4 5 U.S.C. § 706 (“[T]he court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.”).


III. Establish a minimum comment period for proposed major rules

Interested parties need sufficient time to read, consider, and draft meaningful comments on proposed rules. An insufficient comment period may make the notice-and-comment process less deliberative and democratic, produce less-than-optimal results, and increase the likelihood of judicial challenges to the rule. The APA does not, however, specify a minimum time period for which agencies must accept public comments on notice-and-comment rules.

Providing a minimum time period would help ensure that the public has ample opportunity to comment on proposed rules. The ABA has long supported amending the APA to generally require a 60-day comment period.\(^7\) We note that a 60-day comment period is consistent with recommendations in a recent executive order\(^8\) as well as a recent recommendation from the Administrative Conference of the United States (ACUS) for “significant regulatory actions.”\(^9\) Longer comment periods may be appropriate for complex rulemakings.

At the same time, we recognize that many rules are noncontroversial and may not receive any comments. Indeed, the comment period for non-economically significant rules in recent years has averaged less than 39 days.\(^10\) A 60-day comment period will thus be longer than the nature of many rulemakings warrants, or may conflict with a need for expeditious action. On the other hand, rules that qualify as “major” under the Congressional Review Act\(^11\) typically will require that much time for interested persons to understand the agency’s proposal and to develop comments. We therefore support requiring a minimum comment period of 60 days for major rules. To the extent that an agency believes that even a major rule should be subject to a shorter comment period, it should be allowed to set one for good cause, provided it offers an appropriate

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\(^7\) Id. at ¶ 5(a) (recommending a 60-day minimum comment period).

\(^8\) E.O. 13563, § 2(b), 76 Fed. Reg. 3821, 3821-22 (Jan. 21, 2011) (providing that, “[t]o the extent feasible and permitted by law,” agencies should allow “a comment period that should generally be at least 60 days”).

\(^9\) ACUS Recommendation 2011-2, ¶ 2, 76 Fed. Reg. 48789, 48791 (Aug. 9, 2011) (suggesting that agencies should as a general matter allow comment periods of at least 60 days for “significant regulatory actions” and at least 30 days for all other rules).


\(^11\) 5 U.S.C. § 804(2) (defining a “major rule” as “any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in—(A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment,
explanation. We would anticipate that courts would defer to the agency’s choice in such cases to the same extent that they currently defer to agency determinations to make a rule effective sooner than 30 days after publication in the Federal Register. The foregoing balances the need to ensure that the public has an opportunity to comment meaningfully on proposed rules with other compelling needs.

IV. Clarify the definition of “rule”

The APA’s definition of “rule” has been a target of criticism since the statute was enacted. The opening words of the definition – “the whole or a part of an agency statement of general or particular applicability and future effect” – are out of keeping with the manner in which administrative lawyers actually use the word “rule” in two respects:

- Taken literally, the current definition’s inclusion of “or particular” deems an agency decision to be a “rule” even if it applies only to one party.
- Similarly, the reference to “prospective effect” implies that agency action with retroactive effect cannot be a rule – even though rules may in appropriate circumstances have retroactive effect, particularly where Congress expressly authorizes such rules. It makes more sense for the scope of the prohibition on retroactivity to be addressed directly by these existing administrative law principles as opposed to ambiguously in the definition of a “rule.”

To avoid these unintended results, courts frequently apply the commonly understood definition of “rule” notwithstanding the APA definition. The words “or particular” and “and future effect” should therefore be deleted from the definition, leaving the definition to hinge on whether the agency decision is addressed generally (a rule) or to named parties (an order).


13 5 U.S.C. § 551(4) (“‘rule’ means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing”).

14 See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) (“[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.”).

This change would reconcile the APA with commonly understood use of the term “rule.” Other prominent authorities have long recognized this common usage, and the recommended change would make the APA consistent with the Model State Administrative Procedure Act, longstanding ABA policy, and prior recommendations of ACUS.16

Accordingly, we recommend that the following definition of “rule” replace the definition that appears in 5 U.S.C. § 551(4):

(4) “rule” means the whole or a part of an agency statement of general applicability that interprets, implements or prescribes law or policy or describes the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.[

We also reiterate our support for updating the term “interpretative rules” to “interpretive rules.” This change would bring the Act into conformity with virtually universal usage.17

Finally, we also suggest that the Act be conformed to modern word usage by substituting “rulemaking” for the two-word version “rule making” wherever it appears.

V. Address “midnight” rules

Outgoing administrations being replaced by one of the other political party are often criticized for issuing rules in their waning days that become effective during the new administration. ACUS recently addressed the issue.18 Its recommendation opines that incoming administrations should be authorized to delay the effective date of such “midnight” rules while they examine their merits, and that the public should be given the opportunity to comment on whether such rules should be amended, rescinded or further delayed. We propose that either 5 U.S.C. § 553 of the APA be amended to track the ACUS recommendation, or a new provision be added, such as the following:


17 See, e.g., Perez v Mortgage Bankers Ass’n, 135 S. Ct. 1199, 1204 & n.1 (2015) (“[The term . . . ‘interpretive rule’] is the more common phrasing today, and the one we use throughout this opinion.”).

(x) RULES ADOPTED AT THE END OF A PRESIDENTIAL ADMINISTRATION.—

(A) During the 60-day period beginning on a transitional inauguration day (as defined in section 3349a), with respect to any final rule that had been placed on file for public inspection by the Office of the Federal Register or published in the Federal Register as of the date of the inauguration, but which had not yet become effective by the date of the inauguration, the agency issuing the rule may, without notice and comment, delay the effective date of the rule for not more than 60 days for the purpose of obtaining public comment on whether the rule should be amended or rescinded or its effective date further delayed.

(B) If an agency delays the effective date of a rule under subparagraph (A), the agency shall give the public not less than 30 days to submit comments on whether the rule should be amended, rescinded or allowed to go into effect as written.

VI. Promote retrospective review

To varying degrees, most rules become out of date with the passage of time. One option for promoting continued timeliness and appropriateness is for agencies to review all of their rules over a specified timeframe. This is the approach of the Regulatory Flexibility Act, at least with respect to rules that have a significant economic impact on a substantial number of small entities.19 Such an across-the-board approach has multiple shortcomings, however. First, rules are implemented over varying timeframes, and the data necessary to determine if a rule has been effective in accomplishing its objectives may or may not be available at a given date. Second, some rules may be more in need of change than others. Finally, external stakeholders will almost certainly be far more concerned about some rules than others. Agency resources devoted to retrospective review will come necessarily at the expense of issuing new rules or enforcing existing ones, and thus should be focused on the rules with the greatest impact that most warrant review.

The ABA therefore supports two reforms, neither of which would be subject to judicial review, that would take account of these considerations in promoting retrospective review.

First, we recommend that the preamble to each major rule20 contain a plan that will assist the agency in assessing the effectiveness of the rule in accomplishing its regulatory objectives. Such a plan should identify those objectives and describe information the agency believes will enable it to assess the effectiveness of the rule in accomplishing its objectives. It may be that other rules or program activities of the agency are also directed toward or affect the relevant objectives. In such cases, the plan


20 Supra note 11
could contemplate assessment of these initiatives collectively. The plan should also describe how the agency intends to compile the relevant information over time. It would be beneficial for agencies to solicit comments on these issues in notices of proposed rulemaking to ensure that the final rule is designed to facilitate the collection of data that will allow evaluation of effectiveness. This recommendation builds upon a recent ACUS recommendation and a memorandum from the Office of Management and Budget’s Office of Information and Regulatory Affairs (OIRA).

Second, agencies should, on an ongoing basis, invite members of the public to identify rules that particularly warrant review, and should focus on reviewing such rules. Consistent with the shift of the rulemaking process to the Internet, this invitation should permit such “nominations” to be submitted electronically. It could also provide for members of the public to vote for or “like” earlier nominations. We note that agencies need not accept the suggested reforms, prioritize them by their degree of popularity, or even respond to them. But they should at least be receptive to such suggestions from their constituencies and give due regard to the relative breadth of support for particular changes. Section 553(e) currently says: “Each agency shall give interested persons the right to petition for the issuance, amendment, or repeal of a rule.” Congress could add thereafter:

Each agency shall, on a continuing basis, invite interested persons to submit, by electronic means, suggestions for rules that warrant retrospective review and possible modification or repeal.

VII. Codify and enhance the Unified Regulatory Agenda

The Unified Regulatory Agenda is an important mechanism for agencies to apprise the public of their upcoming rulemaking activity. Unified Agenda requirements are currently provided by Section 4 of Executive Order 12866, and the Unified Agenda is available on OIRA’s website. However, the executive order only requires the agenda to be updated semi-annually. Some agencies now maintain websites that provide more current data on important rulemakings. We recommend codifying the executive order’s requirements so they clearly apply to all agencies. Codification should also include a variety of enhancements to the Agenda contained in a recent ACUS recommendation on the topic. The ABA recognizes that compliance with these requirements in the dynamic rulemaking process may not be perfect, and we do not address conditioning issuance of a rule on compliance with Agenda requirements. But the provisions we recommend will help move the Agenda more fully into the Information Age and enable it to fulfill its

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potential as a vital and useful source of public information about the status of agency
rulemaking. We also realize that not all agencies may be able to implement these
requirements immediately due to resource constraints or other reasons. Agencies could
be given some period of time to comply, and should be given adequate resources to do so.

Section 4 of EO 12866 also requires agencies to issue an annual regulatory plan
that describes, among other things, the agency’s regulatory objectives and priorities and
how they relate to the President’s priorities. In recent years, some independent regulatory
agencies have stopped submitting such plans. The regulatory activities of such agencies
can have major public consequences, and the public deserves to know what such agencies
are planning in that regard. They should therefore resume participation in the planning
process.

Accordingly, the ABA recommends that:

• Each agency should maintain a website that contains its regulatory agenda. These
agency agendas should be updated in real time to reflect concrete actions taken
with respect to rules such as initiation, issuance or withdrawal of a rule or change
of contact person. Such real-time updates would make the Agenda more useful to
the public, but would be ministerial in nature and would not require agencies to
continually reassess their priorities.
• The Unified Agenda website should link to agency agenda webpages.
• Agencies should be required to explain how all rules were resolved rather than
removing rules without explanation.
• All active rulemakings should be reflected in an entry in the public Agenda.
• Agencies should be required to make reasonable efforts to accurately classify all
Agenda items – that is, rules should not be classified as “long-term actions” when
the agency contemplates issuing a proposed or final rule within the next year.
• OIRA should be required to publish the Regulatory Plan on an annual basis.
Independent regulatory agencies should be required to participate in the Plan.

