**MEETING OF OFFICERS, COUNCIL AND COMMITTEE CHAIRS**

**Telephonic Council Meeting**  
July 26, 2016 3:00 PM ET  
866-646-6488 passcode 7282890493

**COUNCIL MEETING AGENDA**

<table>
<thead>
<tr>
<th>Item</th>
<th>Presenter</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Call to order; Introductions</td>
<td>William Rosenberg</td>
</tr>
<tr>
<td>2. Chair Report</td>
<td>William Rosenberg</td>
</tr>
<tr>
<td>2.1 Highlights from the Section Scorecard</td>
<td>William Rosenberg</td>
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<tr>
<td>2.2 Update on the Section Annual Meeting</td>
<td></td>
</tr>
</tbody>
</table>

**Action Items**

3. Consideration of Proposed 2016-2017 Budget     Linda Rusch/  
                                               Bill Johnston

4. Approval of Section Positions on Reports and   Lynne Barr/Barbara  
Recommendations, ABA House of Delegates          Mayden/Alvin Thompson/  
                                               Steve Weise
<table>
<thead>
<tr>
<th>Report</th>
<th>Sponsor and Subject</th>
<th>Reviewing Entity</th>
<th>Recommended Committee Position</th>
<th>Final Section Position</th>
</tr>
</thead>
<tbody>
<tr>
<td>102</td>
<td>NATIONAL CONFERENCE OF FEDERAL TRIAL JUDGES JUDICIAL DIVISION APPELLATE JUDGES CONFERENCE NATIONAL CONFERENCE OF STATE TRIAL JUDGES NATIONAL CONFERENCE OF SPECIALIZED COURT JUDGES NATIONAL CONFERENCE OF THE ADMINISTRATIVE LAW JUDICIARY TORT TRIAL AND INSURANCE PRACTICE SECTION</td>
<td>Business and Corporate Litigation Diversity and Inclusion Judges Initiative</td>
<td>Support</td>
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<td><strong>Urges the President of the United States and appropriate parties to recognize the importance of racial, ethnic, sexual orientation, gender identity and gender diversity in the selection process for United States Circuit Judges and United States District Judges, United States Bankruptcy and Magistrate Judges and for other qualified employees in the Judicial Branch of the United States, and to expand the diversity of the pool of qualified applicants, nominees and appointees, including without limitation, the use of diverse merit selection panels.</strong></td>
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<td>104</td>
<td>STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS COMMISSION ON HOMELESSNESS AND POVERTY COMMISSION ON INTEREST ON LAWYERS TRUST ACCOUNTS NATIONAL LEGAL AID AND DEFENDER ASSOCIATION</td>
<td>Business and Corporate Litigation Consumer Financial Services Pro Bono Nonprofit Organizations</td>
<td>Support</td>
<td>No position Support TBD</td>
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<td><strong>Urges jurisdictions to adopt court rules or legislation authorizing the award of class action residual funds to non-profit organizations that improve access to civil justice for persons living in poverty.</strong></td>
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<td>STANDING COMMITTEE ON LAWYER REFERRAL AND INFORMATION ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AUSTIN BAR ASSOCIATION BROOKLYN BAR ASSOCIATION CINCINNATI BAR ASSOCIATION LAW PRACTICE DIVISION 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 THE BAR ASSOCIATION OF SAN FRANCISCO NEW YORK STATE BAR ASSOCIATION</td>
<td>Professional Responsibility</td>
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<td><strong>108</strong></td>
<td>STANDING COMMITTEE ON LAWYER REFERRAL AND INFORMATION ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AUSTIN BAR ASSOCIATION BROOKLYN BAR ASSOCIATION CINCINNATI BAR ASSOCIATION LAW PRACTICE DIVISION 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 THE BAR ASSOCIATION OF SAN FRANCISCO NEW YORK STATE BAR ASSOCIATION</td>
<td>Urges federal, state, territorial and tribal courts and legislative bodies to adopt rules or enact legislation to establish an evidentiary privilege for lawyer referral services and their clients (“LRS clients”) for confidential communications between an LRS client and a lawyer referral service when an LRS client consults a lawyer referral service for the purpose of retaining a lawyer or obtaining legal advice from a lawyer.</td>
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<td><strong>108A</strong></td>
<td>SECTION OF INTELLECTUAL PROPERTY LAW</td>
<td>Intellectual Property</td>
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<td><strong>108B</strong></td>
<td>SECTION OF INTELLECTUAL PROPERTY LAW</td>
<td>Intellectual Property</td>
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<td><strong>108C</strong></td>
<td>SECTION OF INTELLECTUAL PROPERTY LAW</td>
<td>Intellectual Property</td>
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<td>Number</td>
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<td>109</td>
<td>STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE COMMISSION ON DISABILITY RIGHTS DIVERSITY &amp; INCLUSION 360 COMMISSION COMMISSION ON RACIAL AND ETHNIC DIVERSITY IN THE PROFESSION COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY</td>
<td>Amends Rule 8.4 and Comment of the ABA Model Rules of Professional Conduct to add an anti-discrimination and anti-harassment provision.</td>
<td>Oppose</td>
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<tr>
<td>111A</td>
<td>YOUNG LAWYERS DIVISION</td>
<td>Urges legislatures to enact laws that criminalize electronic grooming tactics that target children and make them vulnerable to victimization and encourages states to review criminal laws and engage stakeholders to ensure that laws governing sexual misconduct involving the internet are sufficient to protect children.</td>
<td>Support 2nd Clause TBD</td>
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<tr>
<td>112</td>
<td>SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE SECTION OF INTELLECTUAL PROPERTY LAW SECTION OF PUBLIC UTILITY, COMMUNICATIONS AND TRANSPORTATION LAW SECTION OF REAL PROPERTY, TRUST AND ESTATE LAW SECTION OF SCIENCE AND TECHNOLOGY LAW</td>
<td>Urges Congress to enact legislation to require federal agencies to provide an online source at which material that has been incorporated by reference into proposed or final regulations can be consulted without charge.</td>
<td>Support Support with suggested language tweak</td>
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<td>113</td>
<td>DIVERSITY &amp; INCLUSION 360 COMMISSION</td>
<td>Urges all providers of legal services, including law firms and corporations, to expand and create opportunities at all levels of responsibility for diverse attorneys and urges clients to assist in the facilitation of opportunities for diverse attorneys, and to direct a greater percentage of the legal services they purchase, both currently and in the future, to diverse attorneys.</td>
<td>Support</td>
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| 114 | STANDING COMMITTEE ON THE DELIVERY OF LEGAL SERVICES  
STANDING COMMITTEE ON LAWYER REFERRAL AND INFORMATION SERVICES  
STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS  
STANDING COMMITTEE ON PARALEGALS  
SPECIAL COMMITTEE ON HISPANIC LEGAL RIGHTS AND RESPONSIBILITIES  
COMMISSION ON INTEREST ON LAWYERS TRUST ACCOUNTS | Cyberspace Law | Support |
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<td>Urges courts and other governmental entities, bar associations, non-profit organizations and entrepreneurial entities that make forms for legal services available to individuals through the Internet to provide clear and conspicuous information on how people can access a lawyer or a lawyer referral service to provide assistance with legal matters.</td>
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<td>116</td>
<td>COMMISSION ON THE AMERICAN JURY</td>
<td>Business and Corporate Litigation</td>
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<td>Amends Principles 2(B) and 6(C) of the ABA Principles for Juries and Jury Trials to include marital status, gender identity and gender expression to the groups which should not be excluded from jury service, and to recommend that jurors be educated as to implicit bias and how to avoid such bias in the decision making process.</td>
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RESOLVED, That the American Bar Association urges the President of the United States and
United States Senators to emphasize the importance of racial, ethnic, disability, sexual
orientation, gender identity and gender diversity in the selection process for United States Circuit
Judges and United States District Judges and to employ strategies to expand the diversity of the
pool of qualified applicants, nominees and appointees to the U.S. District Court and U.S. Circuit
Court of Appeals, including without limitation, the use of diverse merit selection panels.

FURTHER RESOLVED, That the American Bar Association urges the United States Circuit
Courts of Appeals and the Circuit Judicial Councils to emphasize the importance of racial, ethnic, disability, sexual orientation, gender identity and gender diversity in the selection process for United States Bankruptcy Judges and to employ strategies to expand the diversity of the pool of qualified applicants, nominees and appointees to the Bankruptcy Court, including without limitation, the use of diverse merit selection panels.

FURTHER RESOLVED, That the American Bar Association urges the United States District
Courts to emphasize the importance of racial, ethnic, disability, sexual orientation, gender
identity and gender diversity in the selection process for United States Magistrate Judges and to
employ strategies to expand the diversity of the pool of qualified applicants, nominees and appointees to United States Magistrate Judge positions, including without limitation, the use of diverse merit selection panels.

FURTHER RESOLVED, That the American Bar Association urges the Judicial Conference of
the United States, federal courts, defender organizations, and the court support agencies to
recognize the importance of racial, ethnic, disability, sexual orientation, gender identity and
gender diversity in the hiring process and to expand the diversity of the pool of qualified
employees in the Judicial Branch of the United States.

FURTHER RESOLVED, That the American Bar Association urges its members to facilitate the
selection of judges reflecting racial, ethnic, disability, sexual orientation, gender identity and
gender diversity by identifying, encouraging, assisting, and mentoring qualified diverse
candidates to seek selection as judges.
REPORT

Introduction

Diversity of both the profession and the bench is critical to ensuring public trust and confidence in our system of justice. In her recent opinion to The Washington Post, Stanford Professor Deborah L. Rhode writes, “From the outside, the legal profession seems to be growing ever more diverse. Three women are now on the Supreme Court. Loretta Lynch is the second African American to hold the position of attorney general. The president and first lady are lawyers of color. Yet according to Bureau of Labor statistics, law is one of the least racially diverse professions in the nation. Eighty-eight percent of lawyers are white...”¹ Thus, the diversity, or lack thereof, of the legal profession is an issue that cannot be ignored. This Report will specifically focus on the diversity of the federal judiciary.

Federal judges fall into two basic groups: Article III judges who are appointed by the President upon confirmation by the Senate, and Article I judges, some of whom also come to the bench by way of Presidential appointment and Senate confirmation, and others who are appointed by other federal judges. The first category, Article III judges, includes federal district and circuit judges who are appointed for life terms. The second group, Article I judges, includes magistrate judges who are appointed by district judges for eight year renewable terms and bankruptcy judges who are appointed by circuit judges for fourteen year renewable terms.² It is important to closely examine both groups’ diversity patterns. Some suggest that the diversity of the federal judiciary, indeed the diversity of the profession, should be measured against the diversity of the American people.³ While progress has been discernible, for these measurements to be on par, there is a long road ahead.

Definition of Diversity

The definition of diversity includes: “racial, ethnic, disability, sexual orientation, gender identity and gender diversity.” The ABA has a longstanding and unwavering commitment to increasing the appointment of diverse persons to the federal judiciary. Judicial diversity helps ensure that officials representing the judiciary reflect those whom the system serves, thus helping to promote public confidence in the decisions rendered. While the Administrative Office of the United States Courts (AO) collects data on racial, ethnic and gender diversity, it does not provide any information with regard to disability, sexual orientation, or gender identity of the bench. Reporting data on the demographics of the federal judiciary provides a very important tool in ensuring judicial diversity. There have been very few openly gay members of the District and Circuit courts. Recently, President Barack Obama has successfully nominated a number of members of the LGBT community; however, the number of judges is not confirmed by the AO,


² Frank J. Bailey, Does the Federal Article I Bench Reflect the Ethnicity of the Populations It Serves? What If the Answer Is No?, JUDGES’ J. (forthcoming Spring 2016).

³ Fair Employment Practices Officer, the Office of Fair Employment Practices of the Administrative Office of the U.S. Courts Briefing at ABA Roundtable on Diversity of Article I Federal Judges (July 29, 2015) [hereafter referred to as “ABA Roundtable”].
nor is there any information with regard to magistrate, bankruptcy judges or staff. Likewise, information with regard to disabilities is unavailable. Although the discussion below focuses on those areas for which there is data, the accompanying Resolution still encourages the appointing authority to consider all forms of diversity in the appointive process. It is the intention of the proponents of this Resolution to work with the AO and other entities to provide this diversity information in the future.

Background: Advances in the Diversity of the Federal Bench

Federal courts, both Article III and Article I, have become measurably more diverse in recent years. Indeed, the federal bench was over 80% male in 2000, but by 2014, that number had decreased to 68%. Gender diversity achievements in the magistrate and bankruptcy courts have been impressive: between 2000 and 2014 the magistrate judge and bankruptcy judge benches have increased female representation by over 10%. As to ethnicity, in 2000 only 12% of the federal bench was non-Caucasian whereas that percentage was over 16% in 2014. The data is clear that the Article III benches have diversified more quickly than their magistrate and bankruptcy court colleagues. Non-Caucasian Article III judges made up over 23% of the federal bench in 2014, while the equivalent number for magistrate judges was 14.6% and 5.6% for bankruptcy judges. Still, progress has been made on the Article I benches: nearly 90% of magistrate judges and 95% of bankruptcy judges were Caucasian in 2000. While reliable data is not readily available, anecdotal evidence suggests that these magistrate and bankruptcy benches have further diversified in the past eighteen to twenty-four months, but that data is not reflected in the most recent reports from the AO.

Plainly, overall ethnicity of the bar affects the pool of candidates from which appointments to any federal bench can be made. As noted above, 88% of lawyers nationwide identify themselves as Caucasian. Certain states have attempted to keep track of ethnicity. In 2011, consistent with national numbers, almost 87% of the members of the New York State Bar Association identified themselves as Caucasian. In Illinois, a similar survey in 2008 revealed that nearly 83% of the bar identified as Caucasian. In California, over 20% of the members of the bar identified themselves as ethnic minorities in 2014. Thus, while the “color of the bar” is slowly changing,
the legal profession remains significantly non-diverse and is not yet reflective of the general population. Therefore, the pool of diverse candidates from which federal judges can be selected is small. Measured against the ethnicity of the bar, diversity in the overall federal judiciary has been impressive. But, more needs to be done if the federal benches are to reflect the population as a whole.

**Encouraging Diversity in the Selection of United States Circuit and District Court Judges**

This Resolution urges the President of the United States and United States senators to recognize the importance of racial, ethnic, disability, sexual orientation, gender identity and gender diversity in the selection process for United States circuit judges and United States district judges and to expand the diversity of the pool of qualified applicants, nominees and appointees to these benches, as well as the diversity of merit selection panels where used. 12

2013 census data can be used to compare the racial and ethnic makeup of the general population with the makeup of the federal judiciary, presented by state and broken down by ethnicity. 13 According to the U.S. Census Summary, as of 2013, the estimated general population was 73% Caucasian; 13% African-American; 16% Hispanic; 5% Asian American; .9% Native American/Alaskan; and .2% Pacific Islander/Hawaiian. 51% of the general population was estimated as female, and 49% male. 14 The Article III Bench was 75.6% Caucasian; 12% African American; 9% Hispanic; 2.5% Asian American; 0.3% Native American; 0.4% Pacific Islander; and .3% unreported. 15 Moreover, just about a third of appellate judges (31.5%) and district judges (31.2%) were female; and this percentage of disparity appears to be decreasing. 16 To demonstrate some minor changes, in 2014, the Article III Bench was 72.3% Caucasian; 11.6% African American; 9% Hispanic; 2.4% Asian American; and .4% Pacific Islander; 0% Native American; and 4.3% were unreported. 32.3% of Article III judges were female. 17

By reallocating the population data out of state boundaries and into federal judicial districts and then accumulating the data into judicial circuits, the ethnic breakdown in each district and circuit can be identified. 18 Further, ethnic breakdown of federal judges is available from the AOUSC. 19 With this information, the ethnic makeup of the general populations in the judicial districts and circuits (rather than by state boundaries) can be compared to the ethnic makeup of the benches in those locations. Implications from this data are clear: overall, the judicial officer population does not yet appear to reflect the general population that those officers serve. 20 Clearly one of the largest impediments to the diversity of the bench is the diversity of the bar. Although 73% of the population is Caucasian, 88% of the legal profession is. 21 This restricts the pool of diverse candidates. Therefore, those selecting judges have to work harder to encourage qualified,
diverse candidates to apply. To a degree, those selecting judges have done so; in most circuits, the bench is more diverse than the profession. However, more can be done. Greater diversity on the bench may also encourage greater diversity within the profession.

A more diverse bench promotes the public’s confidence in the judiciary. As Judge Frank J. Bailey of the United States Bankruptcy Court for the District of Massachusetts explains, “when the entire bench in a district is Caucasian the litigant from an ethnic minority may feel an implied bias. When the entire bench in a certain court is Caucasian, an ethnic minority lawyer may not feel that it is possible to achieve an appointment to the bench on that court. ...”22 Moreover, “[w]hen judges do not look like the defendants or litigants in court, or if there is a perception that people of color are treated with bias, communities of color will have a more difficult time turning to the courts and trusting their decisions.... When entire communities lose faith in an essential component of our system of government, we all lose.”23 The data is clear: while discrepancy in diversity is not as broad as with the bankruptcy and magistrate courts, more effort must be made to ensure greater diversity of the Article III bench.

**Encouraging Diversity in the Selection of United States Bankruptcy and Magistrate Court Judges**

This Resolution further urges the U.S. Circuit Courts of Appeals and the Circuit Judicial Councils to continue to recognize the importance of racial, ethnic, disability, sexual orientation, gender identity and gender diversity in the selection process for federal bankruptcy judges, and for the U.S. District Courts to continue to do the same in the selection process for magistrate judges, and to expand the diversity of the pool of qualified applicants, nominees and appointees to the magistrate and bankruptcy court benches, including the use of diverse merit selection panels.

By far, the largest number of cases filed in federal court are those filed in bankruptcy courts, and most American citizens have their federal court experience in front of a bankruptcy judge.24 Moreover, magistrate judges handle the day to day work of thousands of federal cases, civil and criminal, and often the first federal judge on the scene at an arraignment is a magistrate judge. Thus, it matters a great deal that those who appear before bankruptcy and magistrate judges perceive that they are being treated fairly.25

For magistrate judges, Judicial Conference rules require that a merit selection panel be established by the district judges to select qualified candidates. Jud. Conf. Rules, 420.20.10.26 The merit selection panel must consist of at least seven members, including two non-lawyers, and no district court judge or retired Article III judge may serve on the panel. The rules now state as follows: “To further efforts to achieve diversity in all aspects of the magistrate judge

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22 Id.
24 Andre Davis, U.S. Court of Appeals for the Fourth Circuit, ABA Roundtable.
25 Id.
26 Bailey, supra note 2.
selection process, the court is encouraged to appoint a diverse selection panel.” Jud. Conf. Rules, 420.30.20. The merit selection panel has a duty to “make an affirmative effort to identify and give due consideration to all qualified applicants without regard to race, color, age (40 and over), gender, religion, national origin, or disability.” Jud. Conf. Rules 420.30.30.

Even with the encouragement of the guidelines, the magistrate judge bench is less diverse than the overall Article III Bench. According to the statistics provided by the AO, as of 2013, the magistrate judge bench was 82% Caucasian; 6.4% African American; 4.4% Hispanic; 2.1% Asian American; .2% Native American; .2% Pacific Islander; and 4.7% unreported. Only about a third of magistrate judges were female, or 30.6%. In 2014, to show minor variation, the magistrate judge bench was 84.2% Caucasian; 6.2% African American, 3.8% Hispanic; 2.5% Asian American; .3% Native American; .2% Pacific Islander; and 2.8% were unreported. 34.8% of the magistrate judges were female.

The bankruptcy bench is even less diverse. As of 2013, the bankruptcy bench was 92.6% Caucasian; 2.6% African American; 1.6% Hispanic; .8% Asian American; 0% Native American; 0% Pacific Islander; and 2.4% unreported. While advances have been made on gender diversity, still only about a third of bankruptcy judges were female, or 30.6%. In 2014, the bankruptcy bench was 90.9% Caucasian; 2.9% African American; 1.6% Hispanic; 1.1% Asian American; 0% Native American; 0% Pacific Islander; and 3.5% unreported. 30.6% of the bankruptcy judges were female.

In 2013, the Institute for the Advancement of the American Legal System (the “IAALS”) at the University of Denver studied the selection, appointment and reappointment process for federal bankruptcy judges. The study involved interviews with circuit executives, circuit judges, bankruptcy judges, and merit selection panelists in all federal judicial circuits where there are regular vacancies for bankruptcy judges. Although the Judicial Conference of the United States has adopted guidance on the selection of bankruptcy judges, unlike with magistrate judges, the guidance is not mandatory. The judicial councils have adopted a wide range of approaches to the selection process. Most all circuits appoint a merit selection panel to coordinate the process, including advertising the vacancy, soliciting applicants, gathering the application materials, conducting interviews, checking references, and recommending a slate of qualified candidates to the circuit judges for appointment. Guidelines offer little detail relating to diversity, and though there is of course a requirement that the selection process be free of any discrimination, there is no affirmative guidance in the regulations. Thus, it is up to each circuit

27 Id.
28 Id.
29 Fair Employment Practices Officer, supra note 3.
30 Fair Employment Practices Officer, supra note 3.
31 Fair Employment Practices Officer, supra note 3.
32 Fair Employment Practices Officer, supra note 3.
34 Id.
35 Id.
36 Id.
37 Id.
court to adopt any requirements it might deem appropriate to ensure that diverse candidates apply and are given an opportunity for appointment.\textsuperscript{38}

One of the primary challenges surrounding the selection of bankruptcy judges is that, when making judicial appointments, the merit selection panel may, logically, look for candidates with the most extensive bankruptcy experience. By emphasizing bankruptcy expertise, the goal of increased diversity may suffer very early in the hiring process. If candidates are drawn from what is generally regarded as a non-diverse bar, the diversity of the applicant pool may not be substantial. By the time the finalists are presented to the circuit court, there is little the court can do to find diverse candidates. Should bankruptcy expertise be the deciding factor in the appointment process, or should a highly talented, diverse candidate that lacks subject matter expertise be given the edge? Can the law be learned through exposure in the same way that many district judges, with little prior experience in either civil or criminal matters, can still successfully preside over such matters? It should also be noted that in certain circuits, the notices of vacancy for bankruptcy judges now de-emphasize the level of bankruptcy practice experience in favor of more generalized legal expertise and personal skills. The First Circuit, for example, recently sought applicants for a vacancy with “outstanding legal ability and competence as evidenced by substantial legal experience, ability to deal with complex legal problems, aptitude for legal scholarship and writing, and familiarity with courts and court processes.”\textsuperscript{39} They also encouraged applicants to “possess demeanor, character, and personality to indicate that they would exhibit judicial temperament . . .” But, nowhere did the First Circuit’s application notice stress bankruptcy law experience, thus encouraging a broad range of applicants with high achievement in the legal profession.

Diversity on the bankruptcy bench is particularly important in relation to perceptions of justice.\textsuperscript{40} Studies have shown that when a merit selection panel is itself diverse, the likelihood of a diverse pool of applicants and a diverse appointee is increased, and when a merit selection panel consists only of bankruptcy practitioners (and judges), the applicants and appointees tend to be less diverse because they are regular participants in the practice, which is itself often non-diverse.\textsuperscript{41} One possible way to increase demographic diversity among bankruptcy judges without making diversity an explicit factor in the selection decision, could be demographic diversity of the merit selection panel itself. Research demonstrates that there is a link between the diversity of the panel’s membership and the diversity of applicants, nominees, and appointees.\textsuperscript{42} One solution may be to revise the Judicial Conference Rules for the appointment of bankruptcy judges so as to bring them in line with those for the appointment of magistrate judges.\textsuperscript{43}

“The pipeline method” is another important strategy, in which organizations reach out to youth directly, encouraging them to pursue a career in justice and present future career options in the federal judiciary.\textsuperscript{44} The diversity of the bench is not by any means the responsibility of the

\textsuperscript{38} \textit{Id.}
\textsuperscript{39} United States Court of Appeals for the First Circuit website, http://www.ca1.uscourts.gov/news/vacancy-us-bankruptcy-judge
\textsuperscript{40} \textit{Id.}
\textsuperscript{41} \textit{Id.}
\textsuperscript{42} \textit{Id.}
\textsuperscript{43} Bailey, supra note 2.
\textsuperscript{44} Fair Employment Practices Officer, supra note 3.
President and the judges alone. The American Bar Association, along with state, local and specialty bar associations, has an obligation to both develop and encourage the diversity of the profession. The legal profession is the least diverse among other professions, such as medical doctors or accountants. The broader bar is in the best position to take steps on multiple fronts to garner the interest of more minorities and women to pursue a career in law. Bar associations should develop programs to encourage those who demonstrate the necessary legal skill and moral character to become judges. Likewise, specialty bars, such as the bankruptcy bar, must take steps to be more inclusive and to offer training and courses to allow lawyers to expand and improve their expertise within the field. These actions will allow the court a deeper pool of diverse candidates from which to choose the most qualified individuals to sit on the bench.

Sitting federal judges can assist the cause of diversity by ensuring that their interns and law clerks represent diverse backgrounds. Increasing the pipeline of qualified candidates, however, is a long-term solution and may have little impact short term. Nominating committees and merit selection panels should acknowledge and address forcefully the existence of implicit bias so that the issue may be faced head-on.

**Encouraging Diversity of Employees of the Judicial Branch of the United States**

Finally, this Resolution urges the Judicial Conference of the United States, federal courts, defender organizations, and the court support agencies to recognize the importance of racial, ethnic, disability, sexual orientation, gender identity and gender diversity in the development of hiring goals and in the hiring process and to expand the diversity of the pool of qualified employees in the Judicial Branch of the United States. It is not only important for the judiciary to reflect the general population in which it serves, but also those employees who work with the judges and assist in their decision making.

**Conclusion**

With the acknowledgment that there exists a lack of diversity in the federal judiciary, this Resolution is intended to highlight potential effective ways to address the issue, and to encourage the development of new practices that enhance diversity. There is reason to believe that both the Article III and Article I (bankruptcy and magistrate courts) benches have become more diverse since 2013. Nevertheless, turnover is slow among those with lifetime appointment as well as among those with terms of either eight or fourteen years. The principal reason cited for a lack of diversity on the federal bench is that the pipeline of diverse applicants for judicial openings is not robust. Qualified diverse candidates must be encouraged to apply and must be mentored to understand the standards that are required to obtain appointments as a federal judge. Pipeline recruitment is an effective strategy in targeting minority students and encouraging them to consider a career in the federal judicial branch. This, however, is a long term approach that will take years to have an impact. It is also essential to have a diverse merit selection panel, as this can engender more diverse nominations and, in turn, a more diverse pool of applicants from

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45 Id.
46 Fair Employment Practices Officer, supra note 3.
47 Bailey, supra note 2.
48 Id.
which the courts of appeals (for bankruptcy judges) and the district courts (for magistrate judges) select. Selection committees need to widen their outreach to the legal community to build a wider pool of candidates. There is no doubt that “[d]iversity on the bench means more perspectives are brought to bear on complicated issues, and this leads to better decisions.”\textsuperscript{49} The diversity of the third branch has been improving over time, however the employment of these strategies and the continuation of this critical discussion will most quickly and efficiently allow for a more representative federal judiciary which better reflects, and thus serves, the American population.

To ensure the advancement of these ideas, the Judicial Division of the American Bar Association intends to report back to the House of Delegates, through the appropriate committee, the diversity of the appointments to these benches every five years after the approval of this resolution.

Respectfully submitted,
Hon. Nannette Baker, Chair
National Conference of Federal Trial Judges

Mr. Michael Bergmann, Chair
Judicial Division
August 2016

\textsuperscript{49} Michele L. Jawando & Billy Corriher, supra note 23, at 6.
GENERAL INFORMATION FORM

Submitting Entity: National Conference of Federal Trial Judges; Judicial Division

Submitted By: Judge Nannette Baker, Chair, National Conference of Federal Trial Judges
              Mr. Michael Bergmann, Chair, Judicial Division

1. Summary of Resolution(s).

This Resolution urges the appropriate parties to recognize the importance of racial, ethnic, disability, sexual orientation, gender identity and gender diversity in the selection process for United States Circuit Judges and United States District Judges, United States Bankruptcy and Magistrate judges, and for other qualified employees in the Judicial Branch of the United States, and to expand the diversity of the pool of qualified applicants, nominees and appointees, including without limitation, the use of diverse merit selection panels.

2. Approval by Submitting Entity.

The National Conference of Federal Trial Judges voted by email to approve this Resolution and Report on March 24, 2016. The Lawyers Conference, National Conference of Specialized Court Judges, National Conference of State Trial Judges, Appellate Judges Conference and National Conference of Administrative Law Judiciary all voted by email to cosponsor the Resolution and Report on March 25, 2016 and March 28, 2016. The Judicial Division voted to co-sponsor the Resolution and Report on April 5, 2016, during its monthly Judicial Division Council conference call. Finally, the Tort Trial and Insurance Practice Section voted to co-sponsor and notified the Judicial Division on May 5, 2016. After additional input from Judicial Division conferences and outside supporting entities, the decision was made to include the word “disability” within the definition of diversity; each named cosponsor approved and voted to remain a cosponsor by email during the week of May 9, 2016.

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

Yes. A related draft of the Resolution and Report was initially submitted for consideration of the House at the 2016 ABA Midyear Meeting, however, the item was withdrawn before the House agenda was even drafted. While the idea behind the policy has always had full support of all Judicial Division conferences, the Resolution and Report were revised after receiving additional input and commentary from each Judicial Division conference, in order to garner full support and cosponsorship of each Judicial Division conference.

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

At the 1995 ABA Midyear Meeting, the ABA House of Delegates adopted “Recommendation 111,” calling for the President of the United States to appoint minority lawyers of racial and ethnic diversity to all levels of the federal judiciary, including the United States Supreme Court.
This Resolution is also fully in sync with Goal III of the ABA, to Eliminate Bias and Enhance Diversity through (1) the promotion of full and equal participation in the association, our profession and the justice system by all persons; and (2) elimination of bias in the legal profession and the justice system. This Resolution, if adopted, only enhances and supports existing ABA policy and goals.

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 Judicial Division will work with judges and outside entities to increase the use, size, and diversity of merit selection panels. It will develop training materials on the issue of diversity. The Judicial Division will also reach out to various partners within the ABA and outside to work on long-term strategies to increase the diversity pool of qualified candidates.

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

None.

9. Disclosure of Interest. (If applicable)

N/A

10. Referrals.

National Conference of State Trial Judges
National Conference of the Administrative Law Judiciary
National Conference of Specialized Court Judges
Lawyers Conference
Appellate Judges Conference
Commission on Racial and Ethnic Diversity in the Profession
Commission on Diversity and Inclusion 360
Coalition on Racial and Ethnic Justice
Council for Racial and Ethnic Diversity in the Educational Pipeline
Section of Administrative Law and Regulatory Practice
Section of Business Law
Criminal Justice Section
Government and Public Sector Lawyers Division
Section of Rights and Social Justice
Section of Labor and Employment Law
Section of Litigation
Tort Trial & Insurance Practice Section
Young Lawyers Division
Law Student Division
Section of State and Local Government Law
Standing Committee on the American Judicial System

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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T: 617.748.6650
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EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution urges the appropriate parties to recognize the importance of racial, ethnic, disability, sexual orientation, gender identity and gender diversity in the selection process for United States Circuit Judges and United States District Judges, United States Bankruptcy and Magistrate Judges, and for other qualified employees in the Judicial Branch of the United States, and to expand the diversity of the pool of qualified applicants, nominees and appointees, including without limitation, the use of diverse merit selection panels.

2. Summary of the Issue that the Resolution Addresses

Diversity of both the profession and the bench is critical to ensuring public trust and confidence in our system of justice, yet law is one of the least diverse professions in the nation. This resolution specifically focuses on increasing the diversity of the federal judiciary, so that the diversity of the federal judiciary can be equally measured against the diversity of the American people. For these measurements to be on par, there is a long road ahead.

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

The proposed policy position addresses the lack of diversity in the federal judiciary by drawing attention to the problem, using data as factual evidence, and by encouraging those responsible to take action by using appropriate tools and techniques to expand the diversity of the pool of qualified applicants, nominees and appointees to the bench, including without limitation, the use of diverse merit selection panels. The accompanying Report also calls for the Judicial Division of the ABA report back to the House of Delegates, through the appropriate committee, the diversity of the appointments to these benches every five years. By tracking the progress, invested parties will continue to be aware of the problem and work towards a solution.

4. Summary of Minority Views

There are no minority views known at this time.
RESOLVED, That the American Bar Association urges state, local, territorial and tribal jurisdictions to adopt court rules or legislation authorizing the award of class action residual funds to non-profit organizations that improve access to civil justice for persons living in poverty.

FURTHER RESOLVED, That before class action residual funds are awarded to charitable, non-profit or other organizations, all reasonable efforts should be made to fully compensate members of the class, or a determination should be made that such payments are not feasible.
REPORT

Introduction

The unmet need for civil legal services among those living in poverty is well documented: study after study has demonstrated that the majority of poor people who need civil legal services are turned away due to a severe shortage of legal aid resources. This not only has grave consequences for the people who are unable to get this critical legal help; everyone with matters before the courts and the justice system suffers as well as a result of the large increase in people left with no choice but to represent themselves in court on often complex legal matters.

Funding for legal aid services is woefully inadequate and the Association annually organizes bar leaders from around the country to lobby for more funding for the Legal Services Corporation to partially address this problem. The Association has adopted policy statements in support of adequate funding for LSC, as well as called upon bar associations and lawyers to “undertake vigorous leadership and aggressive advocacy to identify, pursue and implement creative initiatives that will result in new funding mechanisms for legal services providers.”

A creative initiative that has now been adopted in 19 U.S. jurisdictions helps provide critical funding for legal aid while at the same time providing a balanced resolution to what otherwise can often become a thorny issue in class action litigation. Specifically, these rules and statutes authorize non-profit organizations that improve access to civil justice for persons living in poverty as appropriate recipients of awards of undistributed class action settlement residuals. This resolution seeks to have the Association go on record as supporting this approach for the reasons articulated below.

The Origins of the Cy Pres Doctrine

Cy pres awards are distributions of the residual funds from class action settlements or judgments (and occasionally from other proceedings, such as probate and bankruptcy matters) that, for various reasons, are unclaimed or cannot be distributed to the class members or other intended recipients. The term cy pres derives from the Norman-French phrase, cy pres comme possible, meaning “as near as possible.” Originating at least as early as sixth-century Rome, the cy pres doctrine has its roots in the laws of trusts and estates, operating to modify charitable trusts that specified a gift that had been granted to a charitable entity that no longer existed, had become infeasible, or was in contravention of public policy. In such instances, courts transferred the funds to the next best use that would satisfy “as nearly as possible” the trust settlor’s original intent.

When class actions are resolved through settlement or judgment, it is not uncommon for excess funds to remain after a distribution to class members. Residual funds are often a result of the inability to locate class members or class members failing or declining to file claims or cash

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1 House of Delegates policy resolution 95A124.
settlement checks. Such funds are also generated when it is “economically or administratively infeasible to distribute funds to class members if, for example, the cost of distributing individually to all class members exceeds the amount to be distributed.”

In these circumstances courts have used the cy pres doctrine to accomplish the distribution of residual funds to charities that benefit persons similarly-situated to the plaintiffs, or that advocate to improve access to justice more generally. This preserves the deterrent effect of the class action device, and allows courts to distribute residual funds to charitable causes that reasonably approximate the interests pursued by the class action for absent class members who have not received individual distributions.

Cy Pres is a Well-Established Practice

The application of the cy pres doctrine in class actions, as with any other doctrine throughout legal history, has evolved as courts have been required to grapple with complex and unique facts and circumstances in each particular case. Because of such complexities, trial courts sometimes fashion unique cy pres distributions; some such awards have been reversed on appeal. The vast majority of such reversals are not for “abusing” the cy pres doctrine (i.e., using cy pres for personal gain for counsel or judges). Rather, most reversals are due to the misapplication of the doctrine within the particular circumstances of the case (e.g., failure to make every effort to fully compensate class members or misalignment between the interests of the class members and the interests of the cy pres recipients). While addressing these problems, federal courts have consistently found that the cy pres doctrine is valid in the class action context. The American Law Institute’s Principles of Law of Aggregate Litigation (“ALI Principles”) agrees and provides key guidance on the application of cy pres awards in class actions, which is respected and generally followed by the courts. The ALI Principles acknowledge that “many courts allow a settlement that directs funds to a third party when funds are left over after all individual claims have been satisfied . . . [and] some courts allow a settlement to require a payment only to a third party, that is, to provide no recovery at all directly to class members.”

With respect to funds left over after a first-round distribution to class members, the ALI Principles express a policy preference that residual funds should be redistributed to other class members until they recover their full losses, unless such further distributions are not practical:

If the settlement involves individual distributions to class members and funds remain after distribution (because some class members could not be identified or chose not to participate), the settlement should presumptively provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair.

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2 In re Baby Prods. Antitrust Litig., 708 F.3d 163, 169 (3d Cir. 2013)
3 PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07 cmt. a (2010) [hereinafter ALI PRINCIPLES]
4 ALI PRINCIPLES, supra note 3, § 3.07(b)
As the ALI Principles recognize, when further distributions to class members are not feasible, the court has discretion to order a cy pres distribution, which puts the settlement funds to their next-best use by providing an indirect benefit to the class.

**Legal Aid and Access to Justice Organizations Are Appropriate Recipients of Cy Pres Distributions**

The fundamental purpose of every class action is to offer access to justice for a group of people who on their own would not realistically be able to obtain the protections of the justice system. This purpose is closely aligned with the mission of every civil legal aid and access to justice initiative across the nation.

In class action suits, when distributions to the class members are not feasible, it is necessary to determine other recipients who would be appropriate to receive the residual cy pres funds. The ALI Principles state that such recipients should be those “whose interests reasonably approximate those being pursued by the class,” and, if no such recipients exist, “a court may approve a recipient that does not reasonably approximate the interests” of the class.\(^5\)

Courts evaluate whether distributions to proposed cy pres recipients “reasonably approximate” the interest of the class members by considering a number of factors, including: the purposes of the underlying statutes claimed to have been violated, the nature of the injury to the class members, the characteristics and interests of the class members, the geographical scope of the class, the reason why the settlement funds have gone unclaimed, and the closeness of the fit between the class and the cy pres recipient.

Organizations with objectives directly related to the underlying statutes or claims at issue in the relevant class action are clearly appropriate cy pres recipients. But narrowly limiting the scope of appropriate cy pres recipients to the precise claims in the class action may not always be possible or practical. Too narrow of a focus on the subject matter of the case can unnecessarily complicate the socially desirable settlement of large class action disputes. In a typical class action, counsel for plaintiffs and a defendant are resolving a complex dispute, and the disposal of residual funds is typically a detail in a larger resolution. While some court opinions speak of residual funds as “penalties” or “recoveries” for violations of the law, settling defendants usually see themselves as making a pragmatic business decision that specifically avoids any admission that they violated the law. Moreover, settling defendants have a practical interest in how residual funds are used, and may wish to avoid funding interest groups that campaign against the interests of the defendant.

There have been cases where parties improperly attempted to direct cy pres awards to causes that had no connection to the class or the case or to access to justice through the courts. Examples have included general awards to charities or educational institutions with no particular relationship to the class action. The concerns in the cy pres context are not about whether these

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\(^5\) ALI PRINCIPLES, *supra* note 3, § 3.07(c)
are good and effective charities and institutions; it is their relevance to the class action where there are residual funds to be awarded. In some instances, the reasons for including the organization have not been articulated, leaving the appeals court to guess about the connection of a particular organization to the issues of the case.

An appropriate recipient in most cases will be a legal services organization, so long as the underlying premise of expanding access to justice is properly articulated. Thus, federal and state courts throughout the country have long recognized organizations that provide access to justice for low-income, underserved, and disadvantaged people as appropriate beneficiaries of cy pres distributions from class action settlements or judgments. The access to justice nexus falls squarely within ALI Principles’ guidance that “there should be a presumed obligation to award any remaining funds to an entity that resembles, in either composition or purpose, the class members or their interests.”

An issue that sometimes arises in disposition of class action residuals is whether the scope of a suit (local or national) has been properly matched to the scope of a cy pres award. It is clearly disfavored under the case law for a cy pres award in a national class action case to be directed solely to a local charity. One advantage of an award to an organization with a broad access to justice mission is that such organizations exist throughout the country so any distribution can easily be structured to take into account the national nature of the case.

Because organizations with broad access to justice missions are widely recognized as appropriate recipients of cy pres awards, a growing number of states have adopted statutes or court rules codifying the principle that cy pres distributions to organizations promoting access to justice are an appropriate use of residual funds in class action cases. The state courts and legislatures in 19 states have adopted rules and statutes that specify, as appropriate cy pres recipients, charitable entities that promote access to legal services for low-income individuals. Nine of these courts and legislatures have mandated a minimum baseline distribution (usually 25% to 50%) to the pre-approved category of recipients. Because such statutes and court rules establish that it is permissible for any residual funds in class action settlements or judgments to be distributed to organizations that provide access to justice/civil legal aid, they make clear that such organizations are distinct from other charitable causes that have drawn legitimate concerns regarding a lack of nexus with the interests of the class members.

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6 ALI PRINCIPLES, supra note 3, § 3.07 cmt. b.
7 The states are: California, Colorado, Connecticut, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maine, Massachusetts, Montana, Nebraska, New Mexico, North Carolina, Oregon, Pennsylvania, South Dakota, Tennessee, Washington. As of this writing, it has been reported that the Wisconsin Supreme Court adopted a petition for a cy pres rule, which is expected to become effective January 1, 2017 after final orders are drafted.
8 The states with rules requiring a percentage of cy pres awards to be devoted to access to justice organizations are: Colorado (50%), Illinois (50%), Indiana (25%), Kentucky (25%), Montana (50%), Oregon (50%), Pennsylvania (50%), South Dakota (50%) and Washington (50%). When effective, Wisconsin (50%) will become the 10th state.
Conclusion

Class action litigation has become an important device for resolving a wide range of disputes between individual plaintiffs and corporate defendants. Cy pres awards of undistributed class action settlement residue are an important part of the settlement process. Distributing funds to appropriate recipients is a practical variant of the cy pres device long recognized in trust law and is generally accepted as preferable to returning undistributed funds to the settling defendants or escheat of those funds to the state.

Awards of class action settlement funds should follow these principles: (1) compensation of class members should come first; (2) cy pres awards are appropriate where cash distributions to class members are not feasible; (3) cy pres recipients should reasonably approximate the interests of the class; (4) cy pres distributions should recognize the geographic make-up of the class, and where circumstances dictate should be made on the basis of such factors; (5) legal aid and access to justice organizations should be considered as appropriate cy pres recipients.

The American Bar Association therefore urges that state, local, territorial, and tribal jurisdictions adopt court rules or legislation that authorize non-profit organizations that improve access to civil justice for persons living in poverty as appropriate recipients of class action residual funds.

Respectfully submitted,

Jacquelynne J. Bowman, Member
Standing Committee on Legal Aid & Indigent Defendants

August 2016
1. **Summary of Resolution(s).**

This resolution urges jurisdictions to adopt court rules or legislation that authorize non-profit organizations that improve access to civil justice for persons living in poverty as appropriate recipients of class action residual funds. It states that before residual funds are awarded to such organizations, all reasonable efforts should be made to fully compensate members of the class, or it should be determined that such payments are not feasible.

2. **Approval by Submitting Entity.**

April 2016

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

This resolution has not been previously submitted.

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

This resolution is consistent with prior policy that urges adequate funding for civil legal aid organizations.

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.)

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

The resolution will be circulated to advocates for civil legal aid funding in the states.

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

None

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

N/A

10. **Referrals.**

Section of Litigation  
Section of Business Law  
Section of Tort Trial and Insurance Practice  
Section of Civil Rights and Social Justice  
Section of Taxation  
Judicial Division  
Young Lawyers Division  
Standing Committee on the Delivery of Legal Services  
Standing Committee on Pro Bono and Public Service  
Commission on Domestic and Sexual Violence  
Commission on Homelessness and Poverty  
Commission on Immigration  
Commission on Disability Rights  
Commission on Interest on Lawyers’ Trust Accounts  
Commission on Law and Aging  
Commission on Youth at Risk  
Commission on Women in the Profession  
Commission on Hispanic Legal Rights and Responsibilities  
Center for Racial and Ethnic Diversity  
Commission on Racial and Ethnic Diversity in the Profession  
Coalition on Racial and Ethnic Justice  
Commission on Sexual Orientation and Gender Identity  
National Legal Aid and Defender Association  
National Association of Women Judges
11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address.)

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Standing Committee on Legal Aid and Indigent Defendants  
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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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Standing Committee on Legal Aid and Indigent Defendants  
261st Judicial District Court  
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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges jurisdictions to adopt court rules or legislation that authorize non-profit organizations that improve access to civil justice for persons living in poverty as appropriate recipients of class action residual funds. It states that that before residual funds are awarded to such organizations, all reasonable efforts should be made to fully compensate members of the class, or it should be determined that such payments are not feasible.

2. Summary of the issue which the Resolution Addresses

Access to justice organizations should always be considered to be appropriate recipients of class action residual awards. It is not always clear, absent specific authorizing rules or statutes, that such awards are permissible.

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

The resolution clarifies that access to justice organizations are appropriate recipients of class action residual awards.

4. Summary of Minority Views

No opposing views have been expressed by other ABA entities or organizations as of the preparation of this summary.
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 lawyer referral services and their clients ("LRS clients") for confidential communications between an LRS client and a lawyer referral service, when an LRS client consults a lawyer referral service for the purpose of retaining a lawyer or obtaining legal advice from a lawyer.
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 lawyer referral services and their clients ("LRS clients") for confidential communications between an LRS client and a lawyer referral service for the purpose of retaining a lawyer or obtaining legal advice from a lawyer. It generally facilitates and implements the goal of existing ABA policy (93A 10D), 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 and Section 6 of the Model Act 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.”

Shielding communications between legal referral services and those seeking legal assistance from discovery remains important, but, despite the existing ABA policy, the protection of those communications remains uncertain, in part because the communications often do not involve a lawyer. This Resolution therefore urges a complementary approach: establishing a new lawyer referral service-LRS client privilege similar to the privilege that currently exists for confidential communications between attorneys and their clients. Such new privilege should provide that a person or entity who consults a lawyer referral service 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. The lawyer referral service-LRS client privilege would belong to the LRS client, and the LRS client would have the authority to waive the lawyer referral service-LRS client privilege. In addition, each jurisdiction may wish to apply to this new privilege certain of the recognized exceptions to the attorney-client privilege, including, for example: a) the crime/fraud exception (see, e.g., Cal. Evid. Code § 956 (crime/fraud exception to the attorney-client privilege; Cal. Evid. Code § 968(a) (crime/fraud exception to the lawyer referral service-client privilege)); b) the fiduciary exception (see, e.g., Restatement (Second) of Trusts § 173, cmt. b; Garner v. Wolfinbarger, 430, F.2d 1093 (5th Cir. 1970), but note that a number of states do not recognize this exception); and/or c) any overriding public policy exceptions.

II. Background on Lawyer Referral Services

Lawyer referral services help connect LRS clients (people, businesses, and other entities) seeking legal advice or representation with attorneys or organizations who are qualified to assist the LRS clients with their specific legal needs. In addition to providing an important service to the public, lawyer referral services provide an important service for attorneys by helping them to get new clients and grow their practices.
Lawyer referral services are usually non-profit organizations affiliated with a local, state or territorial bar association. There are hundreds of these organizations, and they assist hundreds of thousands of LRS clients every year connect with a lawyer. Some state governments and/or bar associations regulate and certify local lawyer referral services, such as in California. In addition, the ABA offers its own accreditation to lawyer referral services. While some lawyer referral services are directed by attorneys, most of the staff who do “intake” (answering phone calls from LRS 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. Lawyer referral services all invariably have adopted confidentiality rules requiring the intake staff to keep confidential the information provided consumers.

The lawyer referral process begins when the LRS 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 lawyer referral service either provides the LRS client with contact information for one or more attorneys whose expertise is appropriate to the problem or directs the LRS 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 LRS client to the lawyer referral service. Indeed, to be directed to the appropriate lawyer or government or non-profit office, LRS clients need to disclose the same or similar information to the lawyer referral service 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.

Lawyer referral services are able to make appropriate referrals because they obtain detailed information needed to evaluate which is the appropriate resource for a given LRS client. Without detailed LRS client information, lawyer referral services cannot function properly. Inaccurate referrals are frustrating to LRS clients as they delay their ability to connect with a lawyer who is qualified to handle their matter if the LRS client so desired. What makes lawyer referral services valuable is their ability to triage LRS clients' issues against the backdrop of knowledge of the government and nonprofit resources available, in addition to private lawyers in every area of law. Lawyer referral services are regularly questioned by LRS clients about the issue of confidentiality of the information being provided, and most, while they can assure the consumer that it is the lawyer referral service’s policy to keep the information provided confidential, are unable to reassure LRS clients that their communications are clearly privileged. This can hamper the kind of open communication required to make the right referral. More importantly, however, the lack of privilege may chill prospective LRS clients from seeking the assistance of a lawyer referral service and consequently deprive them of the ability to obtain competent and affordable counsel to assist with their legal problem. Moreover, in recent years in a number of instances, litigants have sought discovery of such communications. In particular, the Bar Association of San Francisco was subpoenaed by a District Attorney concerning LRS client communications. The issue was resolved without having to turn over any LRS 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. This resolution seeks to protect lawyer referral services and LRS clients from these types of subpoenas.
Until it is made clear that the communications are protected, LRS clients may 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. Indeed, even uncertainty as to whether the communications are protected can and does have this affect. Ineffective referrals do and will result in LRS clients not connecting with the appropriate agency, legal aid society, or lawyer and decrease the use and utility of lawyer referral services. This is particularly unfortunate because two-thirds to three-quarters of referrals are not to private lawyers. Lawyer referral services provide a significant public service — not only to the LRS 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 lawyer referral service personnel, LRS 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 LRS clients’ outbursts and as a result, LRS clients often will provide potentially damaging or sensitive information immediately or soon after the referral counselor’s greeting. Similarly, LRS clients seeking legal assistance on lawyer referral services’ websites often ignore or resist the lawyer referral services’ attempts to restrict the information LRS clients provide. For example, while lawyer referral services’ websites typically ask specific questions and then limit the number of characters an LRS client can type in response, LRS 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 LRS clients’ open narratives frequently include information that could harm the LRS client’s criminal or civil case if revealed to adverse parties, lawyer referral services’ cautions about not providing too much information are unlikely to be effective. LRS 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, based on an informal survey of LRIS administrators throughout the country, the most common alternative utilized by many other lawyer referral services—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

The concept of attorney-client privilege concerns information that the lawyer must keep private and facilitates the client’s ability to confide freely in his or her lawyer. 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 representation or advice, 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 fully and candidly with lawyers, which, in turn, enables the clients to receive the most competent legal advice from fully-informed counsel. The attorney-client privilege contributes to the trust that is the hallmark of the confidential attorney-client relationship. The privilege belongs to the client, not to the lawyer, and so the client is always free to waive the privilege.

The attorney-client privilege is 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.

IV. The Problem and the Solution

If an LRS client reveals confidential information to a lawyer referral service 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 lawyer referral service 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 lawyer referral service itself. Thus, some courts may conclude that the attorney-client privilege does not apply to communications between LRS clients and lawyer referral services (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 LRS clients and lawyer referral services, making it difficult for the lawyer referral service to gather the information necessary to make a referral to the appropriate lawyer, government agency, not-for-profit program or other source of help. LRS clients sometimes ask lawyer referral services 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 LRS clients feel comfortable sharing as much information as possible with a lawyer referral service 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 LRS clients who are overly comfortable sharing damaging or sensitive information with lawyer referral service personnel without being prompted to do so, these LRS clients are likely to be seriously harmed in the event of an

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consent, implied authorization, or under specific, limited exceptions permitted by the rule. Violations of the rules may lead to disciplinary sanctions. This Resolution does not suggest any changes or additions to such rules.
opposing party’s successful discovery request. In a number of instances, as cited above, litigants have sought discovery from a lawyer referral service with respect to confidential communications with an LRS client, and it is likely this will continue to occur.

The lack of a clear privilege threatens the open communication necessary for lawyer referral services to effectively triage the legal issues involved and match LRS clients with appropriate lawyers, government agencies, non-profit programs or organizations, or other resources. LRS clients’ trust and confidence in lawyer referral services might well quickly evaporate following publicized accounts of successful discovery requests to lawyer referral services. Discouraging or impeding the free and candid communications between lawyer referral services and LRS clients will materially harm the ability of lawyer referral services to help hundreds of thousands of people in need of legal assistance. Without open communication – including the exchange of information that might prompt lawyer referral service personnel to advise or warn an LRS client about fast-approaching deadlines and other crucial aspects of the case – LRS 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 an LRS client and a lawyer referral service in order to eliminate any uncertainty as to the privileged status of such communications from an LRS client seeking legal counsel. It would enable lawyer referral services to reassure LRS 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 lawyer referral service concerning its confidential communications with the other party.

The ABA previously expressed support for the goal 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.”

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2 See Resolution (93A 10D),

3 In 1998, the ABA adopted a general policy against extending the attorney-client privilege to accountants and other non-lawyers: “RESOLVED, That the American Bar Association opposes legislation such as S. 1737 pending before the 105th Congress which would extend the attorney-client privilege to accountants and others not licensed to practice law.” The 1993 policy appears to control as it specifically addresses lawyer referral services, while the 1998
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 should not be provided to funding sources absent client consent. In particular, Resolution (01M 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 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." 4

Despite the fact that the ABA Model Supreme Court Rules and the ABA Model Act urging that the attorney-client privilege be extended to cover lawyer referral service-LRS client communications were adopted in 1993, whether such protection is afforded remains uncertain. Only one state (California) has taken action on this issue at all, creating a new lawyer referral service-client privilege similar to the one urged in this Resolution, and one other state (New York) has proposed legislation taking a similar approach. Moreover, the communications at issue in this Resolution often do not involve a lawyer, and at the same time, lawyer referral services want to be careful to avoid any suggestion that they are "practicing law" or providing legal representation without a license to do so. Therefore, it is time for the ABA to revise and aggressively implement the goal 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 an LRS client and a lawyer referral service.

Respectfully Submitted,

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

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4 See Resolution (01M8A), Resolved Clause 3.
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 lawyer referral services and their clients ("LRS clients" or "LRS client") for confidential communications between an LRS client and a lawyer referral service for the purpose of retaining a lawyer or obtaining legal advice from a lawyer. The new lawyer referral service-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.

2. Approval by Submitting Entity. Standing Committee on Lawyer Referral Services, by email on April 25, 2016

3. Has this or a similar resolution been submitted to the House or Board previously? Almost identical resolutions were submitted to the House prior to the 2015 Annual Meeting (Resolution 15A111) and the 2016 Mid-Year Meeting (Resolution 16M113), but the resolutions were voluntarily withdrawn to provide the sponsors an opportunity to further discuss the relevant issues with the ABA Standing Committees on Ethics and Professional Responsibility and Professional Discipline 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 Quality Assurance Act, previously adopted by the ABA House of Delegates as policy in August 1993 (See Resolution 93A10D). However, while Resolution 93A10D urged state supreme courts and legislatures to apply the attorney-client privilege to confidential communications between LRS 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 LRS clients and lawyer referral services.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? This resolution is generally consistent with the goal of Resolution (93A 10D), which adopts Rule XIV of the ABA Model Supreme Court Rules Governing Lawyer Referral Services and Section 6 of the ABA Model Lawyer Referral and Information Service Quality Assurance Act. Both Rule XIV and Section 6 provide as follows:

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

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

In addition, the proposed resolution is generally consistent with ABA Resolution (01M 8A), 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. Resolution (01M 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-LRS client privilege that is similar to the attorney-client privilege, the resolution is also generally consistent with Resolution (05A 111, 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? N/A


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, Criminal Justice, 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, Division for Legal Services, and the CPR/SOC Professional Responsibility Committee.