VIII. Repeal and update outmoded exemptions

We urge repealing the broad and anachronistic exemption in § 553(a)(2) for
“public . . . loans, grants [and] benefits.” Significant public effects arising from the
activities of federal agencies are sometimes shielded from public input by this exemption.
ACUS has repeatedly called for repeal of this exemption, beginning in 1969,25 and the
ABA has concurred with a minor reservation relating to public property and contracts.26
We fear that the adverse effect of these exemptions will only increase now that the
Department of Agriculture (USDA) has revoked its policy – dating back to 1971 – of


26 1981 ABA Recommendation, supra note 6, at 783-84, 788.
voluntarily employing notice–and-comment in rulemakings that fall within the terms of the former exemption.27

As the ABA did in 1981, we urge Congress to narrow the exemption in § 553(a)(2) for “public property [and] contracts” so that the development and formulation of generally applicable policies with respect to public property and contracts would be governed by § 553.

We also urge narrowing the exemption in § 553(a)(1) relating to “military or foreign affairs functions.” Both the ABA and ACUS have long recommended that this exemption be limited to the scope of the Freedom of Information Act exemption for classified information.28 Otherwise, rules addressing military and foreign affairs functions should be subject to the public notice–and-comment requirements of § 553 unless they are covered by another exemption.

A requirement that rules in the subject areas of both exemptions must be issued through the normal notice-and-comment process would harmonize well with this recommendation’s overall emphasis on promoting public participation and agency accountability in rulemaking.

IX. Codify existing use of interim final rulemaking for the exercise of the “good cause” exemption and set requirements for the consideration of public comments in final rulemaking

As emphasized above, the opportunity to comment on the factual basis of rules in advance of their adoption is fundamental to the democratic legitimacy of the rulemaking process. However, there are circumstances in which it is reasonable to allow an agency to engage in rulemaking without providing the public that opportunity. The APA specifically authorizes agencies to do so through the “good cause” exemption, which allows an agency to promulgate a rule without notice and comment when notice and comments would be “impracticable, unnecessary, or contrary to the public interest.”29 While this allowance is appropriate, we believe that its proper exercise does not negate the public policy value, both to the public and to the agency, of public comment.

ACUS considered agency use of the “good cause” exemption in 1995, and recommended procedures by which an agency would invite “post-promulgation comments.” For instances in which the agency believes notice and comment are “unnecessary,” it recommended “direct final rulemaking,” in which any “significant adverse comment” from the public would be sufficient to prevent the rule from

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automatically becoming final. For instances in which the agency believes notice and comment are “impracticable” or “contrary to the public interest,” it recommended issuance of an “interim final rule,” which would serve simultaneously as a notice of final rulemaking and a request for comments. ACUS further recommended that the agency should, “as expeditiously as possible,” respond to comments and make changes to the rule. It suggested the agency consider setting a deadline for consideration of comments and a termination date for the interim final rule.

Since the 1995 ACUS recommendation, use of interim final rulemaking has become commonplace, to the point that, in some cases, Congress has required the use of interim final rulemaking to meet tight statutory deadlines for rulemaking. With the increase in interim final rulemakings, the number of instances in which agencies do not “finaliz[e]” these rulemakings by responding to public comments and making appropriate changes has also increased. This practice risks leaving in place a rule developed without public scrutiny and possibly based on an incomplete or erroneous administrative record. The public policy principles that underlie the authority of each agency to engage in the making of laws should be given full consideration, especially for those regulations initiated under exigent circumstances.

Legislation has been advanced that would address this growing problem by providing that interim rules would cease to have effect if agencies did not respond to comments and reissue the rule within 9-18 months.\(^{30}\) We are reluctant to establish a single legally enforceable deadline by which such a response must occur – the diversity of rules and the potential scope of competing obligations on an agency both counsel allowing agencies to set a deadline. We note that Congress can – and generally should – set a deadline for the agency to “finaliz[e]” an interim final rule whenever it authorizes an agency to issue such a rule. We are also reluctant to establish such a draconian sanction. The APA already contains an adequate remedy in Section 706(1).\(^{31}\)

Therefore, without commenting on the extent to which federal agencies are exercising the ‘good cause’ exemption appropriately, we recommend that the APA be amended to require that, when an agency promulgates a final rule without notice and comment procedure on the basis that such procedure is impracticable or contrary to the public interest, it should invite the public to submit post-promulgation comments and should set a target date by which it expects to adopt a successor rule after consideration of the comments received. If the agency fails to replace the interim final rule with a successor rule by the target date, it should explain its failure to do so and set a new target date. The adequacy of the agency’s compliance with the foregoing obligation

\(^{30}\) See H.R. 185, § 3 (proposed 5 U.S.C. § 553(g)(2)(B)) (2015). This sanction would not be triggered where notice and comment was “unnecessary.”

\(^{31}\) 5 U.S.C. § 706(1) (authorizing reviewing courts to “compel agency action unlawfully withheld or unreasonably delayed”).
should not be subject to judicial review, but existing judicial remedies for undue delay in
rulemaking should be unaffected.32

The preamble and rulemaking record accompanying the successor rule should
support the lawfulness of the rule as a whole, rather than only the differences between the
interim final rule and the successor rule. This does not require an agency to restate the
prior preamble in the subsequent one, but it does require the agency to discuss the
information or reasoning supporting the original rulemaking insofar as it is relevant to the
later one.

X. Encourage experimentation with “reply comment” processes

ACUS has twice recommended that federal agencies employ “reply comment”
processes, in which members of the public can react to comments that have been filed
earlier in a rulemaking.33 Several agencies, most notably the Federal Communications
Commission and the Federal Energy Regulatory Commission, have employed the
practice routinely, and have indicated that the process is beneficial for two principal
reasons: it results in issues being narrowed to their most essential elements, and the
prospect of being the subject of reply comments discourages commenters from making
maximalist claims in their initial comments.34

The ABA does not believe that Congress should mandate use of reply comment
periods at this stage. However, we do believe the practice can improve rulemaking and
that all agencies should experiment with the process in a way that is reasonably
calculated to produce data regarding when and how it can be most beneficial.
Accordingly, the ABA urges federal agencies to experiment with reply comment
processes in their rulemakings. An agency could, for example, provide in advance that
persons who file comments within the comment period on a proposed rule would be
entitled, during a second comment round, to file comments limited to responding to
points made by other commenters in the first round. An agency could also determine,
after the close of a comment period, that the record would benefit if the agency solicited
reply comments by reopening the comment period for a specific time. An agency might
also permit a commenter to file a reply if the commenter demonstrated a particular
justification for that opportunity, such as a specific interest in responding to specified
comments that were filed at or near the end of the regular comment period. Agencies

32 These include 5 U.S.C. § 706(1) and actions for mandamus.

33 See ACUS Recommendation 76-3, ¶ 1(a), 41 Fed. Reg. 29654 (July 19, 1976) (recommending a second
comment period in proceedings in which comments or the agency’s responses thereto “present new and
important issues or serious conflicts of data”); ACUS Recommendation 2011-2, ¶ 6, 76 Fed. Reg. at 48789
(“Where appropriate, agencies should make use of reply comment periods or other opportunities for
receiving public input on submitted comments, after all comments have been posted.”).

and Recommendations to the Administrative Conference of the United States (March 15, 2011) (consultant
report in support of ACUS Recommendation 2011-2) at 12.
should seek to gather information that would enable them to evaluate the merits or
demerits of approaches that they try.

Respectfully submitted,

Jeffrey A. Rosen, Chair
Section of Administrative Law and Regulatory Practice
February 2016
1. **Summary of Resolution(s).**

The resolution urges Congress to modernize the rulemaking provisions of the Administrative Procedure Act. The APA has grown outdated in a number of respects as agency practice, technology, and judicial doctrine have evolved. Congress has entertained a broad variety of proposed reforms to the Act, most of which have proven highly controversial. The resolution proposes reforms to modernize the Act that are widely supported within (and outside of) the Section of Administrative Law and Regulatory Practice. These reforms are intended to help enhance public participation in the rulemaking process and to provide clearer direction to agencies. Some codify case law or executive order and many of them build on prior recommendations of the ABA or Administrative Conference of the United States.

The resolution urges Congress to amend the Administrative Procedure Act to: 1) codify the requirement that an agency fully disclose data and other information used in rulemaking; 2) codify the requirement that agencies develop a rulemaking record and a public docket for each rulemaking; 3) establish a minimum comment period of 60 days for “major” rules, subject to an exemption for good cause; 4) tighten and clarify several outdated definitions; 5) authorize new presidential administrations to delay the effective date of rules finalized at the end of the prior administration; 6) promote retrospective review of major rules; 7) codify some provisions of the Unified Regulatory Agenda; 8) repeal or narrow several outdated exemptions from the notice-and-comment process; and 9) require agencies to seek post-promulgation comments on some rules issued without notice and comment. The resolution also encourages agencies to experiment with “reply comment” processes.

2. **Approval by Submitting Entity.**

The Council of the Section of Administrative Law and Regulatory Practice voted to approve the resolution on November 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?**

   The resolution would reaffirm multiple aspects of several long-standing ABA policies, particularly 106 ABA ANN. REP. 549, 785 (1981). See also *The 12 ABA Recommendations for Improved Procedures for Federal Agencies*, 24 ADMIN. L. REV. 389, 389-91 (1972). This resolution does not conflict with existing ABA policies.

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

   N/A

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

   N/A

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

   Policy could be implemented by legislative action.

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

   None.

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

   N/A

10. **Referrals.**

    Business Law Section  
    Government and Public Sectors Lawyers Division  
    Intellectual Property Law Section  
    Labor and Employment Law Section  
    Public Contract Law Section  
    Public Utility, Communications and Transportation Law Section  
    Science and Technology Law Section
11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution urges Congress to modernize the rulemaking provisions of the Administrative Procedure Act.

2. Summary of the Issue that the Resolution Addresses

While it remains a cornerstone of the administrative state, the Administrative Procedure Act has grown outdated in a number of respects as agency practice, technology, and judicial doctrine have evolved. Congress has entertained a broad variety of proposed reforms to the Act, most of which have proven highly controversial. The resolution proposes reforms to modernize the Act that are widely supported within (and outside of) the Section of Administrative Law and Regulatory Practice. These reforms are intended to help enhance public participation in the rulemaking process and to provide clearer direction to agencies. Some codify case law or executive order and many of them build on prior recommendations of the ABA or Administrative Conference of the United States.

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

The resolution urges Congress to amend the Administrative Procedure Act to: 1) codify the requirement that an agency fully disclose data and other information used in rulemaking; 2) codify the requirement that agencies develop a rulemaking record and a public docket for each rulemaking; 3) establish a minimum comment period of 60 days for “major” rules, subject to an exemption for good cause; 4) tighten and clarify several outdated definitions; 5) authorize new presidential administrations to delay the effective date of rules finalized at the end of the prior administration; 6) promote retrospective review of major rules; 7) codify some provisions of the Unified Regulatory Agenda; 8) repeal or narrow several outdated exemptions from the notice-and-comment process; and 9) require agencies to seek post-promulgation comments on some rules issued without notice and comment. The resolution also encourages agencies to experiment with “reply comment” processes.