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

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

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

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

1. Summary of the Resolution

This resolution urges federal, state, tribal, and territorial courts and legislatures to adopt rules or enact legislation establishing a new evidentiary privilege for lawyer referral services and their clients ("LRS clients" or "LRS client") for confidential communications between client and a lawyer referral service for the purpose of retaining a lawyer or obtaining an LRS legal advice from a lawyer. The new lawyer referral service-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.

2. Summary of the Issue that the Resolution Addresses

Lawyer referral services provide a public service in helping LRS clients to find legal representation (and attorneys find clients). In order to provide this service, lawyer referral services must first obtain information from each LRS 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 an LRS 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 LRS clients about this issue, and most are unable to reassure LRS 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 an LRS 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 supports the treatment of the likelihood-of-confusion standard in federal trademark law as a question of fact.
REPORT

This Resolution and Report concerns the trademark law “likelihood-of-confusion” test for infringement and, in particular, whether the test should be treated as a question of fact or law or a mixed question of fact and law. This Resolution favors treatment of the test as a question of fact. If the issue arises on appeal or in Congress, approval of this Resolution by the House of Delegates would support an Association amicus curiae brief encouraging the treatment of the likelihood-of-confusion test as a question of fact or legislation that would codify treatment as a question of fact by amending the federal trademark statute, the Lanham Act, 15 U.S.C. § 1051 et seq.

Trademarks allow consumers to identify the source of a product. As consumers become familiar with certain products and the companies that sell them, they come to expect consistent quality in all products sold by particular companies. Trademark laws allow companies to protect their brand, and the expectation of quality or other goodwill they have established with customers. It accomplishes that by preventing competitors from using a mark that is the same as or so similar that it is likely to confuse consumers as to whether the product was made by or is being sold by the company that first used the trademark. The legal test for challenging the use of a mark that might mislead consumers is the “likelihood of confusion test.” The ultimate question, based on the weighing of several factors—such as the similarity of the two trademarks, the notoriety of the first trademark, the similarity of the products—is whether consumers are likely to be confused as to the source of the goods.

Given the fact-intensive nature of this inquiry, most circuit courts consider likelihood of confusion a question of fact to be decided by a jury. Consistent with that, the U.S. Supreme Court recently held that a similar trademark issue that also requires a fact-intensive assessment made from the perspective of a reasonable person or community should be left to a jury and not a district court to decide. Hana Fin., Inc. v. Hana Bank, 135 S. Ct. 907 (2015) (“Hana Financial”). “Tacking” in trademark law is a doctrine under which a trademark owner may make certain modifications to its mark over time while preserving its claim to prior use, the test being whether the two marks create the same continuing impression on consumers so that they consider them the same. In “Hana Financial,” the Supreme Court held that the jury, rather than a court, determines whether the use of an older trademark may be tacked to a newer one. The Supreme Court explained that when the relevant question is how an ordinary person or community would make an assessment, the jury is generally the decision maker that ought to provide the fact-intensive answer. Like tacking, the likelihood of confusion test employs factors that require an inquiry into consumers’ perception. Because the likelihood of confusion test is a similar fact-intensive assessment made from the perspective of an ordinary person or community, that question also should be left to a jury and not a district court.

A few circuits, however, consider likelihood of confusion a mixed question of fact and law, reviewing a district court’s determination on each factor for clear error, while the court’s ultimate balancing of those factors is treated as a matter of law subject to de novo review. That treatment of this fact-intensive inquiry flies in the face of long-standing principles of jurisprudence that delicate assessments of the inferences to be drawn by a reasonable person or
community should be left to a jury. Therefore, the Section of Intellectual Property Law proposes this Resolution to establish Association policy that favors treatment of the likelihood of confusion test is a question of fact.

A. Likelihood of Confusion Test Is a Fact Intensive Inquiry

A mark infringes upon the rights of another when the second mark is likely to cause confusion with a first mark. 15 U.S.C. §§ 1114, 1143(a); Rosco, Inc. v. Mirror Lite Co., 304 F.3d 1373, 1384 (Fed. Cir. 2002). Actual confusion need not be proven, the mark owner need only show the likelihood that a reasonable consumer of the goods or services could mistake the origin of the goods or services identified by the mark. To determine whether likelihood of confusion exists between two marks, all jurisdictions have established very similar multi-factor tests.

The factors currently used by the regional circuit courts to determine whether a mark is likely to confuse consumers are based on factors first stated in Polaroid Corp. v. Polarad Elect. Corp., 287 F.2d 492 (2d Cir. 1961). These factors, sometimes known as the “Polaroid factors,” the specifics of which may vary slightly as applied throughout the country, generally include:

- Strength of the senior user’s mark. The stronger or more distinctive the senior user’s mark, the more likely the confusion.
- Similarity of the marks. The more similarity between the two marks, the more likely the confusion.
- Similarity of the products or services. The more that the senior and junior user’s goods or services are related, the more likely the confusion.
- Likelihood that the senior user will bridge the gap. If it is probable that the senior user will expand into the junior user’s product area, the more likely there will be confusion.
- The junior user’s intent in adopting the mark. If the junior user adopted the mark in bad faith, confusion is more likely.
- Evidence of actual confusion. Proof of consumer confusion is not required, but when the trademark owner can show that the average reasonably prudent consumer is confused, it is powerful evidence of infringement.
- Sophistication of the buyers. The less sophisticated the purchaser, the more likely the confusion.
- Quality of the junior user’s products or services. In some cases, the lesser the quality of the junior user’s goods, the more harm is likely from consumer confusion.

When applying these multi-factor tests, typically no single factor determines whether confusion is likely, and not all factors carry the same weight. See Bd. of Supervisors for La. State Univ. Agric. & Mech. Coll. v. Smack Apparel Co., 550 F.3d 465, 478 (5th Cir. 2008). The Trademark Trial and Appeal Board (“TTAB”) uses a variation of the above factors, called the DuPont factors, in making the same assessment regarding the registrability of a mark. Palm Bay Imps. v. Veuve Clicquot Ponsardin, 396 F.3d 1369, 1371 (Fed. Cir. 2005); In re E.I. du Pont de Nemours & Co., 476 F.2d 1357 (CCPA 1973). Clearly, the issue of likelihood of confusion is a fact-intensive inquiry.
Most circuits, including the First, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth Eleventh, and District of Columbia, treat likelihood of confusion as a question of fact. That is because the fact-intensive nature of the inquiry is better suited for a jury to decide than a district court. See *Wendt v. Host Int'l*, Inc. 125 F.3d 806, 812 (9th Cir. 1997) (“The Lanham Act’s ‘likelihood of confusion’ standard is predominantly factual in nature . . . .”); *Palateria La Michoacana, Inc.*, 69 F. Supp. 3d at 196 (“[I]t is less than ideal for a court, sitting in relative isolation, to speculate about what consumers may think regarding the similarity of two marks as a question of law.”); *MDT Corp. v. N.Y. Exch., Inc.*, 858 F. Supp. 1028, 1032 (C.D. Cal. 1994) (“[S]ummary judgment disfavored in trademark cases because the ultimate issue of likelihood of confusion is so inherently factual.”).

Not all circuits treat likelihood of confusion as a question of fact. A few circuits, including the Second and the Sixth, consider likelihood of confusion a mixed question of fact and law. In such mixed question circuits, the courts “review the district court’s determinations as to each separate factor . . . for clear error, while the court’s ultimate balancing of those factors is a matter of law subject to de novo review.” *Starbucks*, 588 F.3d at 105 (citation omitted). Similarly, the Federal Circuit treats likelihood of confusion as a question of law subject to de novo review, but reviews underlying findings of fact by the U.S. Patent and Trademark Office (“PTO”) under the substantial evidence standard. *In re Majestic Distilling Co.*, 315 F.3d 1311, 1314 (Fed. Cir. 2003); see also *Jack Wolfskin Ausrustung Fur Draussen GmbH & Co. v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 1369 (Fed. Cir. 2015). As a result, there is a circuit split on whether likelihood of confusion is a question of fact for the jury to determine, or to be ultimately decided by the court.

In *Hana Financial*, the Supreme Court held that the fact-intensive issue of tacking, a doctrine under which a trademark user may make certain modifications to its mark over time while maintaining priority, was a question of fact for the jury and not the district court. The issue to be determined when a trademark owner relies on previous use of a similar mark is whether the two marks for which continuing priority is sought are similar enough that they “create the same,
continuing commercial impression” so that consumers “consider both as the same mark.” *Van Dyne-Crotty, Inc. v. Wear-Guard Corp.*, 926 F. 2d 1156, 1159 (Fed. Cir. 1991). The question is very similar to that of likelihood of confusion and is also very fact-intensive.

The Supreme Court held that when the relevant question is how an ordinary person or community would make an assessment, the jury is generally the decision maker that ought to provide the fact-intensive answer. The Court went on to explain that a jury is better positioned than a judge to decide such questions:

Application of a test that relies upon an ordinary consumer’s understanding of the impression that a mark conveys falls comfortably within the ken of a jury. Indeed, we have long recognized across a variety of doctrinal contexts that, when the relevant question is how an ordinary person or community would make an assessment, the jury is generally the decisionmaker that ought to provide the fact-intensive answer. See, e.g., *United States v. Gaudin*, 515 U.S. 506, 512 (1995), 115 S.Ct. 2310, 132 L.Ed. 2d 444 (1995) (recognizing that “delicate assessments of the inferences a ‘reasonable [decisionmaker]’ would draw . . . [are] peculiarly one[s] for the trier of fact”’ (quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 450; 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976); first alteration in original)); *id.*, at 450, n. 12, 96 S.Ct. 2126 (observing that the jury has a “unique competence in applying the ‘reasonable man’ standard”); *Hamling v. United States*, 418 U.S. 87, 104-105, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974) (emphasizing “the ability of the juror to ascertain the sense of the ‘average person’” by drawing upon “his own knowledge of the views of the average person in the community or vicinage from which he comes” and his “knowledge of the propensities of a ‘reasonable’ person”); *Railroad Co. v. Stout*, 17 Wall. 657, 664, 21 L.Ed. 745 (1874) (“It is assumed that twelve men know more of the common affairs of life than does one man, [and] that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge”).

*Id.* at 911. The Supreme Court also distinguished between construing patent claim terms, like the terms of a contract, which “is one of those things that judges often do and are likely to do better than jurors,” and the “tacking inquiry, [which] by contrast, involves a factual judgment about whether two marks give the same impression to consumers. Making that kind of judgment is not, as discussed above, ‘one of those things that judges often do’ better than jurors.” *Id.* at 911 n.2. Therefore, the Supreme Court’s holding in *Hana Financial*—that tacking is a question of fact—is highly instructive as to how the Supreme Court would have decided, had it been before the Court, on the issue of likelihood of confusion.

**E. As in Hana Financial, a Jury Should Decide Fact-Intensive Determinations of How a Community Would Make an Assessment**

Should the Supreme Court be given an opportunity to rectify the inconsistent treatment of the question by a few circuits as a mixed question or a question of law, the Supreme Court would likely find that the likelihood-of-confusion inquiry is a question of fact, based upon language from *Hana Financial*. Although tacking and likelihood of confusion are distinct factual
questions, both require the evaluation of consumer perception and commercial impression. Like tacking, the likelihood of confusion test employs factors that require an inquiry into consumers' perception. Indeed, as noted by at least one circuit, tacking "stems from the same 'bloodlines' as the issue of likelihood of confusion because whether two marks impart the same commercial impression is a heightened scrutiny of the likelihood of confusion analysis." Adventis, Inc. v. Consol. Prop. Holdings, Inc., No. 7:02-CV-00611, 2006 WL 1134129, at *5 (W.D. Va. Apr. 24, 2006).

Consumer perception permeates the likelihood of confusion inquiry, further evidencing that the inquiry is a question of fact best suited for juries. Anheuser-Busch, Inc. v. L & L Wings, Inc., 962 F.2d 316, 318 (4th Cir. 1992). "Likelihood of confusion is determined on the basis of a 'reasonably prudent consumer.'" Survivor Media, Inc. v. Survivor Prods., 406 F.3d 625, 630 (9th Cir. 2005); see also Star Indus. v. Bacardi & Co., 412 F.3d 373, 383 (2d Cir. 2005); Heartland Bank v. Heartland Home Fin., 335 F.3d 810, 822 (8th Cir. 2003). This requires consideration of "[w]ho is the reasonably prudent consumer?" Brookfield Commc'ns, 174 F.3d at 1048. "The purchaser contemplated is the ordinary one who uses ordinary caution 'buying under the usual conditions prevailing in the trade, and giving such attention as such purchasers usually give in buying that class of goods.'" David Sherman Corp. v. Heublein, Inc., 340 F.2d 377, 379 (8th Cir. 1965). Consumer surveys are often used to prove likelihood of confusion and are considered by courts to be the most persuasive evidence of the same. Vision Sports, Inc. v. Melville Corp., 888 F.2d 609, 615 (9th Cir. 1989) ("An expert survey of purchasers can provide the most persuasive evidence of secondary meaning."); Tone Bros. v. Sysco Corp., 28 F.3d 1192, 1204 (Fed. Cir. 1994) ("Consumer surveys are recognized by several circuits as the most direct and persuasive evidence of secondary meaning." (internal quotation marks omitted)). Indeed, it may be folly not to offer such a survey. Gimix, Inc. v. JS&A Grp., Inc., 213 U.S.P.Q. 1005, 1006 (N.D. Ill. 1982) ("Neither side in this case has produced any consumer surveys or other similar evidence. Both sides are at fault for such laxness."). aff'd, 699 F.2d 901 (7th Cir. 1983). The likelihood of confusion factors require an assessment of consumer perception.

For example, sophistication of consumers in the relevant market by its very nature requires understanding what level of care consumers use when making choices in the marketplace. Restatement (Third) of Unfair Competition § 20 (1995) ("The reasonably prudent purchaser often invoked in determining likelihood of confusion is the ordinary purchaser of the goods or services buying with ordinary care. As with the standard of the reasonable person in negligence cases, the discernment exercised by a reasonably prudent purchaser varies with the circumstances."). By way of another example, "the strength of a mark depends ultimately on its distinctiveness, or its 'origin-indicating' quality, in the eyes of the purchasing public." Savin Corp. v. Savin Grp., 391 F.3d 439, 457 (2d Cir. 2004). Yet another example is that, "[c]losely related products are those that would reasonably be thought by the buying public to come from the same source, or thought to be affiliated with, connected with, or sponsored by, the trademark owner." CAE, Inc. v. Clean Air Eng'g, Inc., 267 F.3d 660, 679 (7th Cir. 2001). "[B]ecause the rights of an owner of a registered trademark extend to any goods that might be, in the minds of consumers, 'related,' i.e., put out by a single producer, the more accurate inquiry is whether the public is likely to attribute the products and services to a single source." Id. The likelihood of confusion test is a similarly fact-intensive issue and just such a community assessment; like tacking, it therefore also should be left to a jury and not a district court.
Conclusion

The central focus in evaluating trademark infringement is the fact-intensive determination of how a community would assess whether the use of an accused mark is likely to cause confusion, to cause mistake or to deceive. As the U.S. Supreme Court has recently held as to a similar fact-intensive trademark issue and assessment on the inferences to be drawn by reasonable people, the determination of whether a mark is likely to cause confusion should be left for the jury to decide. Consistent with that, the resolution calls for the Association to adopt policy the American Bar Association supports the treatment of the likelihood-of-confusion standard as a question of fact.

Respectfully submitted,

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

The resolution calls for the Association to adopt policy supporting the treatment of the likelihood-of-confusion standard as a question of fact. Given the fact-intensive nature of the inquiry, most circuit courts consider likelihood of confusion a question of fact to be decided by a jury. And in *Hana Fin., Inc. v. Hana Bank*, 135 S. Ct. 907 (2015) ("Hana Financial,"”) the Supreme Court held that the jury, rather than a court, determines how an ordinary person or community would make an assessment to resolve such fact-intensive questions.

A few circuits, however, consider likelihood of confusion a mixed question of fact and law. Those rulings are inconsistent with *Hana Financial* and countless other cases holding that inferences to be drawn by a reasonable person should be left to a jury.

2. **Approval by Submitting Entity**

The Section Council approved the resolution on April 5, 2016.

3. **Has This or a Similar Recommendation Been Submitted to the House or Board Previously?**

No.

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

None.

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

N/A

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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RESOLUTION

RESOLVED, That the American Bar Association supports an interpretation of the federal Lanham Act, 15 U.S.C. § 1051 et seq., recognizing that the ineligibility of an otherwise valid mark for registration with the U.S. Patent and Trademark Office ("USPTO"), through the cancellation of an existing federal registration or the denial of an application for a federal registration, does not in and of itself disqualify that mark for protection under all provisions of the Lanham Act, the common law, or from registration on state registers; and

FURTHER RESOLVED, That the American Bar Association supports an interpretation of the Lanham Act recognizing that the ineligibility of a mark for registration with the USPTO does not in and of itself restrict the mark owner’s right to use the mark in commerce; and

FURTHER RESOLVED, That the American Bar Association supports an interpretation of the Lanham Act recognizing that the owners of marks registered on the Principal Register, the primary register of trademarks maintained by the USPTO, enjoy procedural and substantive advantages in litigation to protect their marks otherwise not available to owners of common-law marks not registered on the Principal Register.
REPORT

This report addresses the significance of the cancellation of an existing registration of an otherwise valid trademark or service mark on the Principal Register of the United States Patent and Trademark Office ("USPTO"),\(^1\) or the USPTO’s denial of an application for such a registration. The Section of Intellectual Property Law requests the House of Delegates to approve this Resolution, which would support an Association amicus curiae brief in support of neither party in two cases that are the subjects of pending petitions for writs of certiorari before the Supreme Court, namely, \textit{In re Tam}, 808 F.3d 1321 (Fed. Cir. 2015) (en banc), \textit{petition for cert. filed sub nom. Lee v. Tam} (U.S. April 20, 2016) (No. 15-1293), and \textit{Pro-Football, Inc. v. Blackhorse}, 112 F. Supp. 3d 439 (E.D. Va. 2015), \textit{petition for cert. filed} (U.S. April 5, 2016) (No. 15-1311).\(^2\) This Resolution does not address, and does not propose the ABA address, the issues of: (1) whether the USPTO properly determined the marks at issue in those cases were unregistrable; or (2) whether those determinations by the USPTO violated the Free Speech Clause of the First Amendment or any other provision of the Constitution. The Resolution instead will establish policy in support of advising the Supreme Court and lower courts of three basic propositions of trademark law, namely, that: (1) a determination that a mark is ineligible for registration on the USPTO’s Principal Register does not necessarily render that mark invalid and unprotectable (although it may); (2) such a determination does not restrict the mark owner’s right to use the mark in commerce; and (3) the owner of a mark registered on the Principal Register enjoys certain substantive and procedural advantages in litigation to protect its mark that are not available to the owners of unregistered marks. Action by the House of Delegates at the 2016 Annual Meeting is necessary to insure that, should the Supreme Court grant either of the pending petitions for certiorari described above, any Association brief on the merits could be timely filed.

\textbf{Summary}

Under Section 45 of the federal Lanham Act, 15 U.S.C. § 1127 (2012), “[t]he term ‘trademark’ includes any word, name, symbol, or device, or any combination thereof . . . used by a person . . . to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.” The same statute contains a substantively identical definition of “service mark”; courts and practitioners typically use “marks” as shorthand references to both trademarks and service marks. Pursuant to the federal Lanham Act, the owner of either type of mark may apply to register its mark on one of two “registers” maintained by the USPTO, namely the Principal

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\(^1\) Federally registered trademarks are those marks that are approved by the USPTO for inclusion on the agency’s Principal Register, the primary register of trademarks maintained by the USPTO. Although federal registration of a mark is not mandatory, it has several advantages including, but not limited to, providing notice to the public of the registrant’s claim of ownership of the mark, establishing a legal presumption of ownership nationwide, and creating an exclusive right to use the mark on or in connection with the goods/services listed in the registration. 15 U.S.C. §§ 1057(b)-(c), 1072, 1115.

\(^2\) The trademark owner in \textit{Pro-Football} has noticed an appeal to the Fourth Circuit and, additionally, petitioned for a writ of certiorari before judgment pursuant to Supreme Court Rule 11. Briefing before the Court of Appeals closed on March 18, 2016, but the Fourth Circuit has not yet scheduled oral argument.
Register and the Supplemental Register. The proposed resolution addresses only registrations on the Principal Register.

Section 2 of the Lanham Act, 15 U.S.C. § 1052 (2012), prohibits the registration on the Principal Register of certain marks. That section provides that:

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it—

(a) Consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute; or a geographical indication which, when used on or in connection with wines or spirits, identifies a place other than the origin of the goods and is first used on or in connection with wines or spirits by the applicant on or after one year after the date on which the WTO Agreement (as defined in section 3501(9) of title 19) enters into force with respect to the United States.

(b) Consists of or comprises the flag or coat of arms or other insignia of the United States, or of any State or municipality, or of any foreign nation, or any simulation thereof.

(c) Consists of or comprises a name, portrait, or signature identifying a particular living individual except by his written consent, or the name, signature, or portrait of a deceased President of the United States during the life of his widow, if any, except by the written consent of the widow.

(d) Consists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive . . .

(e) Consists of a mark which (1) when used on or in connection with the goods of the applicant is merely descriptive or deceptively misdescriptive of them, (2) when used on or in connection with the goods of the applicant is primarily geographically descriptive of them, except as indications of regional origin may be registrable under section 1054 of this title, (3) when used on or in connection with the goods of the applicant is primarily geographically deceptively misdescriptive of them, (4) is primarily merely a surname, or (5) comprises any matter that, as a whole, is functional.

(f) Except as expressly excluded in subsections (a), (b), (c), (d), (e)(3), and (e)(5) of this section, nothing in this chapter shall prevent the registration of a mark used by the applicant which has become distinctive of the applicant’s goods in commerce . . .

A mark which would be likely to cause dilution by blurring or dilution by tarnishment under [15 U.S.C. §] 1125(c) . . ., may be refused registration only pursuant to a proceeding brought under [15 U.S.C. §] 1063 . . . A registration for a mark which would be likely to cause dilution by blurring or dilution by tarnishment under [15 U.S.C. §] 1125(c) of this title, may be canceled pursuant to
a proceeding brought under either section 1064 of this title or section 1092 of this title.

A claimed mark may be found unregistrable under Section 2 in three contexts: (1) an examiner assigned to an application to register the mark can reject the application, in which case the applicant can appeal to the Trademark Trial and Appeal Board (the "Board"), an administrative tribunal within the USPTO;\(^3\) (2) another party can challenge the application in an "opposition proceeding" before the Board; and (3) even if the application matures into a registration, the registration can be cancelled by a court or the Board for any reason that would have prevented its issuance in the first place; after that, it can be cancelled "at any time if the registered mark becomes the generic name for the goods or services, or a portion thereof, for which it is registered, or is functional, or has been abandoned, or its registration was obtained fraudulently or contrary to . . . [Section 2(a)-(c)] . . . ." 15 U.S.C. § 1064(3).\(^4\)

Although the proposed resolution is not linked to a particular ground for unregistrability, the two cases creating the urgency for the House to act both arise from one of the several prohibitions in registration found in Section 2(a) of the Lanham Act, namely, that barring the registration of "matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute." Id. § 1052(a). In Pro-Football, Inc. v. Blackhorse, 112 F. Supp. 3d 439 (E.D. Va. 2015), the court rejected a claim by the parent corporation of the Washington Redskins NFL team (PFI) that the cancellation of its registrations abridged PFI’s right to free speech. It based this conclusion in part on the ground that, because Section 2(a) is relevant only to the registration process, the ineligibility of the marks in question for registration did not affect PFI’s ability to use them. Id. at 455 ("Nothing about Section 2(a) impedes the ability of members of society to discuss a trademark that was not registered by the PTO. Simply put, the Court holds that cancelling the registrations of the Redskins Marks under Section 2(a) of the Lanham Act does not implicate the First Amendment as the cancellations do not burden, restrict, or prohibit PFI’s ability to use the marks.").

In contrast, the en banc Federal Circuit struck down Section 2(a)’s prohibition on the registration of potentially disparaging mark as a violation of the Free Speech Clause. The appeal to the Federal Circuit in In re Tam, 808 F.3d 1321 (Fed. Cir. 2015) (en banc), arose from the USPTO’s rejection of an application to register the mark THE SLANTS for entertainment services on the ground the mark was potentially disparaging to Asian-Americans. Although it might be true the ineligibility of a mark for registration under Section 2(a)’s content-based prohibitions on registration does not restrict the mark’s use, the Tam court identified a number of disadvantages visited on the owners of unregistered marks. Tam, 808 F.3d at 1328-29. Those

\(^3\) As a non-Article III tribunal, the Board’s jurisdiction extends only to determinations of the registrability of the mark or marks before it; in particular, it cannot entertain constitutional issues.

\(^4\) A dissatisfied litigant before the Board can avail itself of two types of appeals: (1) it can appeal on the existing record to the U.S. Court of Appeals for the Federal Circuit; or (2) if it wishes to supplement the record and "there are adverse parties residing in a plurality of districts not embraced within the same State," 15 U.S.C. § 1071(b)(4), it can pursue a de novo review of the Board’s decision by appealing to the U.S. District Court for the Eastern District of Virginia; otherwise, a de novo appeal may be initiated in the district in which the prevailing party before the Board is domiciled. Tam arises from the former type of appeal, while Blackhorse arises from the latter.

Referring to the cause of action available to protect unregistered marks provided by Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (2012), the Tam court also held “it is not at all clear that [an applicant denied registration under Section 2(a)] could bring a § 43(a) unfair competition claim. Section 43(a) allows for a federal suit to protect an unregistered trademark, much like state common law. But there is no authority extending § 43(a) to marks denied under § 2(a)’s disparagement provision.” 808 F.3d at 1344 n.8. Indeed, the court went even further by suggesting an applicant denied registration under Section 2(a)’s content-based prohibitions on registration has no common-law rights to its mark. Id. at 1344 (“The government has not pointed to a single case where the common-law holder of a disparaging mark was able to enforce that mark, nor could we find one. The government’s suggestion that [the applicant] has common-law rights to his mark appears illusionary.”). The Federal Circuit therefore required the government to demonstrate a compelling state interest in the continued maintenance of Section 2(a)’s content-based prohibitions on registration, id., a demonstration the government ultimately could not meet. Id. at 1354-57.

The Resolution does not take a position on the constitutionality of any portion of the Lanham Act, including that of the language in Section 2(a) at issue in Pro-Football and Tam. It also does not purport to opine on whether particular marks are eligible or ineligible for federal registration under the Act. Rather, the Resolution seeks to dispel any misbelief that otherwise valid marks become unprotectable because they are not eligible to be covered by federal registrations. Unregistrability in and of itself does not preclude reliance on certain protections available under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), state law, and the common law. Accordingly, the Resolution asks the ABA House of Delegates to approve policy supporting an interpretation of the Lanham Act recognizing that the ineligibility of an otherwise valid mark for registration with the USPTO does not in and of itself disqualify that mark for protection under the Lanham Act, the common law, or based on state registration. The policy sought here would support a brief filed with the U.S. Supreme Court on behalf of neither party, should the Court grant certiorari in either Tam or Pro-Football.

A. Otherwise Valid Marks Ineligible for Federal Registration May Be Eligible for Protection Under § 43(a) of the Lanham Act, the Common Law, or State Trademark Acts

Some grounds for the denial or cancellation of a federal registration of a trademark also render the mark ineligible for protection under any form of trademark law. For example, if the registration of a mark is cancelled because the underlying mark has become generic, has been abandoned, or is merely functional the owner is left with no rights in the trademark under any body of law. See, e.g., T. Marzetti Co. v. Roskam Baking Co., 680 F.3d 629, 634 (6th Cir. 2012)
(affirming finding that claimed “Texas Toast” mark was generic for oversized bread and croutons); *Specht v. Google Inc.*, 747 F.3d 929, 934-35 (7th Cir. 2014) (affirming finding of abandonment as a matter of law for mark not used for over a decade); *Groeneveld Transp. Efficiency, Inc. v. Lubecore Int’l, Inc.*, 730 F.3d 494, 507-08 (6th Cir. 2013) (affirming finding as a matter of law that claimed product configuration was functional).

Nevertheless, the denial of the application for a federal registration or the cancellation of the federal registration of an otherwise valid mark does not in and of itself disqualify that mark for protection under the Lanham Act, the common law, or state law causes of action such as that found in the Uniform Deceptive Trade Practices Act. For example, Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (2012), recognizes a federal cause of action against the infringement of unregistered marks, and courts have routinely recognized the eligibility for protection under Section 43(a) of designations not qualifying for federal registration, including the titles of individual creative works, trade names, and even reproductions of the United States flag that would be ineligible for registration under Section 2(b) of the Act, 15 U.S.C. § 1052(b).

Moreover, it is well-established that the cancellation of an existing registration does not in and of itself invalidate all rights in the underlying mark. 3 J. Thomas McCarthy, *McCarthy on Trademarks* 5

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5 See, e.g., *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1163 n.2 (Fed. Cir. 2002) (“While titles of single works are not registrable, they may be protected under section 43(a) of the Lanham Act upon a showing of secondary meaning.”); *Sugar Busters LLC v. Brennan*, 177 F.3d 258, 269 (5th Cir. 1999) (“The Trademark Trial and Appeal Board has consistently interpreted [prior authority of the Court of Customs and Patent Appeals] as prohibiting the registration of single book titles as trademarks. The descriptive nature of a literary title does not mean, however, that such a title cannot receive protection under § 43(a).”); *Re v. Smith*, Civ. No. 04-11385-RGS, 2005 U.S. Dist. LEXIS 8985, at *2 (D. Mass. May 11, 2005) (“While single book titles are not registrable as marks, they may fall within the protections of § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), if the title has acquired a secondary meaning.”); *Indus. Indem. Co. v. Apple Computer, Inc.*, 95 Cal. Rptr. 2d 528, 545 (Ct. App. 1999) (“Titles of individual works are given common-law trademark protection, at least if they have acquired a secondary meaning, i.e., if they are commonly identified with their source. However, under a rule criticized by commentators, the title of an individual work may not be registered as a trademark.” (citations omitted)).

6 See, e.g., *Accuride Int’l, Inc. v. Accuride Corp.*, 871 F.2d 1531, 1534 (9th Cir. 1989) (“The major legal distinction between trademarks and trade names is that trade names cannot be registered and are therefore not protected under 15 U.S.C. § 1114. However, analogous actions for trade name infringement can be brought under section 43(a),” (citation omitted)); *Walt-W. Enters. v. Gannett Co.*, 695 F.2d 1050, 1054 n.6 (7th Cir. 1982) (“Although trade names . . . are not registrable under the Lanham Act, an action for trade name infringement is nonetheless proper under [Section 43(a)].” (citation omitted)); *Chronicle Publ’g Co. v. Chronicle Publ’ns, Inc.*, 733 F. Supp. 1371, 1376 (N.D. Cal. 1989) (“The main difference between trade names and trademarks . . . is that trade names cannot be registered and are not protected under [Section 32 of the Lanham Act]. However, actions for infringement of either a trade name or trademark, whether or not it has been registered, may be maintained under section 43(a).” (citation omitted)); *R.R. Salvage of Conn., Inc. v. R.R. Salvage, Inc.*, 561 F. Supp. 1014, 1019 (D.R.I. 1983) (“Although trade names are not registrable under the Lanham Act, they are nonetheless protected under the Act.” (citation omitted)); *Great W. Fin. Corp. v. Great W. Sav. & Loan Ass’n of Oklahoma City*, 406 F. Supp. 1286, 1291 (W.D. Okla. 1975) (“[T]he Lanham Act grants the same remedial treatment to trade names, whether registerable or not, as though they were registered, especially in matters of unfair competition.”).

Trademarks and Unfair Competition § 19:3 (4th ed.) As the Tenth Circuit has explained in a case presenting a fraud-based challenge to a registration:

Unlike the registration of a patent, a trademark registration of itself does not create the underlying right to exclude. Nor is a trademark created by registration. While federal registration triggers certain substantive and procedural rights, the absence of federal registration does not unleash the mark to public use. The Lanham Act protects unregistered marks as does the common law.


The theory that otherwise valid marks become unprotectable because they are not covered by registrations also cannot be reconciled with Section 43(c) of Act, 15 U.S.C. § 1125(c) (2012), which protects the distinctiveness of famous marks against likely dilution. That statute expressly identifies whether or not a mark is registered as one of four nonexclusive factors for consideration in the threshold inquiry into mark fame. See 15 U.S.C. § 1125(c)(2). The existence

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8 See also Specialized Seating, Inc. v. Greenwich Indus., 616 F.3d 722, 728 (7th Cir. 2010) (“All a finding of fraud does is knock out the mark’s ‘incontestable’ status, and its registration . . . . It does not affect the mark’s validity, because a trademark need not be registered to be enforceable.”); Crash Dummy Movie, LLC v. Mattel, Inc., 601 F.3d 1387, 1391 (Fed. Cir. 2010) (“[C]ancellation of a trademark registration does not necessarily translate into abandonment of common law trademark rights.”); Far Out Prods., Inc. v. Oskar, 247 F.3d 986, 996 (9th Cir. 2001) (“[E]ven if [the appellees] knowingly submitted a false declaration such that the appellees’ federal registration should be canceled, the appellees could (and did) still bring suit alleging common law trademark infringement.”); Santana Prods., Inc. v. Compression Polymers, Inc., 8 F.3d 152, 155 (3d Cir. 1993) (“[T]he cancellation of a trademark registration does not extinguish common law rights the registration did not create.”) (quoting Volkswagenwerk Aktiengesellschaft v. Wheeler, 814 F.2d 812, 819 (1st Cir. 1987)); Orient Exp. Trading Co. v. Federated Dept Stores, Inc., 842 F.2d 650, 654 (2d Cir. 1988) (“Even if appellants’ registered marks are cancelled, however, the use of the [disputed] name . . . could still be protected from unfair competition under section 43(a) of the Lanham Act.”); Cal. Cooler, Inc. v. Loretto Winery, Ltd., 774 F.2d 1451, 1454 (9th Cir. 1985) (“[D]eficiencies in registration, such as failure to renew, or even cancellation, do not affect common law trademark rights.”); Keebler Co. v. Rovira Biscuit Corp., 624 F.2d 366, 376 (1st Cir. 1980) (“[I]n some cases of cancellation of federal registration the registrant may still be able to establish his common law right to exclusive use . . . .”); eCash Techs., Inc. v. Guagliardo, 210 F. Supp. 2d 1138, 1155 (C.D. Cal. 2001) (“Defendants seemed to assume that if the registration were canceled, they could not be liable for infringement. As has been stated, such an assumption neglects the continuing common law trademark rights that Plaintiff may have enjoyed even if its registration were canceled.”); Aveda Corp. v. Evita Mktg., Inc., 706 F. Supp. 1419, 1425 (D. Minn. 1989) (“[E]ven if a plaintiff's registration is shown to be fraudulently obtained, the plaintiff's common law rights in the mark may still support an injunction against an infringing defendant.”); Nat’l Trailways Bus Sys. v. Trailway Van Lines, Inc., 269 F. Supp. 352, 357 (E.D.N.Y. 1965) (“Plaintiff’s failure to establish a statutory right [to registration] . . . does not affect its common law claim of unfair competition.”); Bakers Eng’g & Equip. Co. v. Reed, 103 F. Supp. 856, 856 (W.D. Mo. 1952) (“The personal defendant . . . now seeks to have canceled the trade-mark registered by the plaintiff on the ground that it was registered without his consent. Registration of trademarks is not necessary for their validity. And the plaintiff would have a common law action for an alleged infringement and for unfair competition [even in the event of cancellation].”).
or nonexistence of a registration therefore clearly does not serve a gatekeeping function in actions brought under that statute. See, e.g., New York City Triathlon, LLC v. NYC Triathlon Club, Inc., 704 F. Supp. 2d 305, 321-22 (S.D.N.Y. 2010) (finding unregistered marks famous and likely to be diluted in violation of Section 43(c)).

B. The Ineligibility of a Mark for Registration Does Not Affect the Ability of its Owner to Use the Mark

It is well-established that the denial of a registration to a particular mark does not in of itself restrict the mark’s use in commerce. As the Court of Customs and Patent Appeals explained in affirming a refusal to register a mark, “it is clear that the PTO’s refusal to register appellant’s mark does not affect his right to use it. No conduct is proscribed, and no tangible form of expression is suppressed.” In re McGinley, 660 F.2d 481, 484 (C.C.P.A. 1981); see also In re Fox, 702 F.3d 633, 635 (Fed. Cir. 2012) (“[A] refusal to register a mark has no bearing on the applicant’s ability to use the mark . . . .”); In re Boulevard Entm’t, Inc., 334 F.3d 1336, 1343 (Fed. Cir. 2003) (“[T]he refusal to register a mark . . . does not affect the applicant’s right to use the mark in question.”). There is no readily apparent authority to the contrary.

C. The Owner of a Mark on the Principal Register Enjoys Procedural Advantages in Litigation to Protect its Mark Compared to the Owners of Unregistered Marks

The Supreme Court has observed that “[t]he benefits of registration are substantial,” B & B Hardware, Inc. v. Hargis Indus., 135 S. Ct. 1293, 1309 (2015), and a mark owner denied registration can suffer numerous disadvantages in litigation to protect its mark. Some of those disadvantages are purely procedural in nature. For example, Sections 7(b) and 33(a) of the Lanham Act, 15 U.S.C. §§ 1057(b), 1115(a) (2012), provide that a certificate of registration on the Principal Register constitutes “prima facie” evidence of the validity of the registered mark; if

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9 There is a minority position on the enforceability of rights to otherwise valid marks that are, for whatever reason, ineligible for registration but the Section believes that position is less firmly grounded in the Lanham Act and opinions interpreting the Act. Some scholars and others have argued that the enforceability of a mark for which registration has been cancelled on disparagement grounds is an open question, and disagree as to how courts are likely to resolve it. See, e.g., Stephen R. Baird, Moral Intervention In The Trademark Arena: Banning the Registration of Scandalous And Immoral Trademarks, 83 Trademark Rep. 661, 789-91 (1993); see also Jordan Weissmann, Why Washington's NFL Team Might Not Need to Worry About Losing Its Trademarks, Slate, Jun. 18, 2014, http://www.slate.com/blogs/moneybox/2014/06/18/washington_football_team_loses TRADEMARK_case_why_it_might_not_matter.html (last visited Oct 16, 2014); Joseph Stromberg, The Redskins just lost some legal protection of their name. Here’s what it means, Vox, http://www.vox.com/2014/6/18/5820770/the-redskins-just-lost-legal-protection-of-their-name-heres-what-it (last visited Oct 16, 2014). At least one court has held that another of the Section 2 statutory bars—the bar against registration of government insignia—renders such marks unenforceable under Section 43(a) as well. See Renna v. County of Union, N.J., 88 F. Supp. 3d 310, 320 (D.N.J. 2014).

Most recently, in an additional views section of a now-vacated Federal Circuit opinion, Judge Moore commented that “it is the use of a trademark in commerce, not its registration, which gives rise to a protectable right. Equally clear, however, is that § 43(a) protection is only available for unregistered trademarks that could have qualified for federal registration. Thus, no federal cause of action is available to protect a trademark deemed disparaging, regardless of its use in commerce.” In re Tam, 785 F.3d 567, 576 (Fed. Cir. 2015) (additional views of Moore, J.) (citations omitted), reh'g en banc granted, opinion vacated, 600 F. App'x 775 (Fed. Cir. 2015); see also In re Tam, 808 F.3d 1321, 1345 (Fed. Cir. Dec. 22, 2015) (en banc), as corrected (Feb. 11, 2016).
such a registration becomes incontestable under Section 15 of the Act, *id.* § 1065, that evidence becomes “conclusive,” subject to certain exceptions identified in Section 33(b) of the Act. *Id.* § 1115(b). In contrast, “[u]nregistered marks have no presumption of validity . . . . Thus, a plaintiff must prove that an unregistered mark is valid and protectable.” *MNI Mgmt., Inc. v. Wine King, LLC*, 542 F. Supp. 2d 389, 404 (D.N.J. 2008) (citation omitted).

Other advantages are more substantive in nature. 10 These include the availability of particular causes of action to registrants on the Principal Register, but not to nonregistrants. Thus, for example, nonregistrants are ineligible for the cause of action against counterfeiting 11 created by the intersection of Section 32 of the Lanham Act, 15 U.S.C. § 1114, which is available only to federal registrants, 12 with Section 34, 15 U.S.C. § 1116, and Section 35, *id.* § 1117. As noted above, nonregistrants can rely on the unfair competition cause of action under Section 43(a) of the Act, but liability under that section does not trigger the heightened remedies set forth in Section 34(d), *id.* § 1117, or the availability of statutory damages under Section 35(c), *id.* § 1117(c). Nonregistrants are similarly ineligible for the private cause of action provided for Section 526(a) of the Tariff Act of 1930, 19 U.S.C. 1526(a) (2012), which is similarly restricted to the owners of registered marks. Finally, nonregistrants cannot avail themselves of the opportunity to record their registrations with U.S. Customs and Border Patrol, which is a prerequisite for the import-exclusion remedy authorized by Section 526 and Section 42 of the Lanham Act, 15 U.S.C. § 1124.

Respectfully submitted,

Theodore H. Davis Jr., Chair  
Section of Intellectual Property Law  
August 2016

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10 See, e.g., 15 U.S.C. § 1057(c) (providing that registration on Principal Register constitutes nationwide constructive priority as of filing date of application maturing into registration); *id.* § 1125(c)(2) (identifying the existence or nonexistence of a registration as relevant to the inquiry into whether a mark is sufficiently famous to qualify for protection against likely dilution under federal law).

11 A defendant’s mark is “counterfeit” only if it is “identical [to], or substantially indistinguishable from, a registered mark.” 15 U.S.C. § 1127 (emphasis added); *see also id.* § 1116(d)(1)(b) (“[C]ounterfeit mark’ means . . . a counterfeit of a mark that is registered . . . . in the . . . Patent and Trademark Office for such goods or services sold, offered for sale, or distributed and that is in use . . . .” (emphasis added)).

12 See, e.g., *Fin. Inv. Co. (Bermuda) Ltd. v. Geberit AG*, 165 F.3d 526, 531 (7th Cir. 1998) (“Authorities uniformly agree that only the trademark’s registrant (or her assignee) may sue under § 32(1).”); *Gaia Techs., Inc. v. Reconversion Techs., Inc.*, 93 F.3d 774, 779-80 (Fed. Cir. 1996) (vacating finding of liability under Section 32 in light of plaintiff’s failure to demonstrate ownership of registration).
1. **Summary of Resolution**

The Resolution will establish policy in support of advising the Supreme Court and lower courts of three basic propositions of trademark law, namely, that: (1) a determination that a mark is ineligible for registration on the USPTO’s Principal Register does not necessarily render that mark invalid and unprotectable (although it may); (2) such a determination does not restrict the mark owner’s right to use the mark in commerce; and (3) the owner of a mark registered on the Principal Register enjoys certain substantive and procedural advantages in litigation to protect its mark that are not available to the owners of unregistered marks.

2. **Approval by Submitting Entity**

The Section of Intellectual Property Law Council approved the resolution on May 5, 2016.

3. **Has This or a Similar Recommendation Been Submitted to the House or Board Previously?**

No.

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

None.

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

N/A

6. **Status of Legislation**

While there is a bill pending in the House to cancel all federal registrations and requiring the denial of all applications for the registration of marks using the term “redskins,” H.R. 684, the “Non-Disparagement of Native American Persons or Peoples in Trademark Registration Act of 2015,” there is no legislation addressing the issue discussed in the Resolution.
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 U.S. Supreme Court or other appropriate judicial forum in a case presenting the issues that are addressed in the policy.

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

Adoption of the recommendations will 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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12. **Contact Persons (who will present the report to the House)**

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RESOLUTION

RESOLVED, That the American Bar Association supports an interpretation of the special patent venue statute, 28 U.S.C. § 1400(b), that does not adopt the definition of “resides” in the separate, general venue statute, 28 U.S.C. § 1391(c), to ascertain the meaning of “resides” in §1400(b); and

FURTHER RESOLVED, That the American Bar Association supports an interpretation of 28 U.S.C. § 1400(b) such that venue in a patent infringement case involving a business entity defendant is proper only in a judicial district (1) located in the state under whose laws the business entity was formed or (2) where the business entity has committed acts of infringement and has a regular and established place of business.
REPORT

This Resolution and Report concern venue in patent infringement actions—determining where a corporate defendant resides for purposes of venue. Specifically, it concerns whether the proper interpretation of the term “resides” as used in the venue provisions of the Patent Act, 28 U.S.C. § 1400(b)\(^1\) is where the business is incorporated, or whether resort must be had to the general venue statute, 28 U.S.C. § 1391(c), to interpret the meaning of “resides” in the venue provisions of the Patent Act, with the result that venue is proper wherever the defendant is subject to personal jurisdiction for that case.

The Section of Intellectual Property Law requests that the House of Delegates approve this Resolution, which would support an Association amicus curiae brief in the U.S. Supreme Court in the case of In re TC Heartland, LLC, No. 2016–105, 2016 WL 1709433 (Fed. Cir. April 29, 2016) (“TC Heartland”), should a petition for certiorari be filed and granted. If such a petition is timely filed and granted, the deadline for filing an amicus brief on the merits in the Supreme Court will likely be reached before the next meeting of the House of Delegates.

Summary

On April 29, 2016, a unanimous panel of the Federal Circuit\(^2\) held that in light of amendments made by Congress to 28 U.S.C. § 1391 in 2011, the meaning of “resides” as used in special patent venue statute 28 U.S.C. § 1400, which is not defined in § 1400, can only be resolved by resort to the general venue statute, which defines where companies reside for purposes of venue. TC Heartland, 2016 WL 1709433, at *5. The court explained that § 1400(b) of the patent venue statute provides that venue is proper “where the defendant resides” but “itself does not define corporate residence.” Id. It further noted that the outcome of the dispute over the proper reading of the statutes was determined by the court’s prior consistent ruling in VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574 (Fed. Cir. 1990) (“VE Holding”).\(^3\) TC Heartland, LLC, 2016 WL 1709433, at *4.

\(^1\) In addition to defining venue as proper where the defendant resides, 28 U.S.C. § 1400(b) also deems venue as proper “where the defendant has committed acts of infringement and has a regular and established place of business.” Because there is no dispute over this alternative ground on which to establish venue, the report will focus on the portion of the statute that provides for venue based on a defendant’s residence.

\(^2\) The case was before the Federal Circuit on a petition for a writ of mandamus filed by TC Heartland to direct the United States District Court for the District of Delaware either to dismiss or to transfer the patent infringement suit filed against it.

\(^3\) The statutes and views on their interpretation have changed over time. For example, the VE Holdings decision recalls a position once held by the Section of Intellectual Property Law with respect to a past version, stating:

As far back as 1974, the A.B.A. Section of Patent, Trademark and Copyright Law supported a resolution that the term “resides” in § 1400(b) be defined by § 1391(c). Gess, Desirability of Initiating Patent Litigation Wherever the Defendant is Found, 1974 A.B.A. Sec. Pat. Trademark and Copyright L. 114, 115 ("[T]he patent venue provision, 28 U.S.C. § 1400(b) and the interpretation given it by the Supreme Court in Fourco ... is the result of historical accident. The consequence of this accident has been to create confusion in the courts and to unduly shield a corporate infringer.").

Although not mentioned by the court, at the Section’s urging, in 1977 the ABA House of Delegates adopted a resolution that took a similar view on the outcome in Fourco and favored amending the predecessor to Section 1400(b) to define corporate residence to include any judicial district in which the corporation “is
The *TC Heartland* court further held that an earlier amendment to § 1391 in 1988 rendered inapplicable the Supreme Court’s contrary reading of an earlier version of these statutes in *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222 (1957) ("Fourco"). *Id.* at *6. However, subsequent to the amendments of § 1391 in 1988 and 2011, the Supreme Court has not addressed whether the Court’s *Fourco* decision applies to the patent venue statute in its current form.

The Resolution disfavors the Federal Circuit precedent and favors applying Supreme Court precedent for reading the special patent venue statute as it stands alone and not supplemented by the definition of corporate residence found in §1391(c). In 2011, when Congress amended §1391 to add to subparagraph (a) the language "Applicability of Section.—Except as otherwise provided by law—," Congress made clear that resort to §1391 was improper where a special statute existed. Thus, Congress did not intend for courts to look beyond §1400(b) to §1391 to determine where venue is proper in a patent case. As properly read, §1400(b) provides that patent cases against companies may be brought only: (1) where the entity “resides,” meaning where they were incorporated; or (2) where the entity “has committed acts of infringement” and “has a regular and established place of business.” The Federal Circuit’s prior decision in *VE Holding*, and its recent decision in *TC Heartland*, both conflict with the U.S. Supreme Court’s reasoning in *Fourco*, 353 U.S. at 228, which held that §1400(b) stands alone.

These Federal Circuit decisions misinterpret the venue statutes and do not follow Supreme Court precedent. The Federal Circuit’s current reading of the statute produces the result that corporate defendants may be sued anywhere they are subject to a district court’s personal jurisdiction, which has led to improper forum shopping, with a disproportionately high number of plaintiffs favoring the Eastern District of Texas. Accordingly, this Resolution asks the ABA House of Delegates to approve policy supporting a statutory construction of the special patent venue statute §1400(b) such that one should not look to §1391(c) to ascertain the scope of “resides,” but rather venue for a corporate defendant should be limited either to where it resides or where it has committed acts of infringement and has a regular and established place of business. If implemented, this proposed policy would reduce the perceived unfettered forum shopping for which the patent system has been criticized for many years, and would put in the hands of Congress any decision whether venue should be enlarged beyond that provided by §1400(b).

A. The Venue Statutes At Issue

28 U.S.C. § 1400(b) is the patent venue statute and provides:

> Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.

*Id.* (emphasis added). The statute establishes that venue is proper “where the defendant resides.” It does not define the term.

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*doing business." Those positions from the 1970’s have long since ceased to represent ABA or section policy. The ABA resolution was archived in 1998.*
28 U.S.C. § 1391 is the general venue statute and, among other things, defines where a corporation resides for venue purposes. That statute provides, in relevant part:

(a) **Applicability of Section.**—Except as otherwise provided by law—
   (1) this section shall govern the venue of all civil actions brought in district courts of the United States; and
   (2) the proper venue for a civil action shall be determined without regard to whether the action is local or transitory in nature.

(b) **Venue in General.**—A civil action may be brought in—
   (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;
   (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or
   (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

(c) **Residency.**—For all venue purposes—
   (1) a natural person, including an alien lawfully admitted for permanent residence in the United States, shall be deemed to reside in the judicial district in which that person is domiciled;
   (2) an entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question and, if a plaintiff, only in the judicial district in which it maintains its principal place of business; and
   (3) a defendant not resident in the United States may be sued in any judicial district, and the joinder of such a defendant shall be disregarded in determining where the action may be brought with respect to other defendants.

(d) **Residency of Corporations in States With Multiple Districts.**—For purposes of venue under this chapter, in a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

*Id.* (emphasis added). § 1391(a)(1) provides that § 1391 can only be relied on to determine where venue is proper in cases for which there is not already a provision for venue elsewhere ("Applicability of Section.—Except as otherwise provided by law—(1) this section shall govern the venue of all civil actions brought in district courts of the United States."). § 1391(e) defines
“Residency.—For all venue purposes,” and § 1391(c)(2) provides that venue is proper if the defendant corporation would be subject to the court’s personal jurisdiction in that case. Both of these subsections are framed by § 1391(a)(1)’s prohibition against reference to § 1391 where there is already a specific statute providing for venue in a particular type of case.

B. Congress Amended § 1391(a)(1) and Thereby Overturned VE Holding

Before the Supreme Court decided Fourco, § 1391(c) had long defined venue for corporations as including judicial districts where the corporation “is doing business.” In Fourco, the Supreme Court rejected that interpretation, holding instead that “§ 1391(c) is a general venue statute, whereas § 1400(b) is a special venue statute applicable, specifically, to all defendants in a particular type of actions, i.e., patent infringement actions.” Fourco, 353 U.S. at 228. The Fourco Court reaffirmed the holding in Stonite Prods. Co. v. Melvin Lloyd Co., 315 U.S. 561 (1942), “that Section 48 [which is now § 1400(b)] is the exclusive provision controlling patent infringement proceedings” and “that Congress did not intend the Act of 1897 (which had become § 48 of the Judicial Code [*]) to dovetail with the general relating to the venue of civil suits, but rather that it alone should control venue in patent infringement proceedings.” Fourco, 353 U.S. at 225 (quoting Stonite, 315 U.S. at 563, 566). The Federal Circuit’s decision in VE Holding resulted from a 1988 amendment amending § 1391(c) to include the prefatory phrase “for purposes of venue under this chapter.” The VE Holding court relied on that new language to conclude “that “[s]ection 1391(c) applies to all of chapter 87 of title 28, and thus to § 1400(b) ….” VE Holding, 917 F.2d at 1580.

VE Holding was premised on language in § 1391 deleted by the 2011 amendments. In 2011, Congress again amended § 1391 to, among other things, remove “for purposes of venue under this chapter” from subparagraph (c) and to add to subparagraph (a) the prefatory language “Applicability of Section.—Except as otherwise provided by law—.” The 2011 changes also added to subparagraph (c) the prefatory language “Residency.—For all venue purposes—.” The change to § 1391(a), “[e]xcept as otherwise provided by law,” means that if a specific statute defines venue for a particular type of case, such as § 1400(b), then that first statute shall govern without consulting the second, in this case § 1391. A plain reading of § 1391(a) therefore mandates that § 1400(b) be read without resort to § 1391. When read in light of such precedent as Fourco, a defendant corporation resides only where it is incorporated. Fourco, 353 U.S. at 226 (citing Shaw v. Quincy Mining Co., 145 U.S. 444 (1892)).

The primacy of the special patent venue statute, § 1400(b), over the general venue statute, § 1391, is reinforced by the statutory construction canon that “[h]owever inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment.” Fourco, 353 U.S. at 228 (citations omitted) (internal quotation marks omitted). It is erroneous to begin the statutory construction analysis by deciding first the reach of the general statute, then evaluating the effect of the special statute. Id. at 228-29 (“Specific terms prevail over the general in the same or another statute which otherwise might be controlling.”). The Federal Circuit took such an erroneous approach to statutory construction in VE Holding, and it wrongly repeated that error in construing these same statutes again in TC Heartland.
C. In Fourco, the Supreme Court Has Already Rejected The Federal Circuit’s Interpretation of These Patent Venue Statutes By Holding that § 1400(b) Is the Only Statute Governing Venue in Patent Cases

In 1957, the Supreme Court granted certiorari in *Fourco* to decide whether “28 U.S.C. § 1400(b) [is] the sole and exclusive provision governing venue in patent infringement actions, or whether that section is supplemented by 28 U.S.C. § 1391(c).” *Id.* at 223. The Court concluded that 1400(b) is the sole and exclusive provision governing patent venue. *Id.* at 228-29.