4. Summary of Minority Views

None.
RESOLVED, That the American Bar Association encourages all state, territorial, and tribal courts, bar associations and other licensing and regulatory authorities, that have mandatory or minimum continuing legal education requirements (MCLE) to modify their rules to:

1. include as a separate credit programs regarding diversity and inclusion in the legal profession of all persons regardless of race, ethnicity, gender, sexual orientation, gender identity, or disabilities, and programs regarding the elimination of bias ("D&I CLE"); and

2. require a designated minimum number of hours for this separate credit without increasing the total number of required MCLE hours and without changing the criteria for MCLE credit.

FURTHER RESOLVED, That the American Bar Association, through its Goal III and other entities, assist in the development and creation of diversity and inclusion continuing legal education programs to ensure attorneys can meet their MCLE requirements.
I. Introduction

The ABA Diversity & Inclusion 360 Commission (the “Commission”) was created in August 2015 to formulate methods, policy, standards and practices to best advance diversity and inclusion over the next ten years. The Commission was charged with reviewing and analyzing diversity and inclusion in the legal profession, the judicial system, and the American Bar Association. Moreover, the Commission was charged with recommending specific action items to move the needle on diversity and inclusion in an impactful way. The Commission has examined diversity and inclusion related continuing legal education because of its potential to significantly impact the profession, the judicial system and the rule of law.

In 2004, the House of Delegates approved Resolution 110 amending the language of the Commentary to Section 2 of the Model Rule for Minimum Continuing Legal Education. The amended language provided that regulatory systems require lawyers, either through a separate credit or through existing ethics and professionalism credits, complete as part of their mandatory continuing legal education those programs related to racial and ethnic diversity and the elimination of bias in the profession. The resolution being sponsored by the Diversity & Inclusion 360 Commission builds and expands on that prior recognition of the importance and need for programs regarding diversity and inclusion in the legal profession and further expands the definition of diversity and inclusion consistent with current ABA Goal III to include all persons regardless of race, ethnicity, gender, sexual orientation, gender identity, or disabilities. The Commission believes that while the 2004 resolution was a good start to address the need for diversity and inclusion programs, more can be and should be done to advance diversity and inclusion in a meaningful and productive manner.

The resolution encourages all state, territorial and tribal courts, bar associations and other licensing and regulatory authorities that currently require mandatory continuing legal education (MCLE) to modify their rules to include, as a separate required credit, programs regarding diversity and inclusion in the legal profession of all persons, regardless of race, ethnicity, gender, sexual orientation, gender identity, or disabilities, and programs regarding the elimination of bias (“D&I CLE”). Although several states currently allow MCLE credits for D&I CLE, only California and Minnesota have adopted stand-alone D&I CLE requirements.

The resolution does not specify the number of hours for D&I CLE, or increase the total number of MCLE hours required. Rather, the resolution encourages the adoption of a separate credit within those MCLE requirements to ensure that all attorneys receive education regarding the elimination of bias, and diversity and inclusion.
II. Current Status of MCLE and Diversity and Inclusion CLE

Forty five states currently have mandatory continuing legal education. Therefore, the proposed resolution has the potential to impact the vast majority of attorneys in the United States. As referenced above, California and Minnesota have already adopted stand-alone D&I MCLE requirements. Their requirements are as follows:

**California:** California requires one (1) hour of “Recognition and Elimination of Bias in the Legal Profession and Society” as a component of its three-year MCLE requirements. [http://mcle.calbar.ca.gov/Attorneys/Requirements.aspx](http://mcle.calbar.ca.gov/Attorneys/Requirements.aspx).

**Minnesota:** Minnesota requires two (2) hours related to “Elimination of Bias” as a component of its three-year MCLE requirements. [https://www.mbcle.state.mn.us/mbcle/pages/general_info.asp](https://www.mbcle.state.mn.us/mbcle/pages/general_info.asp).

Additional states allow programs on elimination of bias to qualify for ethics and/or professionalism credits, but do not create separate D&I CLE requirements. Those states include Hawaii, Kansas, Illinois, Maine, Nebraska, Oregon, Washington, and West Virginia.

The Commission considered the merits of both approaches – those that create a separate D&I CLE category, and those that provide ethics credits for D&I CLE. Ultimately, the Commission concluded that the California and Minnesota models best advance the goal of diversity and inclusion by ensuring all attorneys actually receive D&I CLE.

Recognizing the wide array of existing MCLE requirements, the Commission declined to specify a precise number of required hours. Rather, each jurisdiction should determine the appropriate number of required hours within their current MCLE requirements.

III. The Availability of D&I Inclusion CLE

The resolution calls upon the ABA, through its Goal III and other entities, to assist in the development and creation of D&I CLE. This is to ensure that all attorneys can satisfy their new D&I CLE requirement. Although we are confident that CLE providers will ultimately develop programming in response to the new D&I CLE requirement (similar to the prevalence of ethics and professionalism CLE classes), the Commission wants to ensure that all attorneys have access to D&I CLE, and that a potential lack of availability of D&I CLE does not deter any jurisdiction from adopting a D&I CLE requirement.

IV. Conclusion

The resolution encourages each jurisdiction that currently has MCLE to designate a minimum number of credit hours for D&I CLE. In order to ensure that all state and territorial bar associations’ attorneys can meet those requirements, the resolution calls upon the American Bar Association, through its Goal III and other entities, to assist in the development and creation of D&I CLE. The resolution is consistent with the ABA’s longstanding commitment to diversity and inclusion in the legal profession as evidenced
in Resolution 110 approved by the House of Delegates in 2004. It is also consistent with multiple states that have recognized the need for D&I CLE. As such, we respectfully request that House of Delegates adopt the resolution.

Respectfully submitted,

Eileen M. Letts, Co-Chair
David B. Wolfe, Co-Chair
Diversity and Inclusion 360 Commission

February 2016
1. **Summary of Resolution(s).** The resolution encourages all state, territorial, and tribal courts, bar associations and other licensing and regulatory authorities that currently require mandatory continuing legal education (MCLE) to modify their rules to include, as a separate required credit, programs regarding diversity and inclusion in the legal profession of all persons, regardless of race, ethnicity, gender, sexual orientation, gender identity, or disabilities, and programs regarding the elimination of bias (“D&I CLE”). Although several states currently allow MCLE credits for D&I CLE, only California and Minnesota have adopted stand-alone D&I CLE requirements.

2. **Approval by Submitting Entity.** The Diversity and Inclusion 360 Commission approved this Resolution at its fall meeting on October 6, 2015.

3. **Has this or a similar resolution been submitted to the House or Board previously?** In 2004, the House approved Resolution 110 amending the language in the Commentary to Section 2 of the Model Rule for Minimum Continuing Legal Education. The amended language provided that regulatory systems require lawyers, either through a separate credit or through existing ethics and professionalism credits, complete as part of their mandatory continuing legal education those programs related to racial and ethnic diversity and elimination of bias in the profession.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** This resolution builds and expands on Resolution 110. Additionally, Goal III of our Association seeks increased awareness of diversity and inclusion, and the elimination of bias. This resolution addresses the intent of Goal III.

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.

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

9. Disclosure of Interest. (If applicable) n/a

10. Referrals. We have or will refer to all committees, sections, and divisions, particularly the Standing Committee on CLE, Litigation Section, TIPS, Business Law, Young Lawyers Division, and the entities within the Diversity Center, and NCBP.

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

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   Darcee.siegel@gmail.com (305) 409-9670                dwolfe@skoloffwolfe.com (973) 992-0900     emletts@greeneandletts.com (312) 346-1100

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.)

   Darcee S. Siegel                           David B. Wolfe                                 Eileen M. Letts
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   Bal Harbour, Florida 33154         293 Eisenhower Pkwy, Ste. 390       55 W. Monroe St. Ste. 600
   Darcee.siegel@gmail.com (305) 409-9670                dwolfe@skoloffwolfe.com (973) 992-0900     emletts@greeneandletts.com (312) 346-1100
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   This Resolution encourages all state, territorial, and tribal courts, bar associations and other licensing and regulatory authorities who require mandatory continuing legal education (MCLE) to modify their rules to include, as a separate credit, programs regarding diversity and inclusion in the legal profession of all persons regardless of race, ethnicity, gender, sexual orientation, gender identity, or disabilities, and programs regarding the elimination of bias (“D&I CLE”). Further, this resolution while requiring a designated minimum number of hours for a separate credit, will not increase the total number of required MCLE hours or in any way change or alter the criteria for MCLE credit.

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

   This Resolution addresses the need to provide stand-alone Diversity and Inclusion CLE requirements for all attorneys who practice in MCLE states. The Resolution also advances Diversity and Inclusion by assisting in the development and creation of diversity and inclusion continuing legal education programs to ensure all attorneys can meet their MCLE requirements. The Resolution is in accordance with Goal III of the American Bar Association, which is to eliminate bias and enhance diversity in the profession.

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

   This Resolution will increase the legal profession’s understanding and awareness of issues relating to diversity and inclusion, and the elimination of bias, by ensuring that all attorneys who are obligated to comply with MCLE requirements receive education related to diversity and inclusion, and the elimination of bias.

4. **Summary of Minority Views**

   No minority views or opposition to this Resolution have been identified.
RESOLVED, That the American Bar Association opposes intellectual property laws and agency and court interpretations of intellectual property laws that impose the payment of the government’s attorney fees on a party challenging a decision of the United States Patent and Trademark Office in federal district court, unless the statute in question explicitly directs the courts to award attorney fees.

FURTHER RESOLVED, That the American Bar Association supports an interpretation or a statutory clarification of 15 U.S.C. § 1071(b)(3) and 35 U.S.C. § 145, that the term “expenses” as provided for in those sections does not include government attorney fees.
On April 23, 2015, the U.S. Court of Appeals for the Fourth Circuit issued a split panel decision in Shammas v. Focarino, 784 F.3d 219 (4th Cir. 2015) (“Shammas”). The decision raises important questions relating to the application of the American Rule, which stands for the proposition that, absent express statutory language or a contract to the contrary, litigants will bear their own legal fees. Specifically, Shammas raises concerns regarding access to justice and the ability of less well-financed applicants for trademark registrations and patents to obtain judicial review of adverse agency decisions in district court. By requiring dissatisfied trademark registration and patent applicants to pay the legal fees of the United States Patent and Trademark Office (“U.S.P.T.O.”) in civil actions brought by those applicants to show their entitlement to trademark registrations or patents, whether or not wrongly denied by the agency, the case establishes a significant financial obstacle, if not a barrier, to complete judicial review of the agency’s decisions and punishes applicants for filing a civil action. Anticipating that the rule articulated in Shammas may be the subject of further appeals, in both the trademark and patent context, the Section of Intellectual Property Law recommends that the House of Delegates adopt this resolution to provide policy to support an Association amicus curiae brief in Shammas or in another judicial proceeding presenting the same or similar issues, and if unsuccessful, to request Congress to amend the applicable statutes consistent with this resolution.

A petition for a writ of certiorari seeking Supreme Court review of Shammas was filed on October 29, 2015. Shammas v. Hirshfeld, No. 15-563. The Section of Intellectual Property Law believes the petition is well-taken. The Section recommends that the House of Delegates approve this resolution, which would provide policy in support of an Association amicus curiae brief in Shammas v. Hirshfeld, or in other litigation presenting issues regarding whether a dissatisfied applicant for trademark registration or patent may obtain judicial review of an adverse decision of the U.S.P.T.O. in district court, as Congress has provided in 15 U.S.C. § 1071(b)(3) and 35 U.S.C. § 145, without bearing the additional burden of paying the U.S.P.T.O.’s attorney fees. Because the decision adds a new financial obstacle to those seeking to challenge agency decisions in a federal district court and acts as a penalty for bringing suit, in direct conflict with the American Rule, the resolution of these issues may have policy implications that go far beyond trademark and patent law. This resolution will provide Association policy opposing intellectual property laws and interpretations of intellectual property laws that impose the payment of the government’s attorney fees on a party challenging a decision of the United States Patent & Trademark Office in federal district court, unless the statute in question specifically and explicitly directs the courts to award attorney fees. The resolution also supports interpretations of, and if needed, a statutory clarification of 15 U.S.C. § 1071(b)(3) and 35 U.S.C. § 145, such that the term “expenses” as recited in those sections does not include government attorney fees.

Trademark Registration Applicants Denied Federal Registrations by the U.S.P.T.O. May Appeal Those Decisions to Federal District Court and Must Pay the U.S.P.T.O.’s “Expenses” Even if their Appeals Succeed

An applicant seeking to register a trademark with the U.S.P.T.O. may seek review of a denial by the U.S.P.T.O.’s Trademark Trial and Appeal Board either by appealing to the United States Court of Appeals for the Federal Circuit (“Federal Circuit”), or by commencing a de novo action in a federal district court. 15 U.S.C. § 1071. An appeal taken to the Federal Circuit proceeds on
the closed record before the agency. Id. § 1071(a)(4). If an appeal is taken to the district court, however, the agency record is treated as if produced in the suit, and the applicant may introduce new evidence and testimony. Id. § 1071(b)(1). If the applicant proceeds in a district court, and names the Director of the U.S.P.T.O. as a defendant, the applicant must pay “all the expenses of the proceeding.” Id. at §1071(b)(3). Under that statute, the applicant must pay the U.S.P.T.O.’s “expenses,” whether the applicant prevails or not. Id.

Applicants Denied a Patent by the U.S.P.T.O. May Appeal that Decision to Federal District Court and Must Pay the U.S.P.T.O.’s “Expenses”

Similarly, an applicant denied a patent may appeal to the Federal Circuit or file a civil action against the U.S.P.T.O. Director in district court, and may also introduce new evidence in the latter proceeding. 35 U.S.C. § 145; Kappos v. Hyatt, 132 S. Ct. 1690, 1692 (2012). As in civil trials involving denials of trademark registrations, “[a]ll the expenses of the proceedings shall be paid by the applicant.” 35 U.S.C. § 145.

Shammas Holds that Applicants Successfully Appealing to a Federal District Court Must Pay the U.S.P.T.O.’s Attorney Fees as “Expenses”

In Shammas, the district court granted the U.S.P.T.O.’s motion pursuant to § 1071(b)(3) that the applicant pay the U.S.P.T.O.’s expenses, including the prorated salaries of the two attorneys and one paralegal who worked on the case. Shammas v. Focarino, 784 F.3d 219, 221-22 (4th Cir. 2015). The Fourth Circuit affirmed. The Fourth Circuit held that “expenses” as provided for in § 1071(b)(3) included the U.S.P.T.O.’s attorney fees and paralegal fees.

On appeal, Shammas had argued that by referring to “expenses,” but not using the term “attorney fees,” the statute was not sufficiently clear to overcome the presumption created by the American Rule that each party pay his or her own legal fees in the absence of a clear statute or contract to the contrary. Id. at 222. A divided Fourth Circuit rejected that argument, finding that the American Rule did not apply to this statute. The Fourth Circuit defined the American Rule as “provid[ing] only that ‘the prevailing party may not recover attorneys’ fees’ from the losing party.” Id. at 223. The Court found that the rule did not apply to § 1071(b)(3) because the applicant must pay the U.S.P.T.O.’s expenses regardless of whether the applicant wins or loses. Quoting Ruckelshaus v. Sierra Club, 463 U.S. 680, 684 (1983), the Court concluded that “a statute that mandates the payment of attorney fees without regard to a party’s success is not a fee-shifting statute that operates against the backdrop of the American Rule.” Id. The Fourth Circuit further reasoned that because the statute was intended to allow the U.S.P.T.O. to recoup the cost of litigating a case anew in the district court, its interpretation of the statute was consistent with the legislative history of the statute. Id. at 225.

1 Where only the U.S.P.T.O is named as a party, civil suits brought under 15 U.S.C. § 1071 must be filed in the U.S. District Court for the Eastern District of Virginia, and appeals taken therefrom are appealed to the U.S. Court of Appeals for the Fourth Circuit. Id. § 1071(b)(4). Thus, this case involves an appeal to the U.S. Court of Appeals for the Fourth Circuit.
The Dissenting Opinion Provides an Alternative Definition of the American Rule and Construction for the Term “Expenses”

The dissent in Shammas defines the American Rule as standing for the proposition that “courts presume that the litigants will bear their own legal costs, win or lose.” Id. at 227 (King, J., dissenting). The dissent argues that unless Congress “clearly and directly” provides for attorney’s fees,” the statute cannot be interpreted as authorizing the award of attorney fees. Id. at 227-28. Accordingly, the dissent would hold that the American Rule presumption against shifting fees to the other party applies, and that the majority’s interpretation of § 1071(b)(3) violates that presumption.

Significantly, the dissent also provides an alternative rationale for interpreting the term “expenses”—as employed in § 1071(b)(3)—as excluding attorney and other legal fees. The dissent points to five instances in Title 15 in which Congress expressly provided for the award of attorney fees in instances where it wanted to provide for fee shifting, in stark contrast to Congress’s omission of that critical language in this provision. Id. at 228. The dissent concludes that, “[b]ecause Congress made multiple explicit authorizations of attorney’s fees awards in Chapter 22 of Title 15—but conspicuously omitted any such authorization from § 1071(b)(3)—we must presume that it acted ‘intentionally and purposely in the disparate ... exclusion.’” Id. (citing Clay v. United States, 537 U.S. 522, 528 (2003) (internal quotation marks omitted)).

Finding nothing in the statute’s legislative history to support the U.S.P.T.O.’s claim that it is entitled to attorney fees, the dissent would find it insufficient to overcome the presumption that the American Rule applies against fee shifting. Id. at 229-30.

The ABA Supports the American Rule and the Fundamental Principle of Facilitating and Encouraging Access to Justice and Opposes Penalizing Parties for Bringing Suit

The American Rule is a fundamental principle of American jurisprudence that stands for the proposition that a party should not be penalized for merely prosecuting a lawsuit. Summit Valley Indus. v. Local 112, 456 U.S. 717, 724 (1982) (citing Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967). Consistent with that principle, the American Bar Association has long advocated for those needing access to the courts and opposed efforts to establish obstacles or barriers to access to justice, be they financial or otherwise.

Unfortunately, the goal of the U.S.P.T.O.’s new interpretation of this decades-old statutory language is to limit access to district court by those dissatisfied with the U.S.P.T.O.’s decisions and deprive applicants of the opportunity to introduce additional evidence to overcome the U.S.P.T.O.’s rejection. The U.S.P.T.O. seeks to recover attorney fees simply to discourage applicants from filing district court actions and from producing new evidence against the agency. If an applicant has unsuccessfully sought to persuade the U.S.P.T.O. to register its trademark or grant its patent, and needs to introduce additional evidence to overcome the rejection, an appeal to the Federal Circuit cannot serve as a viable avenue for obtaining relief from an adverse U.S.P.T.O. decision. Kappos v. Hyatt, 132 S. Ct. 1690, 1694 (2012) (citing Dickinson v. Zurko, 527 U.S. 150 (1999)).
In contrast to district court proceedings, the Federal Circuit reviews decisions based on the closed agency record and forbids the introduction of new evidence. Thus, resort to a civil action in accordance with 15 U.S.C. § 1071(b)(3) or 35 U.S.C. § 145 may be the only viable mechanism available to such applicants seeking agency review. *Shammas* holds that, “if the dissatisfied applicant does not wish to pay the expenses of a *de novo* civil action, he may appeal the adverse decision of the PTO to the Federal Circuit.” 784 F.3d at 225. If the applicant needs to submit additional evidence to prove its case, however, an appeal to the Federal Circuit is not a viable option.

The costs to applicants of pursuing review of a U.S.P.T.O. decision in district court are already high. Those plaintiffs must take discovery and introduce new evidence, and thus often pay for experts and other expenses, as well as their own attorney fees. This decision may have the effect of lightening the U.S.P.T.O.’s civil action caseload and avoiding review of its decisions. And it will also unjustly discourage small businesses, sole inventors, and others—who cannot afford the additional cost of the agency’s attorney fees, but must introduce new evidence to establish the error committed by the U.S.P.T.O.—from filing necessary district court actions.

The U.S.P.T.O. is not a typical litigant that requires an award of attorney fees to be made whole. The agency’s annual appropriations are determined in accordance with its collection of user fees, which it uses to pay its employees and cover other overhead costs, including those related to litigation. It therefore is not similarly situated to the average litigant, which can recover its attorney fees only if it prevails and only in exceptional cases. To the contrary, and assuming the U.S.P.T.O. sets user fees at the appropriate levels, it will be made whole for its litigation-related attorney fees even without the benefit of the statutes. In fact, an automatic award of attorney fees in the manner posited by the Fourth Circuit will result in a double recovery by the U.S.P.T.O., which surely is neither equitable nor within congressional contemplation.

**The U.S.P.T.O.’s New Attempts to Discourage Applicants from Filing in District Court Are Consistent with Its Efforts to Have these Provisions Stricken from the Statutes**

The U.S.P.T.O. has sought legislative solutions to dispense with these district court proceedings, and having failed that, resorts to imposing attorney fees in an attempt to discourage applicants from filing these actions. Around the time that it requested fees in this case, the U.S.P.T.O. sought to have Congress repeal the portion of § 1071(b)(3) that authorizes these proceedings, in hopes of having this amendment join a companion proposal before Congress to similarly strike 35 U.S.C. § 145 patent cases and, thereby, put an end to the filing of these district court cases.2

The U.S.P.T.O. believes that permitting *de novo* review in the district courts undermines its role as expert and gatekeeper on trademark registrability.