When *Fourco* was on appeal to the Second Circuit, that court had held that “proper construction ‘requires ... the insertion in’ § 1400(b) ‘of the definition of corporate residence from § 1391(c), and that the two sections, when thus ‘read together,’ mean ‘that this defendant may be sued in New York, where it ‘is doing business.’” *Id.* at 223-24. Because the Second Circuit’s opinion conflicted with the Supreme Court’s decision in *Stonite Prods. Co. v. Melvin Lloyd Co.*, 315 U.S. 561 (1942), the Court granted certiorari. *Id.* at 224.

The *Stonite* Court had also reviewed whether the special patent infringement venue statute was the exclusive provision governing venue for patent infringement cases, or whether a later venue provision supplemented the patent infringement venue statute. *Fourco*, 353 U.S. at 224. The later venue provision allowed for actions where the “defendants residing in different judicial districts within the same state, [could] be brought in either district.” *Id.* After reviewing the history of the patent infringement venue provision, the *Stonite* Court held that the patent infringement venue statute “alone should control venue in patent infringement proceedings.” *Id.* at 225.

The Court in *Fourco* similarly addressed whether a substantive change had occurred in the exclusive venue statute for patent infringement. *Id.* In relevant part, the statute was amended to have “where the defendant resides” replace “of which the defendant is an inhabitant,” essentially substituting the term “inhabitant” with the term “resident.” *Id.* at 226. The Court noted that the intent to make a substantive change in the law by way of the amendment must be “clearly expressed.” *Id.* at 227. Because the “Revisers’ Notes” associated with the updating of the code did not clearly express any intent to change the exclusive venue provision, the Supreme Court held “that 28 U.S.C. § 1400(b) made no substantive change from [its predecessor] 28 U.S.C. (140 ed.) § 109 as it stood and was dealt with in the *Stonite* case.” *Id.*

Accordingly, the *Fourco* Court rejected the respondent’s argument and the lower court’s holding that § 1391(c) supplemented § 1400(b). *Id.* at 228. It noted that under well-settled law “[h]owever inclusive may be the general language of a statute, it ‘will not be held to apply to a matter specifically dealt with in another part of the same enactment ... Specific terms prevail over the general in the same or another statute which otherwise might be controlling.’” *Id.* at 228-29 (citations omitted). Thus, as it had in *Stonite*, the Court held that, “§ 1391(c) is a general corporation venue statute, whereas § 1400(b) is a special venue statute applicable, specifically, to ... patent infringement actions.” *Id.* at 228.
D. The Federal Circuit’s Recent TC Heartland Decision Is In Conflict with the Supreme Court’s Holding in Fourco

In TC Heartland, the Federal Circuit has again held that the undefined term “resides” as used in special patent venue statute § 1400 can only be resolved by resort to the general venue statute. It noted that the patent venue statute, § 1400(b), provides that venue is proper “where the defendant resides” but “itself does not define corporate residence.” It further held that an earlier amendment to § 1391 rendered inapplicable the Supreme Court’s inconsistent reading of these statutes in Fourco, stating that as a result of that amendment the Supreme Court’s decision “is no longer the law because in the 1988 amendments Congress had made the definition of corporate residence applicable to patent cases.”

Contrary to the Federal Circuit’s interpretation of the 1988 and 2011 amendments, they in fact fail to suggest in any way a congressional intent to overturn Fourco. TC Heartland, 2016 WL 1709433, at *7-8. Instead both VE Holding and TC Heartland conflict with the U.S. Supreme Court’s reasoning in Fourco, in which, when faced with essentially the same statutory interpretation, it held that § 1400(b) controls and that resort to the general statute was improper. Thus, the Federal Circuit’s new inconsistent opinion cannot stand.

Conclusion

In TC Heartland, the Federal Circuit incorrectly held that in light of amendments made by Congress to § 1391 in 2011, the undefined term “resides,” as used in special patent venue statute § 1400, can only be resolved by resort to the general venue statute. The special patent venue statute, however, stands alone and is not supplemented by § 1391(c)’s definition of corporate residence. When Congress last amended § 1391, it rendered inapplicable the analysis found in the Federal Circuit’s prior inconsistent decision in VE Holding. Both that case and the Federal Circuit’s recent holding in TC Heartland are in conflict with the U.S. Supreme Court’s reasoning in Fourco, 353 U.S. at 228, which when faced with essentially the same question, holds that § 1400(b) stands alone.

If the issue arises at the Supreme Court, this resolution would provide the basis for the American Bar Association submitting an amicus curiae brief encouraging the Court to hold that the proper interpretation of the term “resides” as used in 28 U.S.C. § 1400(b) is where the business is incorporated, which interpretation should be made without resort to § 1391(c).

Respectfully submitted,

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

The resolution calls for the Association to adopt policy supporting a statutory construction of the special patent venue statute, 28 U.S.C. § 1400(b), that does not adopt the definition of “resides” in the separate, general revenue statute U.S.C. § 1391(c) to ascertain the meaning of “resides” in §1400, and to put an end to improper forum shopping in patent cases. In In re TC Heartland, LLC, No. 2016–105, 2016 WL 1709433 (Fed. Cir. April 29, 2016) (“TC Heartland”), a unanimous panel of the Federal Circuit recently held that following amendments made by Congress to § 1391 in 2011, the term “resides,” as used in special patent venue statute § 1400, can only be resolved by resort to the general venue statute. As a result of that interpretation, the Federal Circuit held that venue is proper anywhere a court has personal jurisdiction over the corporate defendant.

The special patent venue statute, however, stands alone and should not be supplemented by § 1391(c)’s definition of corporate residence. Both its prior precedent and the Federal Circuit’s recent holding in TC Heartland conflict with the U.S. Supreme Court’s reasoning in Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222, 228 (1957) (“Fourco”), which held that § 1400(b) stands alone. Should the issue arise, this resolution would support an American Bar Association amicus curiae brief encouraging the Supreme Court to again hold that the proper interpretation of the term “resides” as used in 28 U.S.C. § 1400(b) is where the business is incorporated, which interpretation is made without resort to §1391.

2. Approval by Submitting Entity

The Section Council approved the resolution on April 5, 2016.

3. Has This or a Similar Recommendation Been Submitted to the House or Board Previously?

This resolution has not been submitted previously. At its 1977 midyear meeting, the ABA adopted a resolution regarding the then-current versions of the venue statutes. That 1977 resolution supported reversing the Supreme Court’s decision in Fourco by amending Section 1400(b) of Title 28 of the United States Code to read as follows:

Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.
The judicial district in which a corporation is incorporated or licensed to do business or is doing business shall be regarded as the residence of such corporation for the purposes of this section.

This ABA policy was archived in 1998.

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

None.

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

N/A

6. Status of Legislation

The resolution does not call for legislation. At this time, the Section is aware of two bills addressing patent venue: S. 2733, the “Venue Equity and Non-Uniformity Elimination Act of 2016,” was introduced into the Senate Judiciary Committee on March 17, 2016, and H.R. 9, the “Innovation Act,” reported out of the House Judiciary Committee on February 25, 2016. Both would limit venue for corporate defendants.

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 U.S. Supreme Court or other appropriate judicial forum in a case presenting the issues that are addressed in the policy.

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution asks the ABA House of Delegates to approve policy supporting a statutory construction of the special patent venue statute, 28 U.S.C. § 1400(b), that does not look to the separate general venue statute, 28 U.S.C. § 1391(c), to ascertain the meaning of the term “resides,” and limits venue for a corporate defendant to either where it resides or where it has committed acts of infringement and has a regular and established place of business, putting an end to improper forum shopping in patent cases.

2. Summary of the Issue that the Resolution Addresses

In an April 2016 decision, the Court of Appeals for Federal Circuit did not follow Supreme Court precedent. The Federal Circuit’s current reading of the patent venue statute produces the result that corporate defendants may be sued anywhere they are subject to a district court’s personal jurisdiction, which has led to forum shopping, with a high number of plaintiffs favoring venue in the Eastern District of Texas.

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

The resolution will support an American Bar Association amicus brief encouraging the Supreme Court to again hold that §1400 stands alone, and consequently the term “resides” as used in § 1400(b) means where the business is incorporated, and overturn the Federal Circuit precedent that venue is proper wherever the defendant is subject to personal jurisdiction for that case.

4. Summary of Minority Views

Some argue that the Federal Circuit’s interpretation of the current version of the two statutes is correct. They agree the patent venue statute, § 1400(b), provides that venue is proper where the defendant resides and does not define corporate residence. They favor an interpretation of §1400(b) that incorporates the general venue statute definition of corporate residency as necessary to fill a gap in § 1400(b). They see the title of § 1391(c) “Residency.—For all venue purposes, as dictating residency for corporations under § 1400(b). Some also argue that the Supreme Court’s Fourco decision goes too far by shielding corporate infringers from venue in jurisdictions in which they are infringing patents. And they agree with the Federal Circuit that subsequent amendments to § 1391 render Fourco inapplicable.
RESOLVED, That the American Bar Association amends Rule 8.4 and Comment of the ABA Model Rules of Professional Conduct as follows (insertions underlined, deletions struck through):

 Rule 8.4: Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) harass or discriminate on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This Rule does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16.
[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermines confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others because of their membership or perceived membership in one or more of the groups listed in paragraph (g). Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct towards a person who is, or is perceived to be, a member of one of the groups. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Paragraph (g) does not prohibit conduct undertaken to promote diversity.

[5] Paragraph (g) does not prohibit legitimate advocacy that is material and relevant to factual or legal issues or arguments in a representation. A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer’s practice or by limiting the lawyer’s practice
to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.
REPORT

"Lawyers have a unique position in society as professionals responsible for making our society better. Our rules of professional conduct require more than mere compliance with the law. Because of our unique position as licensed professionals and the power that it brings, we are the standard by which all should aspire. Discrimination and harassment . . . is, and unfortunately continues to be, a problem in our profession and in society. Existing steps have not been enough to end such discrimination and harassment."

ABA President Paulette Brown, February 7, 2016 public hearing on amendments to ABA Model Rule 8.4, San Diego, California.

I. Introduction and Background

The American Bar Association has long recognized its responsibility to represent the legal profession and promote the public's interest in equal justice for all. Since 1983, when the Model Rules of Professional Conduct ("Model Rules") were first adopted by the Association, they have been an invaluable tool through which the Association has met these dual responsibilities and led the way toward a more just, diverse and fair legal system. Lawyers, judges, law students and the public across the country and around the world look to the ABA for this leadership.

Since 1983, the Association has also spearheaded other efforts to promote diversity and fairness. In 2008 ABA President Bill Neukum led the Association to reformulate its objectives into four major "Goals" that were adopted by the House of Delegates.\(^1\) Goal III is entitled, "Eliminate Bias and Enhance Diversity." It includes the following two objectives:

1. Promote full and equal participation in the association, our profession, and the justice system by all persons.
2. Eliminate bias in the legal profession and the justice system.

A year before the adoption of Goal III the Association had already taken steps to address the second Goal III objective. In 2007 the House of Delegates adopted revisions to the Model Code of Judicial Conduct to include Rule 2.3, entitled, "Bias, Prejudice and Harassment." This rule prohibits judges from speaking or behaving in a way that manifests, "bias or prejudice," and from engaging in harassment, "based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation." It also calls upon judges to require lawyers to refrain from these activities in proceedings before the court.\(^2\) This current proposal now before the House will further implement the Association's Goal III objectives by placing a similar provision into the Model Rules for lawyers.

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\(^1\) ABA Mission and Goals, [http://www.americanbar.org/about_the_ababa/aba-mission-goals.html](http://www.americanbar.org/about_the_ababa/aba-mission-goals.html) (last visited May 9, 2016).

\(^2\) Rule 2.3(C) of the ABA Model Code of Judicial Conduct reads: "A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others."
When the Model Rules were first adopted in 1983 they did not include any mention of or reference to bias, prejudice, harassment or discrimination. An effort was made in 1994 to correct this omission; the Young Lawyers Division and the Standing Committee on Ethics and Professional Responsibility (SCEPR”) each proposed language to add a new paragraph (g) to Rule 8.4, “Professional Misconduct,” to specifically identify bias and prejudice as professional misconduct. However, in the face of opposition these proposals were withdrawn before being voted on in the House. But many members of the Association realized that something needed to be done to address this omission from the Model Rules. Thus, four years later, in February 1998, the Criminal Justice Section and SCEPR developed separate proposals to add a new anti-discrimination provision into the Model Rules. These proposals were then combined into Comment [3] to Model Rule 8.4, which was adopted by the House at the Association’s Annual Meeting in August 1998. This Comment [3] is discussed in more detail below. Hereinafter this Report refers to current Comment [3] to 8.4 as “the current provision.”

It is important to acknowledge that the current provision was a necessary and significant first step to address the issues of bias, prejudice, discrimination and harassment in the Model Rules. But it should not be the last step for the following reasons. It was adopted before the Association adopted Goal III as Association policy and does not fully implement the Association’s Goal III objectives. It was also adopted before the establishment of the Commission on Sexual Orientation and Gender Identity, one of the co-sponsors of this Resolution, and the record does not disclose the participation of any of the other Goal III Commissions—the Commission on Women in the Profession, Commission on Racial and Ethnic Diversity in the Profession, and the Commission on Disability Rights—that are the catalysts for these current amendments to the Model Rules.

Second, Comments are not Rules; they have no authority as such. Authority is found only in the language of the Rules. “The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.”

Third, even if the text of the current provision were in a Rule it would be severely limited in scope: It applies (i) only to conduct by a lawyer that occurs in the course of representing a client, and (ii) only if such conduct is also determined to be “prejudicial to the administration of justice.” As the Association’s Goal III Commissions noted in their May 2014 letter to SCEPR:

It [the current provision] addresses bias and prejudice only within the scope of legal representation and only when it is prejudicial to the administration of justice. This limitation fails to cover bias or prejudice in other professional capacities (including attorneys as advisors, counselors, and lobbyists) or other professional settings (such as law schools, corporate law departments, and employer-employee relationships within law firms). The comment also does not address harassment at all, even though the judicial rules do so.

In addition, despite the fact that Comments are not Rules, a false perception has developed over the years that the current provision is equivalent to a Rule. In fact, this is the only example in the Model Rules where a Comment is purported to “solve” an ethical issue that otherwise would

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require resolution through a Rule. Now—thirty-three years after the Model Rules were first adopted and eighteen years after the first step was taken to address this issue—it is time to address this concern in the black letter of the Rules themselves. In the words of ABA President Paulette Brown: “The fact is that skin color, gender, age, sexual orientation, various forms of ability and religion still have a huge effect on how people are treated.”

As the Recommendation and Report of the Oregon New Lawyers to the Assembly of the Young Lawyers Division at the Annual Meeting 2015 stated: “The current Model Rules of Professional Conduct (the “Model Rules”), however, do not yet reflect the monumental achievements that have been accomplished to protect clients and the public against harassment and intimidation.” The Association should now correct this omission. It is in the public’s interest. It is in the profession’s interest. It makes it clear that discrimination, harassment, bias and prejudice do not belong in conduct related to the practice of law.

II. Process

Over the past two years, SCEPR has publicly engaged in a transparent investigation to determine, first whether, and then how, the Model Rules should be amended to reflect the changes in law and practice since 1998. The emphasis has been on open discussion and publishing drafts of proposals to solicit feedback, suggestions and comments. SCEPR painstakingly took that feedback into account in subsequent drafts, until a final proposal was prepared.

This process began on May 13, 2014 when SCEPR received a joint letter from the Association’s four Goal III Commissions: the Commission on Women in the Profession, Commission on Racial and Ethnic Diversity in the Profession, Commission on Disability Rights, and the Commission on Sexual Orientation and Gender Identity. The Chairs of these Commissions wrote to the SCEPR asking it to develop a proposal to amend the Model Rules of Professional Conduct to better address issues of harassment and discrimination and to implement Goal III. These Commissions explained that the current provision is insufficient because it “does not facially address bias, discrimination, or harassment and does not thoroughly address the scope of the issue in the legal profession or legal system.”

In the fall of 2014 a Working Group was formed under the auspices of SCEPR and chaired by immediate past SCEPR chair Paula Frederick, chief disciplinary counsel for the State Bar of Georgia. The Working Group members consisted of one representative each from SCEPR, the Association of Professional Responsibility Lawyers (“APRL”), the National Organization of Bar

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1 Paulette Brown, Inclusion Not Exclusion: Understanding Implicit Bias is Key to Ensuring An Inclusive Profession, ABA J. (Jan. 1, 2016, 4:00 AM), http://www.abajournal.com/magazine/article/inclusion_exclusion_understandingImplicit_bias_is_key_to_ensuring.

2 In August 2015, unaware that the Standing Committee on Ethics and Professional Responsibility was researching this issue at the request of the Goal III Commissions, the Oregon State Bar New Lawyers Division drafted a proposal to amend the Model Rules of Professional Conduct to include an anti-harassment provision in the black letter. They submitted their proposal to the Young Lawyers Division Assembly for consideration. The Young Lawyers Division deferred on the Oregon proposal after learning of the work of the Standing Committee on Ethics and Professional Responsibility and the Goal III Commissions.

3 Letter to Paula J. Frederick, Chair, ABA Standing Committee on Ethics and Professional Responsibility 2011-2014.
Counsel ("NOBC") and each of the Goal III Commissions. The Working Group held many teleconference meetings and two in-person meetings. After a year of work Chair Frederick presented a memorandum of the Working Group’s deliberations and conclusions to SCEPR in May 2015. In it, the Working Group concluded that there was a need to amend Model Rule 8.4 to provide a comprehensive anti-discrimination provision that was nonetheless limited to the practice of law, in the black letter of the rule itself, and not just in a Comment.

On July 8, 2015, after receipt and consideration of this memorandum, SCEPR prepared, released for comment and posted on its website a Working Discussion Draft of a proposal to amend Model Rule of Professional Conduct 8.4. SCEPR also announced and hosted an open invitation Roundtable discussion on this Draft at the Annual Meeting in Chicago on July 31, 2015.

At the Roundtable and in subsequent written communications SCEPR received numerous comments about the Working Discussion Draft. After studying the comments and input from the Roundtable, SCEPR published in December 2015 a revised draft of a proposal to amend Rule 8.4(g), together with proposed new Comments to Rule 8.4. SCEPR also announced to the Association, including on the House of Delegates listerv, that it would host a Public Hearing at the Midyear Meeting in San Diego in February 2016.7 Written comments were also invited.8 President Brown and past President Laurel Bellows were among those who testified at the hearing in support of adding an anti-discrimination provision to the black letter Rule 8.4.

After further study and consideration SCEPR made substantial and significant changes to its proposal, taking into account the many comments it received on its earlier drafts.

III. Need for this Amendment to the Model Rules

As noted above, in August 1998 the American Bar Association House of Delegates adopted the current provision: Comment [3] to Model Rule of Professional Conduct 8.4, Misconduct which explains that certain conduct may be considered “conduct prejudicial to the administration of justice,” in violation of paragraph (d) to Rule 8.4, including when a lawyer knowingly manifests, by words or conduct, bias or prejudice against certain groups of persons, while in the course of representing a client but only when those words or conduct are also “prejudicial to the administration of justice.”

Yet as the Preamble and Scope of the Model Rules makes clear, “Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.”9 Thus, the ABA did not squarely and forthrightly address prejudice, bias, discrimination and harassment as would have been the case if this conduct were addressed in the text of a Model Rule. Changing the Comment to a black letter rule makes an important statement to our profession and the public that the profession does not tolerate prejudice, bias, discrimination and

harassment. It also clearly puts lawyers on notice that refraining from such conduct is more than an illustration in a comment to a rule about the administration of justice. It is a specific requirement.

Therefore, SCEPR, along with our co-sponsors, propose amending ABA Model Rule of Professional Conduct 8.4 to further implement Goal III by bringing into the black letter of the Rules an anti-discrimination and anti-harassment provision. This action is consistent with other actions taken by the Association to implement Goal III and to eliminate bias in the legal profession and the justice system.

For example, in February 2015, the ABA House of Delegates adopted revised ABA Standards for Criminal Justice: Prosecution Function and Defense Function which now include anti-bias provisions. These provisions appear in Standards 3-1.6 of the Prosecution Function Standards, and Standard 4.16 of the Defense Function Standards.10 The Standards explain that prosecutors and defense counsel should not, "manifest or exercise, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity or socioeconomic status." This statement appears in the black letter of the Standards, not in a comment. And, as noted above, one year before the adoption of Goal III, the Association directly addressed prejudice, bias and harassment in the black letter of Model Rule 2.3 in the 2007 Model Code of Judicial Conduct.

Some opponents to bringing an anti-discrimination and anti-harassment provision into the black letter of the Model Rules have suggested that the amendment is not necessary—that the current provision provides the proper level of guidance to lawyers. Evidence from the ABA and around the country suggests otherwise. For example:

- Twenty-two states and the District of Columbia have not waited for the Association to act. They already concluded that the current Comment to an ABA Model Rule does not adequately address discriminatory or harassing behavior by lawyers. As a result, they have adopted anti-discrimination and/or anti-harassment provisions into the black letter of their rules of professional conduct.11 By contrast, only thirteen jurisdictions have decided to address this issue in a Comment similar to the current Comment in the Model


11 See California Rule of Prof'l Conduct 2-400; Colorado Rule of Professional Conduct 8.4(g); Florida Rule of Professional Conduct 4-8.4(d); Illinois Rule of Prof'l Conduct 8.4(j); Indiana Rule of Prof'l Conduct 8.4(g); Iowa Rule of Prof'l Conduct 8.4(g); Maryland Lawyers' Rules of Prof'l Conduct 8.4(e); Massachusetts Rule of Prof'l Conduct 3.4(e); Minnesota Rule of Prof'l Conduct 8.4(h); Missouri Rule of Prof'l Conduct 4-8.4(g); Nebraska Rule of Prof'l Conduct 8.4(d); New Jersey Rule of Prof'l Conduct 8.4(g); New Mexico Rule of Prof'l Conduct 16-300; New York Rule of Prof'l Conduct 8.4(g); North Dakota Rule of Prof'l Conduct 8.4(f); Ohio Rule of Prof'l Conduct 8.4(g); Oregon Rule of Prof'l Conduct 8.4(a)(7); Rhode Island Rule of Prof'l Conduct 8.4(d); Texas Rule of Prof'l Conduct 5.08; Vermont Rule of Prof'l Conduct 8.4(g); Washington Rule of Prof'l Conduct 8.4(g); Wisconsin Rule of Prof'l Conduct 8.4(i); D.C. Rule of Prof'l Conduct 9.1.
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Rules. Fourteen states do not address this issue at all in their Rules of Professional Conduct. As noted above, the ABA has already brought anti-discrimination and anti-harassment provisions into the black letter of other conduct codes like the ABA Standards for Criminal Justice: Prosecution Function and Defense Function and the 2007 ABA Model Code of Judicial Conduct, Rule 2.3.

- The Florida Bar’s Young Lawyer’s Division reported this year that in a survey of its female members, 43% of respondents reported they had experienced gender bias in their career.

- The supreme courts of the jurisdictions that have black letter rules with anti-discrimination and anti-harassment provisions have not seen a surge in complaints based on these provisions. Where appropriate, they are disciplining lawyers for discriminatory and harassing conduct.

12 See Arizona Rule of Prof’l Conduct 8.4, cmt.; Arkansas Rule of Prof’l Conduct 8.4, cmt. [3]; Connecticut Rule of Prof’l Conduct 8.4, Commentary; Delaware Lawyers’ Rule of Prof’l Conduct 8.4, cmt. [3]; Idaho Rule of Prof’l Conduct 8.4, cmt. [3]; Maine Rule of Prof’l Conduct 8.4, cmt. [3]; North Carolina Rule of Prof’l Conduct 8.4, cmt. [5]; South Carolina Rule of Prof’l Conduct 8.4, cmt. [3]; South Dakota Rule of Prof’l Conduct 8.4, cmt. [3]; Tennessee Rule of Prof’l Conduct 8.4, cmt. [3]; Utah Rule of Prof’l Conduct 8.4, cmt. [3]; Wyoming Rule of Prof’l Conduct 8.4, cmt. [3]; West Virginia Rule of Prof’l Conduct 8.4, cmt. [3].

13 The states that do not address this issue in their rules include Alabama, Alaska, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nevada, New Hampshire, Oklahoma, Pennsylvania, and Virginia.


15 In 2015 the Iowa Supreme Court disciplined a lawyer for sexually harassing four female clients and one female employee. In re Moothart, 860 N.W.2d 598 (2015). The Wisconsin Supreme Court in 2014 disciplined a district attorney for texting the victim of domestic abuse writing that he wished the victim was not a client because she was “a cool person to know.” On one day, the lawyer sent 19 text messages asking whether the victim was the “kind of girl who likes secret contact with an older married elected DA . . . . . . the riskier the better.” One day later, the lawyer sent the victim 8 text messages telling the victim that she was pretty and beautiful and that he had a $350,000 home. In re Kratz, 851 N.W.2d 219 (2014). The Minnesota Supreme Court in 2013 disciplined a lawyer who, while acting as an adjunct professor and supervising law students in a clinic, made unwelcome comments about the student’s appearance; engaged in unwelcome physical contact of a sexual nature with the student; and attempted to convince the student to recant complaints she had made to authorities about him. In re Griffith, 838 N.W.2d 792 (2013). The Washington Supreme Court in 2012 disciplined a lawyer, who was representing his wife and her business in dispute with employee who was Canadian. The lawyer sent two ex parte communications to the trial judge asking questions like: are you going to believe an alien or a U.S. citizen? In re McGrath, 280 P.3d 1091 (2012). The Indiana Supreme Court in 2009 disciplined a lawyer who, while representing a father at a child support modification hearing, made repeated disparaging references to the facts that the mother was not a U.S. citizen and was receiving legal services at no charge. In re Campiti, 937 N.E.2d 340 (2009). The Indiana Supreme Court in 2005 disciplined a lawyer who represented a husband in an action for dissolution of marriage. Throughout the custody proceedings the lawyer referred to the wife being seen around town in the presence of a “black male” and that such association was placing the children in harm’s way. During a hearing, the lawyer referred to the African-American man as “the black guy” and “the black man.” In re Thomsen, 837 N.E.2d 1011 (2005).
IV. Summary of Proposed Amendments

A. Prohibited Activity

SCEPR’s proposal adds a new paragraph (g) to Rule 8.4, to prohibit conduct by a lawyer related to the practice of law that harasses or discriminates against members of specified groups. New Comment [3] defines the prohibited behavior.

Proposed new black letter Rule 8.4(g) does not use the terms “manifests . . . bias or prejudice” which appear in the current provision. Instead, the new rule adopts the terms “harass or discriminate” which are based on the words “harassment” and “discrimination” that already appear in a large body of substantive law, antidiscrimination and anti-harassment statutes, and case law nationwide and in the Model Judicial Code. For example, in new Comment [3], “harass” is defined as including “sexual harassment and derogatory or demeaning language towards a person who is, or is perceived to be, a member of one of the groups . . . unwelcome sexual advances, requests for sexual favors, and or other unwelcome verbal or physical conduct of a sexual nature.” This definition is based on the language of Rule 2.3(C) of the ABA Model Code of Judicial Conduct and its Comment [4], adopted by the House in 2007 and applicable to lawyers in proceedings before a court.\textsuperscript{17}

Discrimination is defined in new Comment [3] as “harmful verbal or physical conduct that manifests bias or prejudice towards others because of their membership or perceived membership in one or more of the groups listed in paragraph (g).” This is based in part on ABA Model Code of Judicial Conduct, Rule 2.3, Comment [3], which notes that harassment, one form of discrimination, includes “verbal or physical conduct,” and on the current rule, which prohibits lawyers from manifesting bias or prejudice while representing clients.

Proposed new Comment [3] also explains, “The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).” This provision makes clear that the substantive law on antidiscrimination and anti-harassment is not necessarily dispositive in the disciplinary context. Thus, conduct that has a discriminatory impact alone, while possibly dispositive elsewhere, would not necessarily result in discipline under new Rule 8.4(g). But, substantive law regarding discrimination and harassment can also guide a lawyer’s conduct. As the Preamble to the Model Rules explains, “A lawyer’s conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer’s business and personal affairs.”\textsuperscript{18}

B. Mens Rea Requirement

Proposed new Rule 8.4(g) does not use the term “knowingly.” SCEPR received many comments about whether new paragraph (g) should include a specifically stated requirement that the

\textsuperscript{16} The phrase, “manifestations of bias or prejudice” is utilized in proposed new Comment [3].
\textsuperscript{17} ABA Model Code of Judicial Conduct Rule 2.3, Comment [4] reads: “Sexual harassment includes but is not limited to sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome.”
misconduct be “knowing” discrimination or harassment. SCEPR concluded that a “knowing” or “knowingly” requirement in new paragraph (g) is neither necessary nor appropriate.

Rule 8.4(d), which current Comment [3] illuminates, prohibits “conduct that is prejudicial to the administration of justice.” It does not include an additional requirement that such conduct be “knowing.” Current Rule 8.4(d) does not require one to “knowingly” engage in conduct that is prejudicial to the administration of justice.

Some commentators suggested that the term “knowingly” should be preserved from the current Comment, which explains that “a lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice ... violates paragraph (d) when such actions are prejudicial to the administration of justice.” As noted above, Comments provide interpretive guidance but are not elements of the Rule.

“Knowingly” as used in the Model Rules denotes “actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.” Rule 1.0(f). And the use of the term “knowingly” in the current provision makes sense in the context of that comment, which deals with bias and prejudice. Bias and prejudice are states of mind that can only be observed when they are made manifest by knowing acts (words or conduct). So it was appropriate to require a “knowing” manifestation as the basis for discipline.

By contrast, “harassment” and “discrimination” are terms that denote actual conduct. As explained in proposed new Comment [3], both “harassment” and “discrimination” are defined to include verbal and physical conduct against others. The proposed rule would not expand on what would be considered harassment and discrimination under federal and state law. Thus, the terms used in the rule—“harass and discriminate”—by their nature incorporate a measure of intentionality while also setting a minimum standard of acceptable conduct. This does not mean that complainants should have to establish their claims in civil courts before bringing disciplinary claims. Rather, it means that the rule intends that these words have the meaning established at law. The well-developed meaning and well-delineated boundaries of these terms in legal doctrine rebuts any notion that the standard imposes strict liability based on a vague and subjective proscription.

Also, the mens rea of the respondent, as well as the harm caused by the conduct, are factors that could be taken into account under the Standards for Imposing Lawyer Sanctions, for example, when determining what sanctions, if any, would be appropriate for the conduct.

C. Scope of the Rule

Proposed Rule 8.4(g) makes it professional misconduct for a lawyer to harass or discriminate while engaged in “conduct related to the practice of law.” The rule is constitutionally limited; it does not seek to regulate harassment or discrimination by a lawyer that occurs outside the scope of the lawyer’s practice of law, nor does it limit a lawyer’s representational role in our legal system. It does not limit the scope of the legal advice a lawyer may render to clients, which is

19 Thus, for example, where the word “knowingly” is used elsewhere in the Model Rules—in paragraphs (a) and (f) to Rule 8.4 and in Rule 3.3(a) for example—the lawyer’s state of mind and knowledge or lack thereof can readily be inferred from the conduct involved and the circumstances surrounding that conduct.
addressed in Model Rule 1.2. It permits legitimate advocacy. It does not change the circumstances under which a lawyer may accept, decline or withdraw from a representation. To the contrary, the proposal makes clear that Model Rule 1.16 addresses such conduct. The proposal also does not limit a lawyer’s ability to charge and collect a reasonable fee for legal services, which remains governed by Rule 1.5. And, as new Comment [4] makes clear, the proposed Rule does not impose limits or requirements on the scope of a lawyer’s professional expertise.

Note also that while the provision in current Comment [3] limits the scope of Rule 8.4(d) to situations where the lawyer is representing clients, Rule 8.4(d) itself is not so limited. In fact, lawyers have been disciplined under Rule 8.4(d) for conduct that does not involve the representation of clients. 20

Some commenters expressed concern that the phrase, “conduct related to the practice of law,” is vague. “The definition of the practice of law is established by law and varies from one jurisdiction to another.”21 The phrase “conduct related to” is elucidated in the proposed new Comments and is consistent with other terms and phrases used in the Rules that have been upheld against vagueness challenges.22 The proposed scope of Rule 8.4(g) is similar to the scope of existing anti-discrimination provisions in many states.23

Proposed new Comment [4] explains that conduct related to the practice of law includes, “representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.” (Emphasis added.) The nexus of the conduct regulated by the rule is that it is conduct lawyers are permitted or required to engage in because of their work as a lawyer.

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21 MODEL RULES OF PROF’L CONDUCT R. 5.5 cmt. [2].
23 See Florida Rule of Professional Conduct 4-8.4(d) which addresses conduct “in connection with the practice of law”; Indiana Rule of Prof’l Conduct 8.4(g) which addresses conduct a lawyer undertakes in the lawyer’s “professional capacity”; Iowa Rule of Prof’l Conduct 8.4(g) which addresses conduct “in the practice of law”; Maryland Lawyers’ Rules of Prof’l Conduct 8.4(e) with the scope of “when acting in a professional capacity”; Minnesota Rule of Prof’l Conduct 8.4(h) addressing conduct “in connection with a lawyer’s professional activities”; New Jersey Rule of Prof’l Conduct 8.4(g) addressing when a lawyer’s conduct is performed “in a professional capacity”; New York Rule of Prof’l Conduct 8.4(g) covering conduct “in the practice of law”; Ohio Rule of Prof’l Conduct 8.4(g) addressing when lawyer “engage, in a professional capacity, in conduct”; Washington Rule of Prof’l Conduct 8.4(g) covering “connection with the lawyer’s professional activities”; and Wisconsin Rule of Prof’l Conduct 8.4(i) with a scope of conduct “in connection with the lawyer’s professional activities.”
The scope of proposed 8.4(g) is actually narrower and more limited than is the scope of other Model Rules. “[T]here are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity.” For example, paragraph (c) to Rule 8.4 declares that it is professional misconduct for a lawyer to engage in conduct “involving dishonesty, fraud, deceit or misrepresentation.” Such conduct need not be related to the lawyer’s practice of law, but may reflect adversely on the lawyer’s fitness to practice law or involve moral turpitude.

However, insofar as proposed Rule 8.4(g) applies to “conduct related to the practice of law,” it is broader than the current provision. This change is necessary. The professional roles of lawyers include conduct that goes well beyond the representation of clients before tribunals. Lawyers are also officers of the court, managers of their law practices and public citizens having a special responsibility for the administration of justice. Lawyers routinely engage in organized bar-related activities to promote access to the legal system and improvements in the law. Lawyers engage in mentoring and social activities related to the practice of law. And, of course, lawyers are licensed by a jurisdiction’s highest court with the privilege of practicing law. The ethics rules should make clear that the profession will not tolerate harassment and discrimination in all conduct related to the practice of law.

Therefore, proposed Comment [4] explains that operating or managing a law firm is conduct related to the practice of law. This includes the terms and conditions of employment. Some commentators objected to the inclusion of workplace harassment and discrimination within the scope of the Rule on the ground that it would bring employment law into the Model Rules. This objection is misplaced. First, in at least two jurisdictions which have adopted an anti-discrimination Rule, the provision is focused entirely on employment and the workplace. Other jurisdictions have also included workplace harassment and discrimination among the conduct prohibited in their Rules. Second, professional misconduct under the Model Rules already applies to substantive areas of the law such as fraud and misrepresentation. Third, that part of the management of a law practice which includes the solicitation of clients and advertising of legal services are already subjects of regulation under the Model Rules. And fourth, this would not be the first time the House of Delegates adopted policy on the terms and

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24 MODEL RULES OF PROF'L CONDUCT, Preamble [3].
25 MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. [2].
26 MODEL RULES OF PROF'L CONDUCT, Preamble [1] & [6].
27 See D.C. Rule of Prof'l Conduct 9.1 & Vermont Rule of Prof'l Conduct 8.4(g). The lawyer population for Washington DC is 52,711 and Vermont is 2,326. Additional lawyer demographic information is available on the American Bar Association website: http://www.americanbar.org/resources_for_lawyers/profession_statistics.html.
28 Other jurisdictions have specifically included workplace harassment and discrimination among the conduct prohibited in their Rules. Some jurisdictions that have included workplace harassment and discrimination as professional misconduct require a prior finding of employment discrimination by another tribunal. See California Rule of Prof'l Conduct 2-400 (lawyer population 167,690); Illinois Rule of Prof'l conduct 8.4(j) (lawyer population 63,060); New Jersey Rule of Prof'l Conduct 8.4(g) (lawyer population 41,569); and New York Rule of Prof'l Conduct 8.4(g) (lawyer population 175,195). Some jurisdictions that have included workplace harassment and discrimination as professional misconduct require that the conduct be unlawful. See, e.g., Iowa Rule of Prof'l Conduct 8.4(g) (lawyer population of 7,560); Ohio Rule of Prof'l Conduct 8.4(g) (lawyer population 38,237); and Minnesota Rule of Prof'l Conduct 8.4(h) (lawyer population 24,952). Maryland has included workplace harassment and discrimination as professional misconduct when the conduct is prejudicial to the administration of justice. Maryland Lawyers’ Rules of Prof'l Conduct 8.4(e), cmt. [3] (lawyer population 24,142).
conditions of lawyer employment. In 2007, the House of Delegates adopted as ABA policy a recommendation that law firms should discontinue mandatory age-based retirement policies.\textsuperscript{30} and earlier, in 1992, the House recognized that “sexual harassment is a serious problem in all types of workplace settings, including the legal profession, and constitutes a discriminatory and unprofessional practice that must not be tolerated in any work environment.”\textsuperscript{31} When such conduct is engaged in by lawyers it is appropriate and necessary to identify it for what it is; professional misconduct.

This Rule, however, is not intended to replace employment discrimination law. The many jurisdictions which already have adopted similar rules have not experienced a mass influx of complaints based on employment discrimination or harassment. There is also no evidence from these jurisdictions that disciplinary counsel became the tribunal of first resort for workplace harassment or discrimination claims against lawyers. This Rule would not prohibit disciplinary counsel from deferring action on complaints, pending other investigations or actions.

Equally important, the ABA should not adopt a rule that would apply only to lawyers acting outside of their own law firms or law practices but not to lawyers acting within their offices, toward each other and subordinates. Such a dichotomy is unreasonable and unsupportable.

As also explained in proposed new Comment [4], conduct related to the practice of law includes activities such as law firm dinners and other nominally social events at which lawyers are present solely because of their association with their law firm or in connection with their practice of law. SCEPR was presented with substantial anecdotal information that sexual harassment takes place at such events. “Conduct related to the practice of law” includes these activities.

Finally with respect to the scope of the rule, some commentators suggested that because legal remedies are available for discrimination and harassment in other forums, the bar should not permit an ethics claim to be brought on that basis until the claim has first been presented to a legal tribunal and the tribunal has found the lawyer guilty of or liable for harassment or discrimination.

SCEPR has considered and rejected this approach for a number of reasons. Such a requirement is without precedent in the Model Rules. There is no such limitation in the current provision. Legal ethics rules are not dependent upon or limited by statutory or common law claims. The ABA takes pride in the fact that “the legal profession is largely self-governing.”\textsuperscript{32} As such, “a lawyer’s failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process,” not the civil legal system.\textsuperscript{33} The two systems run on separate tracks.

The Association has never before required that a party first invoke the civil legal system before filing a grievance through the disciplinary system. In fact, as a self-governing profession we have made it clear that “[v]iolation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been

\textsuperscript{30} ABA HOUSE OF DELEGATES RESOLUTION 10A (Aug. 2007).
\textsuperscript{31} ABA HOUSE OF DELEGATES RESOLUTION 117 (Feb. 1992).
\textsuperscript{32} MODEL RULES OF PROFESSIONAL CONDUCT, Preamble & Scope [10].
\textsuperscript{33} MODEL RULES OF PROFESSIONAL CONDUCT, Preamble & Scope [19].
Thus, legal remedies are available for conduct, such as fraud, deceit or misrepresentation, which also are prohibited by paragraph (c) to Rule 8.4, but a claimant is not required as a condition of filing a grievance based on fraud, deceit or misrepresentation to have brought and won a civil action against the respondent lawyer, or for the lawyer to have been charged with and convicted of a crime. To now impose such a requirement, only for claims based on harassment and discrimination, would set a terrible precedent and send the wrong message to the public.

In addition, the Model Rules of Professional Conduct reflect ABA policy. Since 1989, the ABA House of Delegates has adopted policies promoting the equal treatment of all persons regardless of sexual orientation or gender identity. Many states, however, have not extended protection in areas like employment to lesbian, gay, or transgender persons. A Model Rule should not be limited by such restrictions that do not reflect ABA policy. Of course, states and other jurisdictions may adapt ABA policy to meet their individual and particular circumstances.

D. Protected Groups

New Rule 8.4(g) would retain the groups protected by the current provision. In addition, new 8.4(g) would also include “ethnicity,” “gender identity,” and “marital status.” The anti-discrimination provision in the ABA Model Code of Judicial Conduct, revised and adopted by the House of Delegates in 2007, already requires judges to ensure that lawyers in proceedings before the court refrain from manifesting bias or prejudice and from harassing another based on that person’s marital status and ethnicity. The drafters believe that this same prohibition also should be applicable to lawyers in conduct related to the practice of law not merely to lawyers in proceedings before the court.

“Gender identity” is added as a protected group at the request of the ABA’s Goal III Commissions. As used in the Rule this term includes “gender expression” which is as a form of gender identify. These terms encompass persons whose current gender identity and expression are different from their designations at birth. The Equal Employment Opportunities

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34 MODEL RULES OF PROFESSIONAL CONDUCT, Preamble & Scope [20].
35 E.g., People v. Odom, 941 P.2d 919 (Colo. 1997) (lawyer disciplined for committing a crime for which he was never charged).
36 A list of ABA policies supporting the expansion of civil rights to and protection of persons based on their sexual orientation and gender identity can be found here: http://www.americanbar.org/groups/sexual_orientation/policy.html.
37 For a list of states that have not extended protection in areas like employment to LGBT individuals see: https://www.aclu.org/map/non-discrimination-laws-state-state-information-map.
38 Some commenters advised eliminating references to any specific groups from the Rule. SCEPR concluded that this would risk including within the scope of the Rule appropriate distinctions that are properly made in professional life. For example, a law firm or lawyer may display “geographic bias” by interviewing for employment only persons who have expressed a willingness to relocate to a particular state or city. It was thought preferable to specifically identify the groups to be covered under the Rule.
39 The U.S. Office of Personnel Management Diversity & Inclusion Reference Materials defines gender identity as “the individual’s internal sense of being male or female. The way an individual expresses his or her gender identity is frequently called ‘gender expression,’ and may or may not conform to social stereotypes associated with a particular gender.” See Diversity & Inclusion Reference Materials, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/ (last visited May 9, 2016).
Commission interprets Title VII as prohibiting discrimination against employees on the basis of sexual orientation and gender identity. In 2015, the ABA House adopted revised Criminal Justice Standards for the Defense Function and the Prosecution Function. Both sets of Standards explains that defense counsel and prosecutors should not manifest bias or prejudice based on another’s gender identity. To ensure notice to lawyers and to make these provisions more parallel, the Goal III Commission on Sexual Orientation and Gender Identity recommended that gender identity be added to the black letter of paragraph (g). New Comment [3] notes that applicable law may be used as a guide to interpreting paragraph (g). Under the Americans with Disabilities Act discrimination against persons with disabilities includes the failure to make the reasonable accommodations necessary for such person to function in a work environment.

Some commenters objected to retaining the term “socioeconomic status” in new paragraph (g). This term is included in the current provision and also is in the Model Judicial Code. The term has not been applied indiscriminately or irrationally in any jurisdiction which has adopted it. The Indiana disciplinary case In re Campiti, 937 N.E.2d 340 (2009) provides guidance as to the meaning of the term. In that matter, a lawyer was reprimanded for disparaging references he made at trial about a litigant’s socioeconomic status: the litigant was receiving free legal services. SCEPR concluded that the unintended consequences of removing this group would be more detrimental than the consequences of keeping it in.

Discrimination against persons based on their source of income or acceptance of free or low-cost legal services would be examples of discrimination based on socioeconomic status. However, new Comment [5] makes clear that the Rule does not limit a lawyer’s ability to charge and collect a reasonable fee and reimbursement of expenses, nor does it affect a lawyer’s ability to limit the scope of his or her practice.

SCEPR was concerned, however, that this Rule not be read as undermining a lawyer’s pro bono obligations or duty to accept court-appointed clients. Therefore, proposed Comment [5] does encourage lawyers to be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 to not avoid appointments from a tribunal except for “good cause.”

E. Promoting Diversity

Proposed new Comment [4] to Rule 8.4 makes clear that paragraph (g) does not prohibit conduct undertaken by lawyers to promote diversity. As stated in the first Goal III Objective, the Association is committed to promoting full and equal participation in the Association, our profession and the justice system by all persons. According to the ABA Lawyer Demographics for 2016, the legal profession is 64% male and 36% female. The most recent figures for racial
demographics are from the 2010 census showing 88% White, 5% Black, 4% Hispanic, and 3% Asian Pacific American, with all other ethnicities less than one percent.\textsuperscript{43} Goal III guides the ABA toward greater diversity in our profession and the justice system, and Rule 8.4(g) seeks to further that goal.

\textbf{F. How New Rule 8.4(g) Affects Other Model Rules of Professional Conduct}

When SCEPR released a draft proposal in December 2015 to amend Model Rule 8.4, some commenters expressed concern about how proposed new Rule 8.4(g) would affect other Rules of Professional Conduct. As a result, SCEPR's proposal to create new Rule 8.4(g) now includes a discussion of its effect on certain other Model Rules.

For example, commenters questioned how new Rule 8.4(g) would affect a lawyer's ability to accept, refuse or withdraw from a representation. To make it clear that proposed new Rule 8.4(g) is not intended to change the ethics rules affecting those decisions, the drafters included in paragraph (g) a sentence from Washington State's Rule 8.4(g), which reads: "This Rule does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16." Rule 1.16 defines when a lawyer shall and when a lawyer may decline or withdraw from a representation. Rule 1.16(a) explains that a lawyer shall not represent a client or must withdraw from representing a client if: "(1) the representation will result in violation of the rules of professional conduct or other law." Examples of a representation that would violate the Rules of Professional Conduct are representing a client when the lawyer does not have the legal competence to do so (See Rule 1.1) and representing a client with whom the lawyer has a conflict of interest (See Rules 1.7, 1.9, 1.10, 1.11, 1.12).

To address concerns that this proposal would cause lawyers to reject clients with unpopular views or controversial positions, SCEPR included in proposed new Comment [5] a statement reminding lawyers that a lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities, with a citation to Model Rule 1.2(b). That Rule reads: "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."

Also, with respect to this rule as with respect to all the ethics Rules, Rule 5.1 provides that a managing or supervisory lawyer shall make reasonable efforts to insure that the lawyer's firm or practice has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct. Such efforts will build upon efforts already being made to give reasonable assurance that lawyers in a firm conform to Rule 8.4(d) and are not manifesting bias or prejudice in the course of representing a client that is prejudicial to the administration of justice.

\textbf{G. Legitimate Advocacy}

New Comment [5] to Rule 8.4 includes the following sentence: "Paragraph (g) does not prohibit legitimate advocacy that is material and relevant to factual or legal issues or arguments in a representation." This retains and updates the statement on legitimate advocacy that is contained

\textsuperscript{43} \textit{Id.}
in the current provision. The current provision reads: “Legitimate advocacy respecting the foregoing factors does not violate paragraph (d).”

**H. Peremptory Challenges**

The following sentence appears in the current provision: “A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.” This statement is analogous to a statement in Disciplinary Rule 4-101 of the 1969 Model Code of Professional Responsibility, where the ethical obligation of confidentiality was linked to the legal evidentiary standard of attorney-client privilege. Just as the Model Rules subsequently separated the evidentiary standard from the ethical standard, so too SCEPR determined to separate a determination by a trial judge on peremptory challenges from a decision as to whether there has been discrimination under the Model Rules. The weight given to the trial judge’s determination should be decided as part of the disciplinary process, not determined by a comment in the Model Rules of Professional Conduct. Thus, SCEPR concluded that this question might more appropriately be addressed under the Model Rules for Lawyer Disciplinary Enforcement or the Standards for Imposing Lawyer Sanctions.

**V. CONCLUSION**

As noted at the beginning of this Report the Association has a responsibility to lead the profession in promoting equal justice under law. This includes working to eliminate bias in the legal profession. In 2007 the Model Judicial Code was amended to do just that. Twenty-three jurisdictions have also acted to amend their rules of professional conduct to address this issue directly. It is time to follow suit and amend the Model Rules. The Association needs to address such an important and substantive issue in a Rule itself, not just in a Comment.

Proposed new paragraph (g) to Rule 8.4 is a reasonable, limited and necessary addition to the Model Rules of Professional Conduct. It will make it clear that it is professional misconduct to harass or discriminate while engaged in conduct related to the practice of law. And as has already been shown in the jurisdictions that have such a rule, it will not impose an undue burden on lawyers.

As the premier association of attorneys in the world, the ABA should lead anti-discrimination, anti-harassment, and diversity efforts not just in the courtroom, but wherever it occurs in conduct by lawyers related to the practice of law. The public expects no less of us. Adopting the Resolution will advance this most important goal.

Respectfully submitted,

Myles V. Lynk, Chair
Standing Committee on Ethics and Professional Responsibility
August 2016

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GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Ethics and Professional Responsibility

Submitted By: Dennis Rendleman, Ethics Counsel

1. **Summary of Resolution(s).** The resolution would amend Model Rule of Professional Conduct 8.4, *Misconduct*, to create new paragraph (g) that would create in the black letter of the Rules an anti-discrimination and anti-harassment provision. The resolution also amends Comment [3], creates new Comments [4] and [5] to Rule 8.4 and renumbers current Comments [4] and [5].

2. **Approval by Submitting Entity.** The Standing Committee on Ethics and Professional Responsibility approved filing this resolution in April 2016. Co-sponsors, the Civil Rights & Social Justice Section, the Commission on Disability Rights, the Diversity & Inclusion 360 Commission, the Commission on Racial and Ethnic Diversity in the Profession, the Commission on Sexual Orientation and Gender Identity, and the Commission on Women in the Profession signed on during the months of April and May 2016. The Commission on Hispanic Legal Rights & Responsibilities and the Center for Racial and Ethnic Diversity voted to support the resolution in May 2016.

3. **Has this or a similar resolution been submitted to the House or Board previously?** This resolution is new. But, the House has acted on similar resolutions. For example, in February 1994 the Young Lawyers Division authored a resolution to bring an anti-discrimination and anti-harassment provision into the black letter of the ABA Model Rules of Professional Conduct. It was withdrawn. Also in February 1994, the Standing Committee on Ethics and Professional Responsibility authored a similar provision. It, too, was withdrawn.

   In February 1995, the House adopted Resolution 116C submitted by the Young Lawyers Division. Through that resolution the Association condemned lawyer bias and prejudice in the course of the lawyer’s professional activities and opposed unlawful discrimination by lawyers in the management or operation of a law practice.

   In February 1998, the Criminal Justice Section recommended that the Model Rules of Professional Conduct include within the black letter an anti-discrimination provision. At the same meeting, the Standing Committee on Ethics and Professional Responsibility submitted a resolution recommending a Comment that included an anti-discrimination provision. Both resolutions were withdrawn.

   In August 1998, a joint resolution of the Standing Committee on Ethics and Professional Responsibility and the Criminal Justice Section was submitted and was adopted. The resolution created Comment [3] to Rule 8.4 suggesting that it could be misconduct that is prejudicial to the administration of justice when a lawyer, in the course of representing a client, knowingly manifest by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status.
4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? The adoption of this resolution would result in amendments to the ABA Model Rules of Professional Conduct. Goal III of the Association—to promote full and equal participation in the Association, the profession, and the justice system by all persons and to eliminate bias in the legal profession and the justice system—would be advanced by the adoption of this resolution.

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 Center for Professional Responsibility will publish any updates to the ABA Model Rules of Professional Conduct and Comments, and also will publish electronically other newly adopted policies. The Policy Implementation Committee of the Center for Professional Responsibility has in place the procedures and infrastructure to successfully implement any policies proposed that are adopted by the House of Delegates.

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

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

10. Referrals. The Standing Committee on Ethics and Professional Responsibility has been transparent in its research and drafting process for this resolution. First, the Committee appointed a Working Group to research and craft a proposal. The Working Group included representatives from the following Goal III Commissions: Disability, Racial and Ethnic Diversity in the Profession, Sexual Orientation and Gender Identity, and Women in the Profession. The Ethics Committee then hosted two public events—an informal Roundtable in July 2015 at the ABA Annual Meeting in Chicago on its summer 2015 Working Discussion Draft and a formal public hearing in February 2016 at the ABA MidYear Meeting in San Diego on its draft proposal. At these two events, the Ethics Committee accepted written and verbal comments on two different discussion drafts.

The Ethics Committee developed a Rule 8.4 website to communicate information about its work. Drafts and comments received were posted. Through this website, the Committee received more than 450 comments to its December 2015 draft rule.

Using email, the Ethics Committee reached out directly to numerous sections and committees communicating with both the entity’s chairman and the entity’s staff person about the public hearings and procedure for providing comments. Groups solicited included: the Standing Committees on Professional Discipline, Professionalism, Client Protection, Specialization, Legal Aid and Indigent Defendants, the Commissions on Law and Aging and Hispanic Rights and Responsibilities, the Sections on Business Law, Litigation, Criminal Justice, Family Law, Trial Tort and Insurance Practice, and the Judicial Division, the Solo, Small
Firm and General Practice Section, the Senior Lawyers Division, and the Young Lawyers Division.

The Ethics Committee’s work on this issue was the subject of news articles in the Lawyers’ Manual on Professional Conduct and the ABA Journal.

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 amends Model Rule of Professional Conduct 8.4, Misconduct, to create new paragraph (g) that establishes a black letter rule prohibiting discrimination and harassment. The resolution also amends Comment [3], creates new Comments [4] and [5] to Rule 8.4 and renumbers current Comments [4] and [5].

Discriminate and harass are both defined in amended Comment [3]. Discrimination is harmful verbal or physical conduct that manifests bias or prejudice towards others because of their membership or perceived membership in one or more of the groups listed in paragraph (g). Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct towards a person who is, or is perceived to be, a member of one of the groups. Protected persons include those listed in current Comment [3] (persons discriminated on the basis of race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status) and also includes persons discriminated on the basis of ethnicity, gender identity, and marital status. This brings the Model Rules more into line with the Model Code of Judicial Conduct and the Criminal Justice Standards for the Prosecution Function and Standards for the Defense Function.

The scope of new paragraph (g) is “conduct related to the practice of law.” The resolution defines covered conduct as “representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.” Adoption of policy on the terms and conditions of lawyer employment is not foreign to the House of Delegates.

New Rule 8.4(g) includes the statement, “This Rule does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16.” ABA Model Rule of Professional Conduct 1.16(a) explains that a lawyer shall not represent a client or must withdraw from representing a client if “the representation will result in violation of the rules of professional conduct or other law.” Examples of a representation that would violate the Rules of Professional Conduct is representing a client when the lawyer does not have the legal competence to do so (Rule 1.1) and representing a client with whom the lawyer has a conflict of interest under the Rules including Rule 1.7 (current client) and Rule 1.9 (former client).