In *Shammas*, the U.S.P.T.O. did not dispute appellant’s contention that prior to 2013 the agency had never sought attorney fees in accordance with 15 U.S.C. § 1071(b)(3) and 35 U.S.C. § 145, or their predecessors. 784 F.3d at 229. Indeed, throughout the existence of this language, the U.S.P.T.O. has never before sought to recover its attorney or paralegal fees. Instead, it only sought to recover its “expenses,” such as the additional expense of hiring an expert witness to

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2 USPTO SECTION 21(b) ABROGATION PROPOSAL, ABA-IPL Section, Joint Task Force of the Trademark Legislation Committee, Trademark Litigation Committee, and Ex Parte Committee.
rebut expert testimony newly submitted by an applicant. The U.S.P.T.O. had also sought to recover the reasonable travel expenses that its employee incurred travelling to a deposition. *Robertson v. Cooper*, 46 F.2d 766, 769 (4th Cir. 1931). One case involved the reasonableness of the amount the U.S.P.T.O. wanted to collect for printing the briefs and joint appendix on appeal. *Watson v. Allen*, 274 F.2d 87, 88 (D.C. Cir. 1959); see also *Cook v. Watson*, 208 F.2d 529, 531 (D.C. Cir. 1953) (expenses not limited to costs but include printing expenses). But, until now, the U.S.P.T.O. had not attempted to erect this barrier to an appeal in district court by charging the applicant for the U.S.P.T.O.’s attorney fees. The U.S.P.T.O. appears to have resorted to expanding the scope of this expense-shifting rule in an effort to reduce or eliminate these types of cases.

The U.S.P.T.O.’s recent shift in position to include attorney fees in its request for expenses is consistent with its recent efforts to have an applicant’s right to bring such proceedings in district court removed from the statutes, and an immediate reaction to the U.S. Supreme Court’s holding in *Kappos v. Hyatt*, 132 S. Ct. 1690, 1692 (2012) (“Hyatt”). In *Hyatt*, the Supreme Court rejected the U.S.P.T.O.’s argument seeking to limit the evidence that an applicant could submit in a district court to challenge the U.S.P.T.O.’s refusal to issue a patent. The agency argued that if an applicant could have submitted the evidence to the U.S.P.T.O., it could not introduce that evidence in a district court proceeding. Consistent with American Bar Association policy, however, the Court concluded that under the statute “there are no limitations on a patent applicant’s ability to introduce new evidence in a § 145 proceeding beyond those already present in the Federal Rules of Evidence and the Federal Rules of Civil Procedure.” *Id.* at 1700-01.

According to reports, unhappy with that decision, the U.S.P.T.O. has supported draft legislation that would eliminate § 145 actions altogether.3

**The Current Resolution**

The resolution calls for the Association to adopt policy relating to the rights of applicants for trademark registrations and patents to bring a civil action in district court challenging the U.S.P.T.O.’s denial of their request for a trademark registration or a patent without having to also bear the additional burden of paying the agency’s attorney fees. The resolution will provide Association policy opposing intellectual property laws and interpretations of intellectual property laws that impose the payment of the government’s attorney fees on a party challenging a decision of the United States Patent & Trademark Office in federal district court, unless the statute in question specifically and explicitly directs the courts to award attorney fees. The resolution also supports interpretations of, and if needed, a statutory clarification of 15 U.S.C. § 1071(b)(3) and 35 U.S.C. § 145, such that the term “expenses” as recited in those sections does not include government attorney fees.

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Conclusion

The Section of Intellectual Property Law urges the House of Delegates to adopt the proposed resolution to provide ABA policy supporting an Association amicus curiae brief in a judicial proceeding presenting issues regarding whether a dissatisfied trademark registrant or patent applicant may obtain judicial relief from an adverse decision by the U.S.P.T.O. in district court, without also paying the U.S.P.T.O.’s attorney fees, and/or to support a legislative change consistent with that policy.

Respectfully submitted,

Theodore H. Davis Jr., Chair
Section of Intellectual Property Law
February 2016
1. **Summary of Resolution**

The resolution calls for the Association to adopt policy opposing intellectual property laws and interpretations of intellectual property laws that impose the payment of the government’s attorney fees on a party challenging a decision of the United States Patent & Trademark Office in federal district court, unless the statute in question specifically and explicitly directs the courts to award attorney fees. The resolution also call for the Association to adopt policies that support interpretations of, and if needed, a statutory clarification of 15 U.S.C. § 1071(b)(3) and 35 U.S.C. § 145, such that the term “expenses” as recited in those sections does not include government attorney fees.

Both 15 U.S.C. § 1071(b)(3) and 35 U.S.C. § 145 allow the U.S.P.T.O. to recover all reasonable “expenses” incurred by the agency in defending its decision against a challenge by a dissatisfied trademark registration or patent applicant. For the first time in the long history of these statutes, in a recent case pending in the Eastern District of Virginia, the U.S.P.T.O. requested payment of its attorney fees as part of its “expenses,” and the district court granted its request.

In *Shammas v. Focarino*, 784 F.3d 219, 221-22 (4th Cir. 2015), a divided Fourth Circuit affirmed. The decision raises important questions relating to the application of the American Rule as well as concerns regarding access to justice and the ability of less well-to-do trademark registration and patent applicants to obtain complete judicial review of agency decisions. By requiring dissatisfied trademark registration and patent applicants to pay the U.S.P.T.O.’s legal fees in civil actions brought by the applicants, the case establishes a financial obstacle or barrier to complete judicial review of the agency’s decisions and punishes applicants for filing a civil action. Anticipating that the decision may be the subject of further appeals, in both the trademark and patent context, the Section of Intellectual Property Law recommends that the House of Delegates adopt this Resolution to provide policy to support an Association *amicus curiae* brief in this case or in another judicial proceeding presenting the same or similar issues, and if unsuccessful, to request that Congress amend the applicable statutes consistent with this resolution.

2. **Approval by Submitting Entity**

The Section Council approved the resolution on November 17, 2015.
3. Has This or a Similar Recommendation Been Submitted to the House or Board Previously?

The House of Delegates has previously adopted recommendations relating to the rights of an applicant denied a patent by the U.S. Patent & Trademark Office to bring a civil action pursuant to 35 U.S.C. §145 in a U.S. District Court to obtain a patent.

At the 2011 Annual Meeting, the House of Delegates approved a resolution supporting an ABA amicus brief to the Supreme Court in support of an interpretation of 35 U.S.C. §145 that preserves the right of such applicant—in cases brought against the agency in U.S. District Court to obtain a patent—to introduce new evidence subject only to limitations generally applicable in federal civil litigation. The resolution also expresses ABA support for, in these cases, district court de novo findings of fact on issues for which new evidence is introduced, and the application of the substantial evidence standard of the Administrative Procedure Act for findings of fact for which no new evidence was admitted and the court relies solely on the record developed before the agency.

4. What Existing Association Policies are Relevant to This Resolution and How Would They be Affected by its Adoption?

The policies referenced in paragraph 3 are similar to those in this recommendation in that they address the same issue of the right of an applicant denied a patent by the U.S. Patent & Trademark Office to bring a civil action pursuant to 35 U.S.C. §145 in a U.S. District Court to obtain a patent. But they are not directly relevant to this recommendation, and would not be affected by its adoption because the earlier resolution does not address whether the cost shifting provision of 35 U.S.C. §145 includes agency attorney fees, and do not discuss 15 U.S.C. § 1071(b)(3) at all.

5. What Urgency Exists Which Requires Action at This Meeting of the House?

A petition for a writ of certiorari seeking Supreme Court review of this decision was filed on October 29, 2015. The Section of Intellectual Property Law believes it is relatively likely that the petition will be granted. Action by the House of Delegates at the 2016 Midyear Meeting is necessary to insure that, should certiorari be granted, any Association brief on the merits could be timely filed.

6. Status of Legislation

None.

7. Plans for Implementation of the Policy if Adopted by the House of Delegates

The policy will provide authority for the preparation and filing of an Association amicus brief in the Supreme Court or other appropriate judicial forum in a case presenting the issues that are addressed in the policy and, if unsuccessful, to request that Congress amend the applicable statutes.
8. **Cost to the Association (both direct and indirect costs).**

Adoption of the recommendations would not result in additional direct or indirect costs to the Association.

9. **Disclosure of Interest**

There are no known conflicts of interest with regard to this recommendation.

10. **Referrals**

This recommendation is being distributed to each of the Sections, Divisions, and the Standing Committees of the Association.

11. **Contact Person (prior to meeting)**

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution calls for the Association to adopt policy opposing statutes and interpretations of statutes that establish financial penalties for prosecuting a lawsuit and limits access to federal district courts in cases challenging government action, and opposing agency and court interpretations of statutes that shift the burden of paying the government’s attorney fees to a party challenging government action unless the statute specifically and explicitly directs the courts to award attorney fees.

2. Summary of the Issue that the Resolution Addresses

The Fourth Circuit’s decision to award the U.S.P.T.O. its attorney fees raises important questions relating to the application of the American Rule as well as concerns regarding access to justice and the ability of less well-to-do trademark and patent applicants to obtain complete judicial review of agency decisions. By requiring dissatisfied trademark registration and patent applicants to pay the U.S.P.T.O.’s legal fees in civil actions brought by the applicant to show that they are entitled to a trademark registration or patent, the case establishes a financial obstacle or barrier to complete judicial review of the agency’s decisions and punishes applicants for filing a civil action.

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

The resolution expresses opposition to statutes, and interpretations of statutes in a manner that establish financial penalties for prosecuting a lawsuit and limits access to federal district courts in cases challenging government action.

The resolution also expresses opposition to agency and court interpretations of statutes that shift the burden of paying the government’s attorney fees to a party challenging government action unless the statute specifically and explicitly directs the courts to award attorney fees.

4. Summary of Minority Views

None known at this time.
RESOLVED, That the American Bar Association supports interpretation and application of the statutory six-year patent damages period (35 U.S.C. § 286) as limiting availability of the judicially created laches defense as a bar to legal damages for patent infringement; and

FURTHER RESOLVED, That the American Bar Association supports interpretation and application of the statutory six-year patent damages period as not limiting availability of laches as a defense where equitable relief is sought.
REPORT

This report concerns the scope of the judicially created laches defense in patent infringement litigation—under what circumstances can a patent rights holder’s unreasonable, prejudicial delay in commencing suit bar relief on a patent infringement claim?

A divided en banc Federal Circuit recently preserved the laches defense for patent cases even though Congress has created a statutory six-year damages period. SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC, No. 2013–1564, 2015 WL 5474261, ___ F.3d ___ (Fed. Cir. Sept. 18, 2015). That decision appears to conflict with at least the U.S. Supreme Court’s reasoning in Petrella v. Metro-Goldwyn-Mayer, Inc., 134 S. Ct. 1962 (2014), which held the laches defense in the copyright context was limited by a statutory three-year copyright damages period. See 17 U.S.C. § 507(b). Because both the Copyright Statutes and the Patent Statutes limit the damages recovery periods similarly, and because there is no convincing justification for treating them differently, the judicially created laches defense must give way to congressional enactment of these statutory damages periods.

This Resolution asks the ABA House of Delegates to approve policy supporting application of the Supreme Court’s Petrella decision in the patent context so that the doctrine of laches (1) would no longer be applied to bar pre-suit legal damages in patent cases during the statutory six-year damages period, but (2) would be available under extraordinary circumstances to curtail claims for injunctive relief and other prospective equitable relief. This policy recommendation is driven not only by applicable precedent, but also by core values of our legal system (in particular deference to statutes enacted by Congress, and policies favoring non-litigation resolutions to legal disputes).


In Petrella, the Supreme Court held that the judicially created laches defense must give way if Congress provided a limiting statutory damages period. 134 S. Ct. at 1967–68. The Court held laches could not bar legal damages for acts of copyright infringement occurring within the three-year statutory look-back period, regardless of how long ago the copyright owner first learned of the infringement. Id. at 1981. Thus, delay in bringing suit forfeits only damages for infringement occurring outside the three-year look back window, but not those for infringement occurring within that window.

The Court explained laches was developed by courts of equity and its “principal application was, and remains, to claims of an equitable cast for which the Legislature has provided no fixed time limitation” 134 S. Ct. at 1973. The Court emphasized laches serves a gap filling, not legislation overriding, purpose. Id. at 1974. If a statutory damages limitation period exists for legal relief, such legislation cannot be disregarded: “To the extent that an infringement suit seeks relief solely for conduct occurring within the limitations period, however, courts are not at liberty to jettison Congress’ judgment on the timeliness of suit.” Id. at 1967.

In a footnote, the Court declined to reach whether its holding would also apply to patents. Id. at 1974 n.15. The Patent Act provides a similar, albeit longer, six-year look-back period for

In extraordinary circumstances, laches may limit awards of equitable relief—the grant of an injunction.

B. The Federal Circuit’s En Banc SCA Hygiene Decision

After Petrella was decided, the Federal Circuit revisited Aukerman. Sitting en banc, a divided court held that the rule articulated in Petrella does not apply to patent law to bar legal remedies. SCA Hygiene, 2015 WL 5474261, at *1. While acknowledging that Section 286 is the sort of explicit temporal damages limitation that the U.S. Supreme Court suggested would preclude the applicability of laches, the Federal Circuit concluded that the unique history of the Patent Statute compelled a different rule for patent law. Id. at *3–7. According to the majority, Congress had intended to preserve laches as a defense to damages when it enacted 35 U.S.C. § 282(b)(1), and therefore the reasoning of Petrella does not apply to patent law. Id. at *3.

The Federal Circuit relied on the comments of one of the primary statutory drafters of the 1952 Patent Act, stating that he intended to preserve equitable defenses, which includes laches. Id. at *8. The court also looked to judicial practice in patent cases prior to 1952 to determine whether laches could reach legal damages. The court concluded there was a consensus among the circuit courts by 1952, which was that laches could bar legal damages as well as equitable relief. Id. at *9–13.

The Federal Circuit then addressed potential policy concerns. Patent infringers are strictly liable for direct infringement. Copyright infringers are held liable only if there is at least some evidence of intentional copying. This distinction favored the application of laches to patent law, according to the court, because unwitting patent infringers can incur substantial damages during the period of delay and miss the opportunity to adopt non-infringing alternatives. Id. at *14–15. The court also noted that that the amici overwhelmingly favored retaining laches as a defense. Id. at *15.

Finally, the court unanimously held the laches defense could bar ongoing injunctive relief, noting that the remedy already incorporates equitable considerations—including but not limited to delay—that lie at the heart of the laches analysis. Id. at *15–17. It further held that in “egregious” or “extraordinary” circumstances, a laches defense could also bar ongoing royalty damages. Id. at *16.

C. SCA Hygiene and Aukerman are irreconcilable with Petrella

SCA Hygiene and Aukerman both conclude that a laches defense can bar a patentee’s claim for pre-suit damages during the six-year damages recovery period of Section 286. These decisions cannot be reconciled with the Supreme Court’s reasoning in Petrella: If Congress has expressly spoken regarding the appropriate period for legal damages, a judge-made laches defense cannot stand. Just as the copyright damages recovery period statute reflects Congress’s judgment that a
claim for copyright infringement is not too old if brought within three years, Section 286 demonstrates Congress’s judgment that a claim for patent infringement is not too old if brought within six years. Because Congress has spoken on the issue, laches should never bar patent infringement damages within the six-year window provided by Section 286.

In attempting to distinguish *Petrella*’s reasoning, the *SCA Hygiene* majority principally relies on its reading of the legislative history and related historical record. According to the majority, Congress implicitly intended to preserve laches as a defense when it codified “unenforceability” as a defense to infringement in 35 U.S.C. § 282(b)(1). Also, circuit courts prior to 1952 had applied laches as a defense to claims for legal remedies, when the statute was adopted and therefore, it was appropriate to presume that Congress had preserved that status quo.

However, Section 282(b)(1) is entirely silent on whether laches was intended to be a defense to legal damages. The majority instead relies on a treatise to show that one of the statute’s drafters believed that laches was implicitly included within Section 282(b)(1). At best, that treatise is silent on the critical question: whether Congress intended to make laches a defense to legal damages. It is entirely plausible that the statute’s drafter was merely confirming that laches could continue to bar equitable relief in some instances.

The *SCA Hygiene* majority ignores clear Supreme Court precedent—predating the 1952 statute—providing that “[l]aches within the term of the statute of limitations is no defense at law.” *United States v. Mack*, 295 U.S. 480, 489 (1935). Following the canon of statutory interpretation that a statute is presumed to retain the substance of the common law, *Mack* strongly suggests that congressional enactment of Section 282 did not implicitly preserve laches as a defense to legal damages. The inclusion of a six-year damages window in Section 286 only reinforces that conclusion.

In *Aukerman*, the Federal Circuit sought to distinguish the limitation prescribed by Section 286 as “an arbitrary limitation on the period for which damages may be awarded on any claim for patent infringement” from laches, which the court said “invokes the discretionary power of the district court to limit the defendant’s liability for infringement by reason of the equities between the particular parties.” 960 F.2d at 1030. The court reasoned that the two limitations could coexist because “[n]othing in section 286 suggests that Congress intended by reenactment of this damages limitation to eliminate the long recognized defense of laches or to take away a district court’s equitable powers in connection with patent cases.” *Id*.

The Supreme Court rejected a similar argument in *Petrella*. The majority observed that the merger of law and equity did not change the substantive and remedial principles that were in effect before 1938. “Both before and after the merger of law and equity in 1938, this Court has cautioned against invoking laches to bar legal relief.” 134 S. Ct. at 1973. Permitting individual judges to have discretion in setting the limitations period would upset that uniformity that Congress sought by prescribing a statutory limitations period for copyright infringement.

The Federal Circuit’s attempt to identify historical differences between copyright law and patent law is unconvincing, and does not provide sufficient basis to distinguish the reasoning of *Petrella*. 
D. Sound Judicial Policy Counsels Against Applying Laches to Patent Damages

Limiting application of the laches defense is sound public policy. Adhering to the six-year damages recovery period of Section 286 gives patent rights holders and accused infringers time to resolve disputes before filing patent infringement litigation. Conversely, if the laches defense is more widely available (including during the six-year damages recovery period), patent litigation may be filed more quickly. Under the Federal Circuit’s *SCA Hygiene* decision, rational patent holders may fear that any delay could lead to laches (and the risk having the bulk of damages related to the infringement stripped away). Such an incentive is contrary to the long-held judicial policy favoring out-of-court dispute resolution.

That policy has particular salience in the context of patent infringement disputes, which are among the most costly and complex to litigate. Modern patent reform has largely been animated by a desire to reduce the volume and costliness of infringement litigation. The Federal Circuit’s retention and expansion of the laches defense runs contrary to that trend.

Invigorating the laches defense, as the Federal Circuit appears to have done with its *SCA Hygiene* decision, would have a disproportionate and negative effect on manufacturing patent owners and research universities. Manufacturing patent owners often view patent litigation as a last resort, preferring instead to focus on business and market place competition. Similarly, universities often seek industry partnerships instead of litigation. Such entities often have large patent portfolios, making it more challenging to actively “police” infringement. The availability of laches during the statutory six-year patent damages period would likely harm to manufacturing patent owners and universities more than non-practicing entities.

Finally, courts have other tools for policing bad actors during the six-year damages limitations period established by 35 U.S.C. § 286. Equitable estoppel remains available if a patentee engages in misleading conduct—including but not limited to delay—that causes the infringer to believe that the patentee will not assert its patent rights, and where such conduct causes prejudice. Because equitable estoppel requires more than delay, it does not create the perverse incentives that exist with laches.

For these reasons, the Section of Intellectual Property Law believes its recommendation is consistent with the law and represents sound public policy, and therefore urges its adoption by the ABA House of Delegates.

Respectfully submitted,

Theodore H. Davis Jr., Chair
Section of Intellectual Property Law
February 2016
GENERAL INFORMATION FORM

Submitting Entity:  Section of Intellectual Property Law

Submitted by:  Theodore H. Davis Jr., Section Chair

1. Summary of Resolution

The Resolution expresses Association policy in support of a clarification of the law relating to the judicially created laches defense to patent infringement. Congress enacted a statutory six-year patent damages period (35 U.S.C. § 286). This limits availability of a laches defense as a bar to legal damages for patent infringement within that six-year period. Of course, laches would still be a defense where equitable relief is sought (such as injunctive relief and ongoing royalties). This is consistent with the U.S. Supreme Court’s treatment of the same defense in the copyright context.

2. Approval by Submitting Entity

The Section Council approved the resolution on November 6, 2015.

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

No.

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

None.

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

The policy would provide authority for the ABA to express views should it decide to file an amicus curiae brief relating to an expected petition for writ of certiorari or on the merits before the U.S. Supreme Court in the case of SCA Hygiene Products AB v. First Quality Baby Products LLC, Appeal No. 13–1564, or another judicial proceeding presenting the same or similar issues regarding the scope of the laches defense in patent infringement suits.

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 policy would support submission of an amicus curiae brief on behalf of the ABA relating to a petition for writ of certiorari or on the merits before the U.S. Supreme Court in the case of SCA Hygiene Products AB v. First Quality Baby Products LLC, Appeal No.
13–1564, or another judicial proceeding presenting the same or similar issues regarding the scope of the laches defense in patent infringement suits.

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

Adoption of the recommendations would not result in additional direct or indirect costs to the Association.

9. Disclosure of Interest

There are no known conflicts of interest with regard to this recommendation.

10. Referrals

This recommendation is being distributed to each of the Sections and Divisions and Standing Committees of the Association.