2. Summary of the Issue that the Resolution Addresses

This Resolution is a reasonable and rational implementation of ABA’s Goal III: to eliminate bias in the justice system. The ABA has adopted anti-discrimination and anti-bias provisions in the black letter of the Model Code of Judicial Conduct and in the black letter of the Criminal Justice Standards for the Prosecution Function and the Defense Function. Twenty-three jurisdictions have already adopted anti-discrimination or anti-harassment provisions in the black letter of their ethics rules. It is time for the Association to now address bias and prejudice squarely in the black letter of the Model Rules of Professional Conduct.
3. **Please Explain How the Proposed Policy Position will address the issue**

In the 23 jurisdictions that have adopted a black letter rule that provides it is misconduct for a lawyer to discriminate or harass another, disciplinary agencies have investigated and successfully prosecuted lawyers for discriminatory and harassing behavior.

For example, in 2015 the Iowa Supreme Court disciplined a lawyer for sexually harassing four women clients and one female employee. In Wisconsin, the Supreme Court disciplined a district attorney for texting the victim of domestic abuse writing that he wished the victim was not a client because she was “a cool person to know.” On one day, the lawyer sent 19 text messages asking whether the victim was the “kind of girl who likes secret contact with an older married elected DA . . . the riskier the better.” One day later, the lawyer sent the victim 8 text messages telling the victim that she was pretty and beautiful and that he had a $350,000 home. The victim reported she felt that if she did not respond, the district attorney would not prosecute the domestic violence complaint.

The Minnesota Supreme Court in 2013 disciplined a lawyer who, while acting as an adjunct professor and supervising law students in a clinic, made unwelcome comments about the student’s appearance; engaged in unwelcome physical contact of a sexual nature with the student; and attempted to convince the student to recant complaints she had made to authorities about him.

The Washington Supreme Court in 2012 disciplined a lawyer, who was representing his wife and her business in dispute with employee who was Canadian. The lawyer sent two ex parte communications to the trial judge asking questions like: are you going to believe an alien or a U.S. citizen? The Indiana Supreme Court in 2005 disciplined a lawyer who represented a husband in an action for dissolution of marriage. Throughout the custody proceedings the lawyer referred to the wife being seen around town in the presence of a “black male” and that such association was placing the children in harm’s way. During a hearing, the lawyer referred to the African-American man as “the black guy” and “the black man.”

Those states are leading while the ABA has not kept pace.

This proposal is a measured response to a need for a revised Model Rule of Professional Conduct that implements the Association’s Goal III – to eliminate bias in the legal profession and the justice system.

4. **Summary of Minority Views**

As explained in the Report, over the past two years, SCEPR has publicly engaged in a transparent investigation to determine, first whether, and then how, the Model Rules should be amended to reflect the changes in law and practice since 1998.

In December 2015, SCEPR published a revised draft of a proposal to amend Rule 8.4(g), together with proposed new Comments to Rule 8.4. SCEPR also announced to the Association,
including on the House of Delegates listserv, that it would host a Public Hearing at the Midyear Meeting in San Diego in February 2016. Written comments were also invited.

After the comment period closed in March 2016, SCEPR made substantial and significant changes to the Resolution based on minority views submitted. Changes include:

- At the request of the ABA Section of Real Property, Trust and Estate Law, the Resolution now defines discriminate in Comment [3]; it explains that disciplinary counsel may use the substantive law of antidiscrimination and anti-harassment to guide application of paragraph (g) in Comment [3]; and provides additional guidance including a statement that lawyers who charge and collect reasonable fees do so without violating paragraph (g)’s prohibition on discrimination based on socioeconomic status in Comment [5].
- At the request of the ABA Labor and Employment Law Section, this Report now explains that the terms and conditions of employment are included within the scope of “operating or managing a law firm.” Labor and Employment Law requested that the proposal include a statement that the Rule be interpreted and implemented in accordance with Title VII case law. This Report explains why the Sponsors rejected this recommendation and the Sponsors’ position that legal ethics rules are not dependent upon or limited by statutory or common law claims.
- At the request of the ABA Business Law Section Professional Responsibility Committee, the Resolution defines “conduct related to the practice of law” in Comment [4]; it includes guidance on how lawyers may ethically limit their practice under Model Rule 1.16; and it explains that paragraph (g) does not prohibit conduct to promote diversity.

In response to the language released April 12, 2016, concerns have been expressed to the Sponsors about the following:

- That paragraph (g) should include a mens rea of “knowing.” The Report addresses this issue and explains why the Sponsors did not include a mens rea.
- That the Comment should retain the statement, “A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.” This Report addressed this issue and explains why the Sponsors did not want to mix evidentiary law with the professional responsibility rules.
- That current Comment language, “Legitimate advocacy respecting the foregoing factors does not violate paragraph (d),” should be retained. The Report addresses this issue and explains why the Sponsors did retain this sentence, as amended.
- That social activities in connection with the practice of law should be more clearly defined. The Sponsors concluded that the definition provided in the Comment is
sufficient for the variety of activities addressed. The critical common factor of such activities is their relationship to the practice of law.

- That Sponsors delete “operating and managing a law firm” from the scope of the Rule or that the Rule require a prior adjudication of discrimination or harassment by a competent tribunal. The Report addresses this issue and explains why the Sponsors determined that creating two separate spheres of conduct, one inside the law firm and one outside the law firm, was inappropriate.

- Finally, some opponents express the opinion that no black letter rule is necessary.\(^{45}\)

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\(^{45}\) Not every concern raised is listed here but we have identified the significant concerns that were expressed.
BUSINESS LAW SECTION COMMITTEE ON PROFESSIONAL RESPONSIBILITY MEMORANDUM TO SECTION DELEGATES AND SECTION LEADERSHIP ON RESOLUTION & REPORT 109, SUBMITTED FOR ABA ANNUAL MEETING 2016

Introduction

The Professional Responsibility Committee of the ABA Business Law Section (hereinafter the “BLS Ethics Committee” or “we”) presents herewith its comments on Resolution & Report 109 (“R&R 109”), offered by the Standing Committee on Ethics & Professional Responsibility (the “Standing Committee”). R&R 109 seeks to amend Rule 8.4 of the Model Rules of Professional Conduct (the “Model Rules”) by adding a new section (g), which would make it professional misconduct for a lawyer to engage in harassment or discrimination with respect to identified groups of people (the “Proposed Rule”). These comments represent the views of the BLS Ethics Committee as a whole1 and do not necessarily reflect the views of any individual member, including the undersigned and those who worked on this Memorandum.2

For the reasons explained herein, we are recommending that the Section oppose R&R 109. Not a single member of the BLS Ethics Committee has offered any favorable comments or expressions of support for the Proposed Rule.

The BLS Ethics Committee continues fully to support and subscribe to the aspirational language of existing Comment [3] to Model Rule 8.4 and to the goal of eliminating harassment and discrimination in the practice of law. R&R 109 seeks, however, to transform these aspirations into binding obligations of professional conduct, enforceable by disciplinary action up to and including suspension and disbarment, by expanding upon the antidiscrimination language in existing Comment [3]3 and moving the expanded language into the black letter text of proposed section (g).

1 The BLS Ethics Committee is fortunate to include amongst its members, in addition to very experienced practitioners across the broad spectrum of business law, distinguished professors of legal ethics/professional responsibility, as well as some former members, and at least one former chair, of the Standing Committee.

2 The Chair of the Committee, who serves as well on the Standing Committee, wishes to make clear that in this Memorandum he expresses no personal opinion one way or another on the Proposed Rule and serves only in the capacities of reporter of the views expressed by Committee members and provider of legal citations and other supporting information where appropriate. The Chair wishes to express his deep appreciation for the excellent work done by Nathan M. Crystal (formerly a Professor of Law and the author of a leading casebook on legal ethics) and his wife, Francesca Giannoni-Crystal, in organizing comments received from Committee members and incorporating them into a first draft of this Memorandum.

3 Existing Comment [3] provides:

[3] A lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based on race, sex,
The change from comment to rule is significant, because rules provide a basis of disciplinary action while comments do not. Moreover, the U.S. Supreme Court has characterized the lawyer disciplinary process as “quasi criminal” in nature and has held that certain due process requirements apply, including the requirement of fair notice of the charges. *In re Ruffalo*, 390 U.S. 544, 550-51 (1968). Even when viewed purely as a civil matter, attorney disciplinary proceedings by State Bar authorities constitute state action that affects the property, liberty, and reputational interests of lawyers facing charges. See, e.g., *In re R.M.J.*, 455 U.S. 191, 203-204 (1982); *Greene v. McElroy*, 360 U.S. 474, 492 (1959); *Schware v. Bd. of Bar Examiners of N.M.*, 353 U.S. 232, 238-39 (1957); *Doe v. DOJ*, 753 F.2d 1092, 1111-12 (D.C. Cir. 1985). Therefore, when, as described below, we recognize vagueness problems with the Proposed Rule, these in turn raise serious due process issues.

The BLS Ethics Committee is concerned with the breadth of the wording of the Proposed Rule. Many members of our committee believe it would actually create harmful opportunities for the targeting and harassment of attorneys by providing unhappy clients, rejected clients, and even possibly rival lawyers greater opportunity for creating complaints to disciplinary authorities. Defending such cases is difficult and expensive, even if they are frivolous, and there is no recourse against frivolous complaints because the complainants typically enjoy immunity. The Proposed Rule also appears to proceed on the assumption, which we believe to be mistaken, that all discrimination is invidious discrimination.

We are also concerned that the uncertainties that abound in both the text of the Proposed Rule and the accompanying Comments will create a chilling effect on lawyers' ability to provide independent judgment and neutral and detached advice to their clients and represent them with undivided loyalty.

Also we have seen no evidence – and R&R 109 adduces none – of any compelling need for so momentous a change to the rules of professional conduct. We are aware of no indication that the legal profession is so rife with harassment and invidious discrimination that the Model Rules must be amended to address the problem. Nor are we aware of allegations of frequent or pervasive misconduct by lawyers under the language of existing Comment [3], despite the fact that it has been in effect for years. Nor has there been an outpouring of complaints against lawyers even in those states that, as indicated in R&R 109, have independently decided to elevate the language of Comment [3] into the black letter of their versions of Model Rule 8.4.4

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religion, national origin, disability, age, sexual orientation, or socioeconomic status violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

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4 Indeed, R&R 109 admits as much: “The supreme courts of the jurisdictions that have black letter rules with antidiscrimination and anti-harassment provisions have not seen a surge in
Rather, the Proposed Rule seems to be an effort to reify in the legal ethics realm some of the objectives advanced by ABA entities referred to collectively in R&R 109 as the “Goal III Commissions.” We support the aims of these Goal III Commissions as ideals to which all Americans – including especially members of the legal profession – should aspire. That does not mean, however, that such ideals should be translated into rules, the alleged violation of which will stigmatize any lawyer so charged and possibly lead to severe professional sanctions up to and including suspension and disbarment. Not all societal ills that touch upon the legal profession are appropriate subjects of rules geared toward professional discipline.

The dissonance struck by the Proposed Rule lies in its clash with the cardinal ethical precept requiring lawyers to represent their clients zealously within the bounds of the law. Consider Harper Lee’s iconic character of the segregated South, Atticus Finch: Should the ABA disbar Atticus, despite the high moral standards he exhibited in To Kill a Mockingbird – standards embodying the loftiest ideals of the legal profession -- because of the bigoted personal beliefs he expresses in Go Set a Watchman? Diversity in the truest sense must be large enough to encompass not only the categories set forth in the Proposed Rule but also diversity of thought. It oversteps the bounds of a voluntary bar association to attempt to regulate private beliefs held by lawyers; it is not a question of whether we disagree with those views but whether we as an organization should silence them.

To be sure, the Proposed Rule also manifests potential constitutional infirmities. As then-Circuit Judge Alito observed, there can be speech that is “harassing” or discriminatory that, “although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections. As the Supreme Court has emphatically declared, “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable.”' Saxe v. State College Area Sch. Dist., 240 F.3d 200, 209 (3d Cir. 2001) (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)).

Additionally, there are implications of the Proposed Rule that suggest unforeseen (or, if foreseen, unreasonable) limitations on which clients or matters lawyers must accept and which they may decline. There are also troublesome implications for how they manage their law firms or in-house legal departments.

**Proposed Model Rule 8.4(g) and Proposed Comments**

R&R 109 represents the latest version of a proposal by the Standing Committee to amend existing Model Rule 8.4 by adding a new subsection (g) and three new comments. After complaints based on these provisions. Where appropriate, they are disciplining lawyers for discriminatory and harassing conduct.” R&R 109 at 6 & n. 15 (citing cases).

5 These include the Commission on Sexual Orientation and Gender Identity, the Commission on Women in the Profession, the Commission on Racial and Ethnic Diversity in the Profession, and the Commission on Disability Rights.
the May 2016 revisions made by the Standing Committee, the Proposed Rule would make it professional misconduct for a lawyer to

(g) harass or discriminate on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This Rule does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16.6

R&R 109 also eliminates existing Comment [3] to Model Rule 8.4 and substitutes the following comments:

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermines confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others because of their membership or perceived membership in one or more of the groups listed in paragraph (g). Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct towards a person who is, or is perceived to be, a member of one of the groups. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Paragraph (g) does not prohibit conduct undertaken to promote diversity.

[5] Paragraph (g) does not prohibit legitimate advocacy that is material and relevant to factual or legal issues or arguments in a representation. A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer’s practice or by limiting the lawyer’s practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge

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and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer’s representation of a client does not constitute an endorsement by the lawyer of the client’s views or activities. See Rule 1.2(b).

At the outset, it is important to note that while proposed comments [3]-[5] envisage a number of important and salutary limitations on the language of the Proposed Rule, some jurisdictions do not adopt the comments at all, while in others (e.g., New York) the comments are not official. Moreover, even where they are official, the black letter text of the rule controls. Also worth noting, as the following tabular presentation makes clear, is that the Proposed Rule goes significantly further than existing Comment [3].

<table>
<thead>
<tr>
<th>Existing Comment [3]</th>
<th>Proposed Rule</th>
</tr>
</thead>
<tbody>
<tr>
<td>“when representing a client”</td>
<td>“in connection with the practice of law”</td>
</tr>
<tr>
<td>“manifests, by words or conduct, bias or prejudice”</td>
<td>“harass or discriminate”</td>
</tr>
<tr>
<td>“knowingly”</td>
<td>no mens rea qualifier: “knowingly” deleted</td>
</tr>
<tr>
<td>“when such actions are prejudicial to the administration of justice”</td>
<td>no such qualification</td>
</tr>
<tr>
<td>“based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status”</td>
<td>adds to the list “ethnicity,” “gender identity,” and “marital status”</td>
</tr>
<tr>
<td>“Legitimate advocacy respecting the foregoing factors does not violate paragraph (d).”</td>
<td>Not in the text of the Proposed Rule but a more limited version appears in proposed Comment [5]: “legitimate advocacy that is material and relevant to factual or legal issues or arguments in a representation.”</td>
</tr>
</tbody>
</table>

7 Existing Comment [3] is linked to Model Rule 8.4(d), which proscribes conduct that is “prejudicial to the administration of justice.”
Brief Procedural History

This past winter, we provided comments to the Section leadership in connection with an earlier version of the Proposed Rule, and the Section permitted the BLS Ethics Committee to submit those comments in its own right to the Standing Committee.\(^8\) Then, as now, the Proposed Rule would move the antidiscrimination language from existing Comment [3] to Model Rule 8.4 into the black letter text of that Rule via a new subsection (g).

We acknowledge that a couple of the concerns we expressed in our March 10 comment letter have been addressed in the modified text. The others have not, however, and, in fact, certain amendments made to the proposal in the aftermath of the public hearing held by the Standing Committee at the ABA’s midyear meeting in February seem to move in the wrong direction. Consequently, we still have a number of significant problems with the Proposed Rule.

Structural Issues

The Proposed Rule seeks to amend Model Rule 8.4 in a manner at odds with its language and structure as well as its underlying theme. The current version of the Rule prohibits six types of misconduct: (1) violating, attempting to violate, or knowingly assisting/inducing others to violate the Model Rules; (2) those criminal acts that reflect adversely on a lawyer’s honesty, trustworthiness or fitness as a lawyer; (3) conduct involving dishonesty, fraud, deceit, or misrepresentation; (4) conduct that is prejudicial to the administration of justice; (5) stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the law or the Model Rules; and (6) knowingly assisting a judge or judicial officer in conduct that is a violation of law or applicable rules of judicial conduct. Model Rule 8.4(a)-(f). The Rule is thus directed against attorney conduct that directly affects his or her fitness to practice law, either because the behavior undermines the trust and confidence that is key to the attorney-client relationship\(^9\) or because it is prejudicial to the administration of justice.\(^10\)

If the Proposed Rule were adopted, subsection (g) would conspicuously be of an entirely different character than subsections (a) through (f). We note that, with the elimination of the anti-discrimination language in existing Comment [3], the linkage of “prejudicial to the

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\(^8\) Our March 10 comment letter to the Standing Committee is available at
http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/aba_business_law_ethics_committee_comments.authcheckdam.pdf.

\(^9\) See Model Rule 8.4, cmt [2] (noting that some offenses do not reflect adversely on fitness to practice law and that a lawyer should be “professionally answerable” for offenses that involve “violence, dishonesty, breach of trust, or serious interference with the administration of justice.”

\(^10\) This element has been interpreted by the courts as involving actual harm to the administration of justice in the judicial process. See, e.g., In re Karavidas, 999 N.E.2d 296, 315 (Ill. 2013); Iowa Supreme Court Attorney Disciplinary Board v. Wright, 758 N.W. 2d 227, 230 (Iowa 2008); In re Complaint as to the Conduct of David R. Kluge, 66 P.3d 492 (Or. 2003).
administration of justice” has disappeared. The Proposed Rule would thus be severed from the legitimate regulatory interests that animate the rest of Model Rule 8.4.

The ironic consequence is that a lawyer would not be subject to discipline for certain criminal conduct (i.e., conduct not deemed to affect fitness to practice law or to be prejudicial to the administration of justice) but would be for calling someone “gay” or “sweet”\(^{11}\) or for telling a ethnically or sexually insensitive joke at a bar convention.

**Vagueness and Uncertainty**

(a) *Elimination of the mens rea requirement*

The modified proposal still suffers from vagueness and uncertainty. The Proposed Rule makes it unethical to “harass or discriminate” against any person on one of the protected grounds. We note that the most recent proposal eliminates the adverb “knowingly” (from the prior formulation “harass or knowingly discriminate”). The report explains that the adverb is unnecessary because the “proposed rule would not expand on what would be considered harassment and discrimination under federal and state law.” R&R 109 at 11. The text of the rule is not so limited, however, nor is proposed Comment [3], which states, “The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).” (Emphasis added).

In addition, even if reference to the requirements of applicable law were explicit, we should be mindful that disciplinary sanctions are quasi-criminal in nature. *Ruffalo*, supra, 390 U.S. at 550-51. Therefore, we believe the standard for disciplinary proceedings should be stricter than the civil standard in discrimination litigation.

Furthermore, without the “knowingly” qualification, the Proposed Rule might lead to the sanctioning of lawyers for unintended/negligent discrimination. For example, if a law firm fails to adopt policies and procedures (or policies and procedures deemed by disciplinary authorities, even though lacking substantive expertise in these matters, to be inadequate) to avoid discrimination in hiring or to prevent a hostile work environment, it is possible that the managing partner or CEO of the firm might be subject to discipline even if it was not “knowing” discrimination. For discipline to be appropriate, the Model Rules typically require intentional, knowing behavior (see definition in Model Rule 1.0(f)). Inclusion of the mental standard of “knowingly” is consistent with other rules, including other provisions of Model Rule 8.4 (e.g., Rule 8.4(a)).

(b) *Vagueness in the meaning of “harassment and discrimination”*

Another problem of vagueness in the Proposed Rule deals with the meaning of “harassment and discrimination.” As noted above, the modified proposal now specifies in proposed new Comment [3]:

\(^{11}\) See In the Matter of Stacy L. Kelley, 925 N.E.2d 1279 (Ind. 2010).
Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others because of their membership or perceived membership in one or more of the groups listed in paragraph (g). Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct towards a person who is, or is perceived to be, a member of one of the groups. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g). (Emphasis added)

This language provides insufficient guidance for lawyers and disciplinary authorities and may well raise due process concerns. It is for this reason that several important states (Illinois, California, and New York, among others) that have inserted anti-discrimination language in their rules of professional conduct have incorporated a clear requirement of a finding by a competent tribunal (i.e., a court or agency) of unlawful discrimination by a lawyer before a disciplinary proceeding can be initiated against that lawyer.

It is unclear what would happen under the Proposed Rule in a situation where a lawyer who has been investigated by an administrative agency or sued civilly for alleged harassment or discrimination is exonerated. While we would hope that disciplinary authorities would be loath to pursue a disciplinary complaint against the lawyer under those circumstances, nothing in the Proposed Rule compels that result.

Moreover, agencies and courts have over time acquired considerable sophistication in the resolution of discrimination complaints, which frequently present factual and legal issues of great complexity and nuance. It is no criticism of state disciplinary authorities to say that they do not share this expertise and lack the resources to develop them. Yet, the Standing Committee has rejected inclusion of such a prior finding requirement in the Proposed Rule.

Absent such a finding, the concepts of harassment and discrimination are so ill-defined in the Proposed Rule and accompanying comments as to be a trap for the unwary. Lawyers should not be made to guess whether particular words or conduct may constitute harassment or discrimination that would subject them to discipline. The Model Rules have traditionally striven to be clear about what conduct is proscribed. Due process requires nothing less.

(c) Vagueness in accepting, declining, and withdrawing from representation

R&R 109 has added to the Proposed Rule the following language (hereinafter referred to as “Nonlimitation Language”): “This Rule does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16.” In addition, proposed Comment [5] provides:

A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer’s practice or by limiting the lawyer’s
practice to members of underserved populations in accordance with these Rules and other law.

These two exclusions are, however, unclear as to the extent to which lawyers may limit their practices based on criteria that could be considered by some to be discriminatory. Consider these examples:

- Suppose a domestic relations lawyer wants to limit his or her practice to representing only men or only women. Neither is, after all, an “underserved population.” Is such a limitation a violation of the rule?
- Suppose a lawyer wants to limit his practice to representation of Muslims or some other religious group. Does this practice violate the rule?
- Suppose a group of lawyers wants to establish a practice representing only Hispanic transgendered individuals. Is that a violation of the rule?
- Suppose a client feels uncomfortable with the assignment made by a firm of one of its lawyers to the client’s case on racial, religious, or gender grounds. Does the firm violate the rule if it honors the client’s preference? Does it make any difference if the client’s reason is based on concern about the location of the proceeding rather than the client’s own views regarding the assigned lawyer?

Under a broad reading of the Nonlimitation Language, such restrictions on the scope of representation arguably would be proper, but the language can also be read more narrowly to allow limitations on acceptance or rejection of cases only when allowed under Model Rule 1.16. This is problematic, however, as there is nothing in Model Rule 1.16 that authorizes lawyers to limit their practices based on any of the protected grounds set forth in the Proposed Rule.

In addition to uncertainties caused by the language, the scope of proposed Comment [5] is unclear. The first part of the comment could be read as a broad authorization of lawyers’ ability to limit their practices regardless of motivation or discrimination. However, the latter part of the comment, referring to “underserved populations,” casts doubt on the breadth of the first part. Moreover, reasonable people may come to different conclusions about what constitutes an “underserved population.”

The BLS Ethics Committee believes that, in general, lawyers should be free to limit their practices to representing members of any group, not only those that some unidentified authority deems “underserved.” This is not discrimination but a legitimate choice of practice, which can be beneficial to clients.

We recognize, however, that there is an argument for the contrary view. For example, many would support the proposition that a lawyer should be free to limit his or her practice to represent women (for example because the lawyer is also a woman) or only Muslims (for example because the lawyer is also a Muslim and thus understands certain religious and cultural nuances). But suppose instead that a lawyer were to look at those examples and claim that he or she should be able to represent only white people, or only Christians. Suddenly, the principle takes on a different hue and enjoys considerably less support. Suddenly, doubt emerges as to
whether there are exceptions to the general principle, set forth in the preceding paragraph, that
lawyers should be free to limit their practices.

The point here is not merely that there are considerable difficulties in trying to reconcile
these conflicting positions, but that such difficulties illustrate precisely how untenable the
Proposed Rule is. Disciplinary authorities are not philosophers. Nor can they be expected to
devote their scarce resources to tackling complex questions of interpretation engendered by the
vagueness and uncertainties of the Proposed Rule.

Furthermore, subjecting lawyers to discipline for refusing to represent a client stands
athwart longstanding deference to professional autonomy and freedom of conscience, both of
which find expression elsewhere in the Model Rules. For example, Model Rule 6.2(c)
recognizes that if a lawyer were compelled to take on a cause that he or she finds “repugnant,”
that would impair the lawyer’s ability adequately to represent the client. Likewise, the
prohibition in Model Rule 1.7(a)(2) against representing a client if there is “significant risk that
the representation . . . will be materially limited by the lawyer’s responsibilities to another client,
a former client or a third person or by a personal interest of the lawyer” (emphasis supplied)
instantiates the same principle of professional autonomy. See also Model Rule 1.10, cmt. [3]
(addressing the exception to the imputation rule in Model Rule 1.10(a)(1) and acknowledging
that a “political” belief can result in a lawyer’s having a personal conflict of interest that would
bar representing the client).

(d) Vagueness in the meaning of “conduct related to the practice of law”

The Proposed Rule has eliminated the phrase “in the course of representing a client” in
favor of a much broader concept of “conduct related to the practice of law.” Proposed Comment
[4] makes clear that the Proposed Rule would not be limited to representation of clients but
instead would encompass all aspects of managing a law firm or law practice and interacting
(whether professionally or socially) with court personnel, with other lawyers, and under many
circumstances with nonlawyers as well. We have concerns with this comment as well.

First, the use of the verb “includes” in Comment [4] makes the comment vague. Second,
and more importantly, Comment [4] extends the prohibition on discrimination and harassment
scope to “business or social activities in connection with the practice of law.” The application
of this language is unclear, and questions abound.

For example, would a lawyer’s membership in a discriminatory club violate the Proposed
Rule, even if the discrimination were not invidious? Suppose, for example, that a lawyer belongs
to a private athletic club whose membership is limited to one sex, primarily for logistical reasons
(e.g., lack of building space or plumbing for both male and female bathroom and shower
facilities, to say nothing of additional facilities that might be required for transgendered
individuals). Members of the club conduct business at lunch or dinner, so the “in connection
with the practice of law” language would be applicable to this situation. Should that private club
membership appropriately have to the potential of leading to professional discipline?12 Or will it

12 The proponents of the Proposed Rule point to a similar rule contained applicable to the
be only membership in a club practicing invidious discrimination that will constitute professional misconduct?

Would a lawyer’s membership in an organization designed to promote the interests of certain types of lawyers violate the rule, e.g., an organization of Latino, African-American, or Asian-American lawyers? How about an Italian-American Bar Association? Comment [5] clarifies that “Paragraph (g) does not prohibit conduct undertaken to promote diversity.” Does the latter group qualify as “diverse”?

It is unclear whether the Proposed Rule would apply to scholarly activities, media presence, and political activities, particularly in light of the fact that the prior version of the Proposed Rule’s Comment [3] -- which provided that the rule “does not apply to conduct unrelated to the practice of law or conduct protected by the First Amendment” -- has now been deleted. For example, would a lawyer violate the rule by publicly expressing support for a governmental policy limiting immigration of Muslims? Advocacy on behalf of a client or a client organization now seems to be protected, because Comment [5] specifies “Paragraph (g) does not prohibit legitimate advocacy that is material and relevant to factual or legal issues or arguments in a representation.” However, advocacy of a political position in which the lawyer does not have a specific client would not be protected by the comment language.