11. Contact Person (prior to meeting)

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12. Contact Persons (who will present the report to the House)

Susan Barbieri Montgomery (See item 11 above).
EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution expresses ABA policy in support of a clarification of the law relating to the judicially created laches defense to patent infringement. Congress enacted a statutory six-year patent damages period (35 U.S.C. § 286). That statutory provision limits the availability of the laches defense, which cannot bar legal damages for patent infringement within that six-year damages period authorized by Congress. Of course, laches remains available as a defense where equitable relief is sought (such as injunctive relief and ongoing royalties). This is consistent with the U.S. Supreme Court’s treatment of the same defense in the copyright context.

2. Summary of the Issue that the Resolution Addresses

The U.S. Supreme Court eliminated the laches defense for copyright cases in Petrella v. Metro-Goldwyn-Mayer, Inc., 134 S. Ct. 1962 (2014). The Court reasoned that the judicially created laches defense must give way to the statutory three-year damages period in copyright. However, on September 18, 2015, the U.S. Court of Appeals for the Federal Circuit, sitting en banc, preserved the defense of laches for patent cases and distinguished Petrella. SCA Hygiene Products AB v. First Quality Baby Products LLC, 2015 WL 5474261 (Fed. Cir. Sept. 18, 2015) (en banc).

The resolution addresses whether the judicially created laches defense should bar legal relief in a patent infringement suit during the six-year damages period authorized by Section 286.

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

The issue relates to roles of the judicial and legislative branches of the federal government. In Petrella, the U.S. Supreme Court explained that congressional enactment of a statutory three-year copyright damages period (17 U.S.C. § 507(b)) has the effect of limiting availability of the judicially created laches defense as a bar to legal damages for copyright infringement.

The Resolution seeks a clarification that the same principle should apply to the patent law. Congressional enactment of a statutory six-year patent damages period (35 U.S.C. § 286) also has the effect of limiting availability of a laches defense as a bar to legal damages for patent infringement, although laches may still be a defense where equitable relief is sought (such as injunctive relief and ongoing royalties).

4. Summary of Minority Views

None known at this time.
RESOLVED, That the American Bar Association urges federal, state, tribal, and territorial courts and legislative bodies to adopt rules or enact legislation to establish an evidentiary privilege for confidential communications between a client and a lawyer referral service, thereby 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, and may prevent the lawyer referral service from disclosing, those confidential communications.

FURTHER RESOLVED, That the American Bar Association urges federal, state, tribal, and territorial courts and legislative bodies to adopt rules or enact legislation protecting the confidentiality of information relating to a client’s consultation with a lawyer referral service, including the identity of the client.
REPORT

I. Introduction

This resolution urges federal, state, tribal, and territorial courts and legislative bodies to adopt rules or enact legislation to establish an evidentiary privilege for confidential communications between a client and a lawyer referral service ("LRS") for the purpose of retaining a lawyer or obtaining legal advice from a lawyer. It generally facilitates and implements existing ABA policy that was adopted in August 1993, when the ABA adopted the ABA Model Supreme Court Rules Governing Lawyer Referral Services and the ABA Model Lawyer Referral and Information Service Quality Assurance Act. Both Rule XIV of the Model Supreme Court Rules the substance of 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.”

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. 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. In addition, each jurisdiction may wish to apply to this new privilege certain recognized exceptions to the attorney-client privilege.

The resolution also urges federal, state, tribal, and territorial courts and legislative bodies to adopt rules or enact legislation protecting the confidentiality of other information relating to the client’s consultation with the LRS, such as the identity of the client, which would be similar to the requirement of confidentiality outlined in ABA Model Rule 1.6. Each jurisdiction adopting or enacting such rules or legislation may wish to include certain reasonable exceptions that are similar to the recognized exceptions applicable to the attorney’s duty of confidentiality.

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.

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.
LRSs are usually non-profit organizations affiliated with a local or state bar association. 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, speaking with people who walk-in, or responding to electronically transmitted requests) 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 increasingly by email or over the Internet, 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 regularly is provided by the client to the LRS. Indeed, to be directed to the appropriate lawyer or government or non-profit office, clients need to disclose the same or similar information to the LRS that they would typically provide in an initial meeting with a law firm or legal aid organization’s office personnel or a lawyer – the who, what, where, when, why and how of their legal situations.

Without detailed client information, LRSs cannot function properly. Inaccurate referrals are frustrating to clients. What makes LRSs valuable is their ability to triage clients’ issues against the backdrop of knowledge of the government and nonprofit resources available, in addition to private lawyers in every area of law. LRSs are able to make appropriate referrals because they obtain detailed information needed to evaluate which is the appropriate resource for a given client. Lawyer referral services have been regularly questioned by clients about the issue of confidentiality of the information being provided, 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 recent years in a number of instances, litigants have sought discovery into such communications. In particular, the Bar Association of San Francisco was subpoenaed by a District Attorney concerning client communications. The issue was resolved without having to turn over any client communications. In 2015, the Akron Bar Association Lawyer Referral Service was forced to comply with a subpoena of its lawyer referral records concerning a referral to a panel attorney.

Without protection of the communications, clients would be forced to endure the frustrating experience of making multiple cold calls to different legal aid organizations or private lawyers, asking each time if his/her issue matches the organization’s limited mission or the lawyer’s particular area of practice, and repeatedly being told no. Ineffective referrals will result in clients not connecting with the appropriate agency, legal aid society, or lawyer and decreases the use of LRSs. This would be particularly unfortunate because two-thirds to three-quarters of referrals are not to private lawyers. LRSs provide a significant public service – not only to the clients they serve, but to the multitude of government agencies and nonprofits that benefit from accurate referrals to them.
When speaking on the phone to LRS personnel, clients are often anxious, angry, and upset about their legal issues; wish to explain their situation in great detail without being prompted to do so; and express concerns about deadlines and a desire for immediate legal assistance. In fact, referral counselors have no control over clients’ outbursts and as a result, clients often will provide potentially damaging or sensitive information immediately or soon after the referral counselor’s greeting. Similarly, clients’ seeking legal assistance on LRSs’ websites often ignore or resist the LRSs’ attempts to restrict the information clients provide. For example, while LRSs’ websites typically ask specific questions and then limit the number of characters a client can type in response, clients often express a clear preference for providing a detailed, open narrative in a text box in response to a general instruction, such as: “Briefly explain your legal issue and what result you would like to see.”

Although clients’ open narratives frequently include information that could harm the client’s criminal or civil case if revealed to adverse parties, LRSs’ cautions about not providing too much information are unlikely to be effective. Clients either ignore the caution altogether, and provide potentially damaging information without prompting, or they take the caution very seriously and provide little to no information, thereby frustrating any ability to make an accurate referral to a lawyer, government agency, or nonprofit organization. On the other hand, the most common alternative utilized by many other LRSs—forms with a series of specific questions—have a high abandonment rate with fewer completed submissions than a simple form with a general instruction that permits a more open-ended answer.

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.²

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

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
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, implied authorization or under specific, limited exceptions permitted by the rule. 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 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

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4 See ABA Model Rule 1.6, Comments 2 and 3.
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, with respect to the multitude of clients who are overly comfortable sharing damaging or sensitive information with LRS personnel without being prompted to do so, these clients are likely to be seriously harmed in the event of an opposing party’s successful discovery request. 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.

The lack of a clear privilege threatens the open communication necessary for LRSs to effectively triage the legal issues involved and match clients with appropriate lawyers, government agencies, non-profit programs or organizations, or other resources. Clients’ trust and confidence in LRSs might well quickly evaporate following publicized accounts of successful discovery requests to LRSs. Discouraging or impeding the free and candid communications between LRSs and clients will materially harm the ability of LRSs to help hundreds of thousands of people in need of legal assistance. Without open communication – including the exchange of information that might prompt LRS personnel to advise or warn a client about fast-approaching deadlines and other crucial aspects of the case – clients may prejudice their legal rights or suffer other serious harm.

This resolution urges federal, state, tribal, and territorial courts and legislative bodies to adopt rules or enact legislation establishing a new evidentiary 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. In addition, the resolution urges courts and legislative bodies to adopt rules or enact legislation requiring lawyer referral programs to keep other LRS client information, such as client identity, confidential.

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 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 evidentiary privilege for confidential communications between a client and a LRS and requiring lawyer referral services to keep other LRS client information confidential as well.

Respectfully Submitted,

C. Elisia Frazier, Chair
Standing Committee on Lawyer Referral and Information Service
February 2016

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GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Lawyer Referral and Information Service

Submitted By: C. Elisia Frazier, Chair

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 evidentiary 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. The resolution also urges courts and legislative bodies to adopt rules or enact legislation protecting the confidentiality of other information relating to the client’s consultation with the LRS, such as the identity of the client.

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?** An almost identical resolution (ABA Resolution 111) was submitted to the House prior to the 2015 Annual Meeting, but the resolution was voluntarily withdrawn to provide the sponsors an opportunity to further discuss the relevant issues with the ABA Standing Committee on Ethics and Professional Responsibility and add several minor clarifications and refinements to both the resolution and report. A similar principle was also incorporated into the ABA Model Supreme Court Rules Governing Lawyer Referral Services and the ABA Model Lawyer Referral and Information Service 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 and requiring lawyer referral services to keep other LRS client information confidential as well.

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.

   “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 evidentiary 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 evidentiary 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.** Business Law, Center for Professional Responsibility, Judicial Division, Litigation, National Conference of Bar Presidents, National Association of Bar Executives, Standing Committee on Client Protection, Standing Committee for Ethics and Professional Responsibility, Standing Committee on Professional Discipline

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

   C. Elisia Frazier  
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   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.

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   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 evidentiary 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. The resolution also urges courts and legislative bodies to adopt rules or enact legislation protecting the confidentiality of other information relating to the client’s consultation with the LRS, such as the identity of the client.

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 or attorneys for their specific legal needs. In most states, it is unclear under existing statutory or 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 have been 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 recent years 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 evidentiary 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.
RESOLUTION

1 RESOLVED, That the American Bar Association approves the Uniform Commercial
2 Real Estate Receivership Act, promulgated by the National Conference of
3 Commissioners on Uniform State Laws, as an appropriate Act for those states desiring to
4 adopt the specific substantive law suggested therein.
THE UNIFORM COMMERCIAL REAL ESTATE RECEIVERSHIP ACT

Summary

A receiver is someone appointed by a court to take possession of another person’s property and manage it. Receivers can be used in a variety of situations, including:

- When the property is the subject of a lawsuit and its value must be preserved while the issue is litigated;
- When the property includes an operating business, to sell its assets in an orderly manner and maximize the return for its owners and/or creditors; and
- When requested by a creditor, to collect, preserve, and distribute the property of an insolvent or defaulting debtor.

Currently, receivership procedures vary widely from state to state, and sometimes even from court to court. The Uniform Commercial Real Estate Receivership Act (UCRERA) provides a consistent set of rules for receiverships involving commercial property, including:

Due Process. Under UCRERA, the court may issue an order only after notice and opportunity for a hearing, unless no interested party requests a hearing or special circumstances require the issuance of an order before a hearing can be held.

Appointment. UCRERA establishes uniform standards under which a court may appoint a receiver, and under which a mortgage lender may obtain appointment of a receiver, either as a matter of right or as a matter of the court’s discretion.

Identity and Independence. Because a receiver is the agent of the court, UCRERA requires independent receivers. A party seeking the appointment of a receiver may nominate a person to serve, but the nomination is not binding on the court.

Effect of Appointment. On appointment, a receiver has the status of a lien creditor with respect to receivership property. However, pre-existing perfected security interests in receivership property are unaffected.

Powers and Duties. UCRERA sets out the receiver’s presumptive powers, as well as those that the receiver may exercise only with court approval. The act also sets out the duties of both the receiver and the owner of receivership property.

Use or Sale of Receivership Property. Receivers can use or sell receivership property in the ordinary course of business, but must get court approval for uses or transfers of property outside the ordinary course of business. With court approval, sales may be free and clear of liens and rights of redemption, except that junior lienholders may not force a
sale free and clear of liens without the consent of senior lienholders. Secured creditors are entitled to the proceeds of property sales according to existing priority rules.

**Existing Contracts and Leases.** A receiver may accept or reject a pre-existing contract with court approval, but UCRERA provides special protections for most commercial tenants of receivership property as well as tenants who occupy receivership property as their primary residences.

**Creditor Claims.** In most cases, a receiver must notify creditors of the receivership, and creditors must file claims with the receiver before receiving distributions from receivership property.

**Reporting.** A receiver must file periodic reports with the court overseeing the receivership, creating a public record of receivership accounts.

**Receivership in Context of Mortgage Enforcement.** Under UCRERA, a mortgage lender that requests appointment of a receiver is not liable as a possessor of receivership property and retains other remedies for enforcing the mortgage.

UCRERA provides a set of uniform rules that should provide more predictability to lenders and borrowers alike. It gives state courts guidance on the receivership process while preserving the court’s flexibility to craft a remedy appropriate under the circumstances.

The work of the Drafting Committee is available at www.uniformlaws.org, the ULC website. A direct link to the Uniform Commercial Real Estate Receivership Act is available here (http://www.uniformlaws.org/shared/docs/appointment%20and%20powers%20of%20real%20estate%20receivers/UCRERA_Final%20Act_2015.pdf)

Respectfully Submitted,

Richard T. Cassidy, President
National Conference of Commissioners on Uniform State Laws
February 2016
GENERAL INFORMATION FORM

Submitting Entity: National Conference of Commissioners on Uniform State Laws

Submitted By: Liza Karsai, Executive Director

1. Summary of Resolution(s).

The National Conference of Commissioners on Uniform State Laws (NCCUSL) requests approval of the Uniform Commercial Real Estate Receivership Act by the American Bar Association House of Delegates.

2. Approval by Submitting Entity.

The National Conference of Commissioners on Uniform State Laws granted final approval to the Act at its July 2015 Annual Meeting.

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

No.

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

No current ABA policies are affected.

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

Not applicable.

6. Status of Legislation. (If applicable)

The Uniform Commercial Real Estate Receivership Act has not yet been enacted in any state.

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

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

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

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

None.

10. **Referrals.**

Pursuant to the agreement between the NCCUSL and the ABA, all members of the House of Delegates and Chairs of all ABA entities were advised of the drafting project and those that expressed interest were notified of drafting meetings and provided with tentative drafts. The drafting committee’s work can be found [here](http://www.uniformlaws.org/Committee.aspx?title=Commercial%20Real%20Estate%20Receivership%20Act)

The ABA Advisor for the Uniform Commercial Real Estate Receivership Act was John Trott. Jeffrey Allen, James Schwartz, and Justin Williams were the Section Advisors for the ABA General Practice Section, and Kay Standridge Kress was the Section Advisor for the ABA Section on Business Law.

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

   Liza Karsai, NCCUSL Executive Director  
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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.)

   Richard Cassidy, NCCUSL President  
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EXECUTIVE SUMMARY

1. Summary of the Resolution

That the American Bar Association approves the Uniform Commercial Real Estate Receivership Act promulgated by the National Conference of Commissioners on Uniform State Laws in July 2015 as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

2. Summary of the Issue that the Resolution Addresses

The remedy of receivership is used to varying degrees in all states. Most commercial real estate loan contracts grant the lender the right to have a receiver appointed in case of default. However, the standard for appointment and the powers granted to receivers vary widely from state to state.

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

The act provides uniform standards for the appointment of receivers and gives courts needed guidance for granting powers to a receiver, while leaving enough flexibility for the court to design a remedy appropriate under the circumstances.

4. Summary of Minority Views

Some commercial lenders have expressed the view that lenders should have more power to control the court’s actions. There is no known opposition within the ABA.
RESOLVED, That the American Bar Association approves the Uniform Home Foreclosure Procedures Act, promulgated by the National Conference of Commissioners on Uniform State Laws, as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.
REPORT

THE UNIFORM HOME FORECLOSURE PROCEDURES ACT

Summary

The surge in foreclosure activity from 2007 through 2011 revealed major flaws in the current system. The bundling of individual mortgages into investment vehicles, sometimes without a clear paper trail of transactions, led to disputes over who had the legal right to foreclose on a property. Borrowers who fell behind on payments sometimes found themselves forced to deal with loan servicers that had no authority or incentive to negotiate a settlement. State court systems were overwhelmed with foreclosure cases, resulting in lengthy and expensive delays. The Uniform Home Foreclosure Procedures Act (UHFPA) provides an improved set of procedures designed to resolve residential foreclosure actions quickly, efficiently, and fairly to all concerned. Commercial real estate foreclosures are not affected by this act.

Article 1 contains definitions and general provisions. Through its definition of “mortgaged property,” UHFPA applies only to single-family homes and condominiums. All parties are required to act in good faith. Creditors and their servicers must refrain from making any misrepresentations about a homeowner’s rights. Municipalities may not enact local regulations that would conflict with the act, and any provision in a mortgage contract that purports to waive the borrower’s rights under this act is void.

Article 2 provides rules to ensure homeowners receive adequate notice of default before a creditor starts foreclosure proceedings. The notice must also disclose the homeowner’s right to cure the default.

Article 3 creates an innovative foreclosure resolution process where a neutral party attempts to help the parties negotiate a resolution agreeable to all. Homeowners facing foreclosure must be informed of their right to participate and provided with a list of local agencies or legal aid offices that provide counseling services. If the homeowner is occupying the property being foreclosed and makes a timely request for a meeting, the creditor is required to participate, but not necessarily to offer concessions.

Article 4 provides rules for the foreclosure process that help ensure fairness and a commercially reasonable sale. Section 403 provides the requirements for a creditor to foreclose when the document evidencing the obligation was lost or destroyed.

Article 5 provides for a negotiated resolution between the parties to a foreclosure action. Sometimes called “cash for keys,” this process allows the parties to agree on terms for the homeowner to vacate the property and turn over possession to the creditor without proceeding to a foreclosure sale.
Article 6 provides an expedited foreclosure procedure for abandoned properties, to help preserve maximum value for the property being foreclosed and its neighbors.

Article 7 provides remedies for violations of the UHFPA, and Article 8 includes miscellaneous provisions on applicability and relation to other laws.

The recent foreclosure crisis was worse than necessary due to outdated legal procedures that extended the process for many foreclosure actions, allowing homes to physically deteriorate and lose even more in value. Clear foreclosure and pre-foreclosure procedures benefit everyone by reducing unnecessary litigation and allowing quick and efficient resolution.

UHFPA is appropriate for enactment in all states, whether a judicial or nonjudicial foreclosure process is used.

The work of the Drafting Committee is available at www.uniformlaws.org, the ULC web site. A direct link to the Uniform Home Foreclosure Procedures Act is available here (http://www.uniformlaws.org/shared/docs/Residential%20Real%20Estate%20Mortgage%20Foreclosure%20Process%20and%20Protections/UHFPA_Final%20Act.pdf)

Respectfully Submitted,

Richard T. Cassidy, President
National Conference of Commissioners on Uniform State Laws
February 2016
GENERAL INFORMATION FORM

Submitting Entity: National Conference of Commissioners on Uniform State Laws

Submitted By: Liza Karsai, Executive Director

1. Summary of Resolution(s).

The National Conference of Commissioners on Uniform State Laws (NCCUSL) requests approval of the Uniform Home Foreclosure Procedures Act by the American Bar Association House of Delegates.

2. Approval by Submitting Entity.

The National Conference of Commissioners on Uniform State Laws granted final approval to the Act at its July 2015 Annual Meeting.

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

No.

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

This resolution complements existing ABA policies on Housing Courts and on Housing and Community Economic Development Initiatives.

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

Not applicable.

6. Status of Legislation. (If applicable)

The Uniform Home Foreclosure Procedures Act has not yet been enacted in any state.

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

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

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

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

None.

10. Referrals.

Pursuant to the agreement between the NCCUSL and the ABA, all members of the House of Delegates and Chairs of all ABA entities were advised of the drafting project and those that expressed interest were notified of drafting meetings and provided with tentative drafts. The drafting committee’s work can be found here (http://www.uniformlaws.org/Committee.aspx?title=Home%20Foreclosure%20Procedures%20Act)

The ABA Advisor for the Uniform Home Foreclosure Procedures Act was Barry Nekritz. Neil Rubenstein was the Section Advisor for the ABA Section of Business Law, and David Campbell was the Section Advisor for the ABA Section of Real Property, Trust and Estate Law.

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

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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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(802) 238-2809 (cell)
rcassidy@uniformlaws.org
EXECUTIVE SUMMARY

1. Summary of the Resolution

That the American Bar Association approves the Uniform Home Foreclosure Procedures Act promulgated by the National Conference of Commissioners on Uniform State Laws in July 2015 as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

2. Summary of the Issue that the Resolution Addresses

The recent housing downturn in the United States revealed flaws in the current foreclosure system. Widespread securitization of mortgage loans confused the issue of which party was entitled to enforce the mortgage. Courts were overwhelmed with cases resulting in lengthy delays, during which time some properties were abandoned and fell into disrepair, further eroding neighborhood property values.

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

The Uniform Home Foreclosure Procedures Act provides a sound set of rules for the foreclosure process. It protects creditors and homeowners from unethical abuse and encourages pre-foreclosure resolution when feasible. It also provides an expedited foreclosure process for abandoned property. The act is appropriate for both judicial and non-judicial foreclosure states.

4. Summary of Minority Views

The Uniform Home Foreclosure Procedure Act is based on sound public policy and aims to treat both lenders and homeowners with utmost fairness. As a result, some advocates from both groups would have preferred different policy choices and were dissatisfied with the final result. There is no known opposition within the American Bar Association.