Relatedly, many lawyers engage in community activities. They sit on boards and commissions, including those of local government, of religious institutions (including nonprofit entities with a connection to a particular religious group), of educational institutions, and other enterprises. They are invited to speak at public fora precisely because of their legal expertise and professional accomplishments. These activities seem to fall within the broad concept of “conduct related to the practice of law.” Once again, however, serious questions arise as to the application of this language.

Consider whether a lawyer may engage in the following activities without fear of professional discipline:

- As a member of the board of a religious institution, assisting in the development of its policies about clergy performing same-sex marriages or use of its facilities. See ABA Model Code of Judicial Conduct, Rule 3.6 (prohibiting judges from joining organizations that practice invidious discrimination). Yet references to that document create false comparisons – comparing apples and oranges, in effect. Judges do not represent clients, and the moral and legal authority of the judiciary depends – and this is of paramount importance to our legal system -- upon public confidence in the integrity of the courts and public acquiescence in their judgments. Judges, therefore, must be seen to be fair, impartial and unbiased. For this reason, the canons of judicial conduct are replete with requirements that judges avoid anything that could undermine such public trust, confidence, and acquiescence, such as avoiding any appearance of partiality, unfairness, or impropriety. In contrast, no such considerations can logically be extended to advocates, who actually owe their clients a duty to be partial (undivided loyalty to the client’s interests) and to do their best to procure for their clients an advantage, whether in litigation or in a business transaction.
for performing such marriages.

- As a trustee of an educational institution with student housing, helping with policies about permissible roommates, bathrooms, and other matters that may have an impact on students’ sexual identity.
- Participating in any manner in an organization that teaches traditional values about sexual conduct or marriage (e.g., the Boy Scouts of America).
- Speaking on these or related issues at a public forum.

Resolution of these matters was difficult enough even when an earlier version of the Proposed Rule contained, in comment [3], a statement that the Proposed Rule was inapplicable to “conduct protected by the First Amendment.” Now that such language has been eliminated from the comments, there is a strong likelihood that lawyers will be subject to discipline for speech on current political, social, and religious issues.

(e) **Vagueness in the meaning of “socioeconomic status”**

The Proposed Rule includes as a protected interest “socioeconomic status” but does not define it. We are not aware of any generally applicable definition of this term. We do know that Congress has listed consideration of socioeconomic status as a factor -- along with race, sex, national origin, and creed -- as to which the U.S. Sentencing Commission should be neutral in the Sentencing Guidelines and policy statements.\(^{13}\) Courts have interpreted this term as encompassing “objective criteria such as education, income, and employment.” *United States v. Lopez*, 938 F.2d 1293, 1297 (D.C. Cir. 1991).

Assuming *arguendo* that this interpretation is a valid guide to the meaning of the same term in the Proposed Rule, there are lurking pitfalls for law firms. Will a law firm that hires the best educated associates or lateral lawyers be discriminating on the basis of socioeconomic status? What about hiring the best-educated expert witnesses for litigation matters? If a law firm were to discount its fees for a particular class of client -- e.g., low-income individuals or wealthy corporate clients that insist on such discounts -- is that professional misconduct under the Proposed Rule?

**Strategic Use of the Proposed Rule Against Lawyers and Law Firms.**

The Proposed Rule does not speak to remedies for its violation. Certainly disciplinary action would be the primary remedy, but the rule could also be used to support a motion for sanctions or disqualification or as the basis for an action seeking damages for malpractice, breach of fiduciary duty, or breach of contract. Current rules in a number of jurisdictions curtail this possibility. For example, in California, Illinois, New York, and Ohio, discrimination is a violation of the rule only if it is unlawful. In addition, as noted above, Illinois, New York, and California require a finding by a tribunal of unlawful discrimination before a disciplinary proceeding can be commenced under the rule.

\(^{13}\) See 28 U.S.C. § 994(d).
Implicit Bias

The ABA itself acknowledges the existence of implicit bias. A ten-minute ABA training video is available on the ABA’s website and is the centerpiece of a toolkit designed by the ABA’s recently formed Diversity and Inclusion 360 Commission to help create a fair system of justice for all Americans. See Hidden Injustice: Bias on the Bench, available at [http://www.americanbar.org/news/abanews/aba-news-archives/2016/02/hidden_injusticebi.html](http://www.americanbar.org/news/abanews/aba-news-archives/2016/02/hidden_injusticebi.html). Though intended primarily for judges, this video reveals that all of us – lawyers and judges alike – are “hard wired” with implicit biases. As a result, if the Proposed Rule were adopted, we would all be in violation on an ongoing basis.

Conclusion

We wish to emphasize once again that there has been no showing of a need, much less a compelling need, to change the status quo. The Model Rules, in their current form, appropriately address isolated instances of harassment or discrimination that are prejudicial to the administration of justice. We understand that some proponents of the Proposed Rule believe that having these principles in existing Comment [3] has not created any problems during the years since they were added 17 years ago, and from this they conclude that it is unlikely to create problems if the language were moved to the black letter text. But that reasoning is specious. First, it does not strike us as a persuasive reason for change. Second, that rationale ignores the changes in language that we have pointed out in the Table on page 5, above. Third, this particular argument for change actually constitutes an even stronger argument for preserving the status quo: If having this language in the comments has not led to any difficulties over the past 17 years, there is no compelling reason to alter the landscape.

For the reasons set forth above, the BLS Ethics Committee recommends that the Business Law Section oppose R&R 109.

July 11, 2016

Respectfully submitted,

Professional Responsibility Committee
By: Keith R. Fisher, Chair
RESOLVED, That the American Bar Association urges state, local, territorial and tribal legislatures to enact laws that criminalize internet grooming tactics that target children and make them vulnerable to victimization.

FURTHER RESOLVED, That the American Bar Association encourages states to review their criminal laws and engage stakeholders to ensure that their laws governing sexual misconduct involving the internet are sufficient to protect children.
REPORT

What is "Grooming"?

"Grooming" is a tactic used by sexual predators to manipulate young people they target online to meet with them offline.¹ Online grooming takes place when an adult who is seeking a child to meet offline pretends to be a child online, but more often they do not hide their age. The adult pretends to share the child's interest and manipulates the child into a sexual relationship.² Online grooming is a process that can take place in a short time or over an extended period of time. It often involves flattery, gift giving, excessive compliments, money, or modeling jobs. Grooming is used by internet predators to establish a relationship to gain a child's trust. This tactic leads children to believe that no one can understand them or their situation like the groomer. After the child's trust develops, the groomer may use sexually explicit conversations to test boundaries and exploit a child's natural curiosity about sex. The ultimate goal of the "groomer" is to build trust and arrange an in-person meeting to engage in sexual contact with the child or teen.³ The grooming process fosters a false sense of trust and authority over a child in order to desensitize or break down a child's resistance to sexual abuse.⁴

The Threat to Children

As the internet and access to technology has exploded over the last twenty years, fears have been raised that children will be exposed to and become the victims of predators through the internet. This is understandable as 95% of teens age 12-17 are online.⁵ 80% of those teens are active on social media.⁶

While, the extent of instances of internet sexual offenses in the United States is difficult to estimate (given that there is no national system for integrating information about internet offenders), estimates indicate that arrests for internet sex crimes have tripled from 2000 to 2009.⁷ At the same time however, child sexual assault cases have decreased over the same amount of time.⁸ In fact, studies of unwanted sexual activity have shown a steep decline from 19% in 2000,

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⁶ Id.
⁸ Id.
to 13% in 2005, and 9% in 2010. Some researchers have suggested that internet sexual crimes are a new phenomenon that may not be influenced by the same contextual factors as other sexually based crimes. Others have suggested that online safety messages are resonating strongly with today’s youth who may be more aware of the potential dangers of online activity. 

Yet, the increase in the number of arrests seems to suggest that the threat to children and teenagers from internet criminals is real. What is likely to happen is for adults to use the internet to meet and seduce underage adolescents and have them willingly participate in sexual encounters that they are unable to consent to by law. Offenders often use promises of love and romance to seduce adolescents. These conversations start out innocently and often occur with someone the adolescent knows in person. Over time, sexual images can be introduced and as their trust is gained the relationship can turn sexual. As discussed above, this tactic of gaining the victims’ trust and then slowly turning the relationship into a sexual one is called “grooming.”

As the crime data shows, the use of the internet to commit these crimes has grown exponentially. Studies have shown that in most cases, the perpetrator and victim are using online means to communicate. When these grooming relationships develop, the data shows that sexual encounters occur on multiple occasions.

**Federal Law**

Federal law makes it a crime for an individual to coerce or entice an individual to travel for the purposes of prostitution or to engage in a sexual activity for which the person can be convicted of a crime. The same statute criminalizes the use of the mail or “any facility or means of interstate commerce” for the purposes of coercing or enticing a minor to engage in prostitution or illegal sexual activity. However, there is no specific language regarding the use of the internet or other electronic means to coerce underage minors to travel to engage in sexual activity. The complete statute reads as follows:

(a) Whoever knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce, or in any Territory or Possession of the United States, to engage in prostitution, or in any sexual activity for which any

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10 Seto, supra note 7.

11 Mitchell et al, supra note 9.

12 Id.


14 Id.

15 Id.

16 Id.

17 http://www.unh.edu/ccrc/pdf/CV263.pdf

person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

(b) Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life. 19

State Law

Similar to federal law, many states criminalize the enticement or luring of a minor for sexually exploitative purposes. To help provide a clearer understanding of the legal framework across the country, a 50 state survey was conducted (the survey is available online at http://americanbar.org/content/dam/aba/administrative/young_lawyers/public_service/world_wide_web/grooming_state_statutes.pdf). The survey and a 2014 study conducted by the National Conference of State Legislatures indicate that all 50 states have some law that criminalizes luring or enticing a minor for sexual acts. 20 However, the 2014 study also revealed that some states do not have a law that specifically mentions the internet or electronic means. 21 (The District of Columbia, Maine, Massachusetts, South Carolina, New York, Pennsylvania, and Wyoming.)

Further, few states specifically outlaw the use of specific grooming tactics to lure children into sexual activity. A review of states found only two states that have specific anti-grooming statutes. 22 Those states include Arkansas 23 and Illinois. 24 The survey, taken into consideration with the research above which indicates the growth of targeting children on the internet, supports the need for a statute that criminalizes grooming as a tactic and supports the need for states to examine their current statutes to make sure they are adequate for deterring crime in the digital age.

Why a Specific Grooming Crime?

Many states only prosecute child grooming or targeting of children through existing exploitation crimes that do not explicitly mention the internet. As outlined previously, only two states have a criminal statute that specifically addresses grooming. It is important to remember that grooming is a tactic, and often that behavior is legal and no crime occurs until there is some agreement to meet or further conduct on behalf of the perpetrator. Thus, without a specific

19 Id.
21 Id.
22 Our team reviewed state statutes for specific instances of statutes that criminalized grooming.
grooming statute, sexual contact will have to occur, or the victim will have to travel to meet the perpetrator, before any crime is committed.

Creating a crime that criminalizes grooming as a tactic will give prosecutors an important tool to stop the conduct as soon as they are aware of it, and could allow prosecutors to stop exploitation before it occurs. Grooming prosecutions will additionally provide a strong incentive for individuals to refrain from grooming children for sexual purposes and will also serve to highlight the problem of grooming for a wider audience that not only includes prosecutors but also includes the general public.

Suggested Statutory Language

A person commits an offense of grooming when he or she knowingly uses a computer on-line service, internet service, or any other device capable of electronic data storage or transmission, with the intent to seduce, solicit, lure, or entice, or to attempt to seduce, solicit, lure, or entice, a child to commit any sexual conduct prohibited by state law.

First Amendment Concerns

Grooming statutes are typically challenged under First Amendment “overbreadth” grounds, which is evident from a review of case law.

Under the First Amendment’s “overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech. The doctrine seeks to strike a balance between competing social costs.” The Supreme Court explained the overbreadth doctrine, especially its limitations, when it stated:

On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. On the other hand, invalidating a law that in some of its applications is perfectly constitutional—particularly a law directed at conduct so antisocial that it has been made criminal—has obvious harmful effects. In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute’s overbreadth be substantial, not only in an absolute sense, but also relative to the statute’s plainly legitimate sweep.

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25 "On-line" is defined as connected by computer to one or more other computers or networks, as through a commercial electronic information service of the Internet.
26 "Internet" is defined as the vast computer network linking smaller computer networks worldwide including commercial, educational, governmental, and other networks, all of which use the same set of communications protocols.
27 "Electronic" is defined as operating through the use of many small electrical parts such as microchips and transistors.
29 Id.
The "mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge."\textsuperscript{30} Accordingly, the Court has advised that "[i]nvalidation for overbreadth is strong medicine that is not to be casually employed."\textsuperscript{31}

In the most recent case to deal with a state anti-grooming statute, the United States Court of Appeals for the Ninth Circuit struck down an Oregon law based upon overbreadth. In \textit{Powell's Books, Inc. v. Kroger}, the Ninth Circuit addressed a statute that "criminalize[d] providing minors under the age of eighteen with visual, verbal, or narrative descriptions of sexual conduct for the purpose of sexually arousing the minor or the furnisher, or inducing the minor to engage in sexual conduct."\textsuperscript{32} Ultimately, the Ninth Circuit ruled that the statute was "facially overbroad and criminalize[d] a substantial amount of constitutionally protected speech."\textsuperscript{33}

The Ninth Circuit noted that the statute "sweep[s] up material that, when taken as a whole, has serious literary, artistic, political, or scientific value for minors and thus also has at least some redeeming social value" while also "not limit[ing] [itself] to material that predominantly appeals to minors' prurient interest" which results in a statute that "reach[es] a substantial amount of constitutionally protected speech."\textsuperscript{34} Here, the court noted that sexual education textbooks, historical and classical works, "coming of age" and related juvenile novels, and the average romance novel could become contraband under the statute because they contain descriptions of sexual conduct and inherently have the effect of arousing the natural curiosity that minors will have in sex and titillating the reader.\textsuperscript{35} Finally, the Ninth Circuit ruled that the statutory language did not allow for a "disjunctive" reading of offensive elements that might have saved it by allowing a limited construction, and for this reason the entire statute required striking.\textsuperscript{36}

In an earlier case, the United States Court of Appeals for the Second Circuit struck down as overbroad a Vermont anti-grooming statute which stated that "[n]o person may, with knowledge of its character and content, and with actual knowledge that the recipient is a minor, sell, lend, distribute or give away [pornographic material] which is harmful to minors."\textsuperscript{37} The Second Circuit ruled that this statute was not "narrowly tailored" and burdened protected speech, and in particular, the court pointed out that the statute could ensnare people who posted material online to chatrooms or discussion groups which are visited by both minors and adults.\textsuperscript{38} Here, the court noted that such a result would be overbroad because even if the uploader knew that minors would be able to view the materials, "[t]he Constitution permits a state to impose restrictions on a minor's access to material considered harmful to minors even if the material is

\textsuperscript{30} \textit{Id.} at 303 (citation omitted).
\textsuperscript{31} \textit{Id.} at 293 (quotations and citations omitted).
\textsuperscript{32} \textit{Powell's Books, Inc. v. Kroger}, 622 F.3d 1202, 1207 (9th Cir. 2010).
\textsuperscript{33} \textit{Id.}
\textsuperscript{34} \textit{Id.} at 1213 (quotations omitted).
\textsuperscript{35} See \textit{Id.} at 1213-15
\textsuperscript{36} \textit{Id.} at 1210-11, 1215.
\textsuperscript{37} \textit{Am. Booksellers Found. v. Dean}, 342 F.3d 96, 100 (2d Cir. 2003) (citation omitted).
\textsuperscript{38} \textit{Id.} at 100-02.
not obscene with respect to adults ... but such restrictions aimed at minors may not limit non-obscene expression among adults." 39

Finally, the court rejected Vermont’s argument that the statute would only be enforced against “transmissions such as email sent directly to a minor when the sender has actual knowledge that the recipient is a minor” because “Vermont did not pass such a narrow statute” although such a more narrowly-written statute that regulated “such two-person email correspondence would [more likely] be constitutional.” 40

Drawing on the guidance from a review of case law, the statute we proposed has been carefully and narrowly constructed to avoid being overbroad. The language has been constructed in a manner to draw a distinction between the statutes discussed above which were determined to be overbroad and which were found to sweep in First Amendment protected speech. Here, rather than focusing on the speech itself, in the form of sexually explicit material, the statute focuses primarily on the actor and his intent in using the speech to solicit or lure a child for illegal activity.

**Review of Existing Law**

Additionally, we respectfully urge states to review their child protection laws to ensure that they effectively protect children and teenagers in this modern age. As new technology continues to proliferate, our body of statutes runs the risk of becoming irrelevant. Case in point—several states have laws on the books designed to protect children from predators which do not specifically criminalize conduct on the internet. 41 This oversight creates an unnecessary risk for the well-being of our children. While prosecutors can and do use these laws to prosecute internet based crimes against children, without specific mention of the internet, there are risks in bring such cases, as well as evidentiary concerns. Thus, it would be effective for states to conduct a review of existing laws and engage law enforcement, prosecutors, and other groups to make sure that our criminal laws are doing their best to protect children from predators.

**Summary**

The recommended steps will allow the ABA to continue to support effective statutory protections for children. As technology—including the internet, smartphones, and social media—continue to change and our children continue to use these technologies in new ways, it is important that states have effective deterrents that discourage criminals, protect our children, and prevent perpetrators from sexually exploiting children.

Respectfully submitted,

Lacy L. Durham, Chair
Young Lawyers Division
August 2016

39 *Id.* at 101 (citations omitted).
40 *Id.* at 101 (quotations omitted).
GENERAL INFORMATION FORM

Submitting Entity: American Bar Association Young Lawyers Division

Submitted By: Lacy L. Durham, Chair, ABA Young Lawyers Division

1. **Summary of Resolution(s).** The resolution encourages state legislatures across the country to enact legislation to criminalize grooming.

2. **Approval by Submitting Entity.** Approved by the Assembly of the ABA Young Lawyers Division on February 6, 2016.

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 promotes Goal IV (Advance the Rule of Law), particularly the objective that we “work for just laws, including human rights, and a fair legal process.”

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)

   See attached 50 state survey.

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

   The goal will be to lobby for the enactment of the statute in select states, and otherwise encourage other states to adopt the provision

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

   None

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

   N/A
10. Referrals.

The following have agreed to be supporters of this resolution:

Section of State and Local Government Law
Commission on Youth At Risk

We are awaiting responses to requests to be supporters from the following, which were contacted in May 2016:

Criminal Justice Section
Section of Family 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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* Although Blake Klinkner is not currently a member of the House of Delegates, we expect him to serve as a proxy for one of the ABA YLD House of Delegates Representatives during the 2016 Annual Meeting. However, in the event he is not able to serve as a proxy, Andrew Schpak (or another delegate) will move the resolution and we will request that Blake Klinkner receive privileges of the floor pursuant to § 44.1.
EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution encourages legislatures across the country to enact legislation to criminalize grooming.

2. Summary of the Issue that the Resolution Addresses

"Grooming" is a tactic used by sexual predators to manipulate young people they target online to meet with them offline. Because grooming is a tactic, and is often based on behavior that is otherwise legal, no crime occurs until there is some agreement to meet or further conduct on behalf of the perpetrator. Thus, without a specific grooming statute, sexual contact will have to occur, or the victim will have to travel to meet the perpetrator, before any crime is committed. Creating a crime that criminalizes grooming as a tactic will give prosecutors an important tool to stop the conduct as soon as they are aware of it, and could allow prosecutors to stop exploitation before it occurs.

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

The resolution addresses the issue by urging legislatures to criminal electronic grooming. If legislatures do so, it would provide prosecutors with a new tool to prosecute child sexual predators before any sexual exploitation actually takes place.

4. Summary of Minority Views

The resolution passed the ABA YLD Assembly unanimously on the consent calendar.
RESOLVED, That the American Bar Association urges Congress to enact legislation that requires the following when a federal agency proposes or issues a substantive rule of general applicability that incorporates by reference any portion of a standard drafted by a private organization:

(a) The agency must make the portion of the standard that the agency intends to incorporate by reference accessible, without charge, to members of the public.

(b) If the material is subject to copyright protection, the agency must obtain authorization from the copyright holder for public access to that material.

(c) The required public access must include at least online, read-only access to the incorporated portion of the standard, including availability at computer facilities in government depository libraries, but it need not include access to the incorporated material in hard-copy printed form.

(d) The legislation should provide that it will have no effect on any rights or defenses that any person may possess under the Copyright Act or other current law.

FURTHER RESOLVED, That the American Bar Association urges Congress to permanently authorize agencies subject to these provisions to enter into agreements with copyright holders to accomplish the access described above.

FURTHER RESOLVED, That the American Bar Association urges Congress to require each agency, within a specified period, to:

(a) identify all privately drafted standards and other content previously incorporated by reference into that agency’s regulations;
(b) determine whether the agency requires authorization from any copyright holder in order to provide public access to the materials as described above; and

(c) establish a reasonable plan and timeline to provide public access as described above, including taking any necessary steps (i) to obtain relevant authorizations, or (ii) to amend or repeal the regulation to eliminate the incorporation by reference.
REPORT

This resolution is a successor to Resolution 106A, which the Section of Administrative Law and Regulatory Practice submitted to the House of Delegates for action at the 2016 Midyear Meeting. That earlier version would have urged Congress to amend the Administrative Procedure Act to require “meaningful free public availability” of all text incorporated by reference into proposed and final substantive rules of general applicability.

However, that resolution elicited objections from several Sections. They asked Administrative Law to withdraw Resolution 106A from the Midyear Meeting agenda and to form an inter-Section task force charged with devising a substitute resolution that could attract broad support within the House. Administrative Law acceded to this request. As a result, a Task Force on Incorporation by Reference, composed of fifteen members from six Sections and one Division, was convened. After extensive discussions, the task force recommended this resolution.

The resolution is intended to advance the general principle that citizens in a democratic society must be able to consult the laws that govern them. A corollary of that principle is that all citizens should have access in full to binding federal regulations. Regulations themselves are published in the Federal Register and are freely available online and at all federal depository libraries. Under present law as implemented, however, affordability problems often undermine the principle of public access with respect to material that has been included in such rules through incorporation by reference (IBR). The legislation proposed in the resolution would provide for a common baseline of availability by requiring agencies to provide an online source at which IBR material in such rules may be consulted without charge. The legislation would also provide for access without charge to material incorporated by reference into proposed rules while those rules are under consideration, so that citizens may comment on those proposals.

At the same time, federal law recognizes the valuable contributions that voluntary consensus standards make to the nation’s regulatory system. Moreover, the purposes and public interest served by copyright laws also deserve recognition and support. Recognizing these concerns, the resolution’s proposed legislation is aimed at ensuring meaningful citizen access without unduly impairing the ability and incentive of organizations to produce standards that can be incorporated by reference into federal regulations.

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1 Entities represented on the task force included the Sections of Administrative Law and Regulatory Practice (James W. Conrad, Jr., Ronald Levin (chair), Nina Mendelson), Civil Rights and Social Justice (Estelle Rogers), Intellectual Property Law (Janet Fries, Susan Montgomery, Mary Rasenberger), Public Utility, Communications, and Transportation Law (William Boswell, Patricia Griffin), Real Property, Trust and Estate Law (James Durham), and Science & Technology Law (Ellen Flannery, Roderick Kennedy, Oliver Smoot), and the Government and Public Sector Lawyers Division (Gregory Brooker, Regina Nassen).
I. BACKGROUND

For over two centuries, the principle that all citizens should be able to read the law has been bedrock. Since the 1800s, Congress has provided public access to federal statutes without charge 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.\(^2\) Congress has further extended the public access framework, first by requiring the Government Printing Office to provide universal online access to statutes and regulations,\(^3\) and then by requiring online public access to other government documents and materials in the Electronic Freedom of Information Act Amendments of 1996 and the e-Government Act of 2002.\(^4\)

The Freedom of Information Act generally requires Federal Register publication of all agency “substantive rules of general applicability” and “statements of general policy or interpretations of general applicability.”\(^5\) However, it allows, in the so-called “incorporation by reference” (IBR) 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.”\(^6\) Although the Office of the Federal Register (OFR) must approve all agency incorporations by reference, its regulations do not specify what level of access makes a particular standard “reasonably available” and thus eligible for incorporation by reference.\(^7\)

Both the National Technology Transfer Act of 1995 and Office of Management and Budget Circular A-119 encourage federal agencies to rely on private voluntary consensus standards.\(^8\) Accordingly, agencies have, on a great many occasions, worked with private standards development organizations (SDOs) and incorporated privately drafted standards by reference into thousands of federal regulations. These privately drafted standards unquestionably have significant public value. SDOs often support and sometimes even seek to have their

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\(^3\) 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.


\(^6\) Id.

\(^7\) See 1 C.F.R. 51.7(a).

privately drafted standards adopted as the law of the land. And agencies indisputably find it useful to draw upon this stock of standards.

The Code of Federal Regulations (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 SDOs. SDOs range from the ASTM International (formerly the Association for Testing and Materials) to the Society of Automotive Engineers and the American Petroleum Institute.

Federal agencies use privately-drafted IBR rules for a host of subjects, ranging from toy safety, crib and stroller safety, safety standards for vehicle windshields (so they withstand fracture), placement requirements for cranes on oil drilling platforms on the Outer Continental Shelf, and food additive standards, to operating storage requirements for propane tanks, aimed at limiting the tanks’ potential to leak or explode. Agencies are encouraged to participate actively in SDO technical committees that draft standards under their jurisdiction.

However, obtaining public access to IBR standards can be difficult. In many cases, IBR rules cannot be accessed without charge either online or in the nearly 1,800 government depository libraries. Under OFR’s current approach, the public can access these rules without charge in OFR’s Washington, D.C. reading room, but only by written request for an

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9 [http://www.archives.gov/federal-register/cfr/ibr-locations.html#why](http://www.archives.gov/federal-register/cfr/ibr-locations.html#why) (as explained by OFR, “This material, like any other properly issued rule, has the force and effect of law... mak[ing] privately developed technical standards Federally enforceable.”)


11 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)

12 49 C.F.R. § 571.2015.


appointment. Apart from this, OFR refers the public to the SDO. IBR standards accordingly are distributed across many individually-maintained private websites and available for purchase from the SDO and from third-party resellers.

SDOs typically sell or license publications of their standards for a fee, which may be in excess of the copying cost or other simple cost of making a standard available. SDOs maintain that publication income supports the work of preparing the standards. When SDOs elect to charge for an individual standard, the price can range from $40 to upwards of $1,000. The incorporated safety standard for seat belts on earthmoving equipment such as bulldozers is currently priced at $74; 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. The cost of reading the two newly-incorporated-by-reference standards for the packaging and transportation of radioactive material, to avoid radiation leakage in transit, is $213. 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.

As publicly-filed comments and other public sources indicate, these fees constrain some citizens and entities from seeing the law's text. Regulated entities are often small businesses for whom the mass of necessary standards may be a significant cost. For example, as the

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18 Membership in an SDO usually affords discounted access to its standards, but such memberships can be costly; for example, the American National Standards Institute charges $750 per year.


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

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


23 Emily Bremer, On the Cost of Private Standards in Public Law, 63 U. Kansas L. Rev. 279 (2015). SDOs occasionally charge more for an older version that an agency has incorporated by reference into binding law—a reflection of its governmentally-created value—than for the SDO’s current version of those same standards. See Strauss, supra note 10, at 509-10.

24 Public comments filed with OFR 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
Modification and Replacement Parts Association stated in its public comment to OFR: “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 . . .”

Frequently, members of the public affected by regulatory frameworks relying upon IBR rules also 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.

Some SDOs have created online reading rooms in which the public can view standards that agencies have incorporated by reference into federal regulations without payment of a fee. But these reading rooms do not consistently make all relevant standards available, and the organizations uniformly reserve the right to revoke the access at will. Some IBR content in rules, particularly older ones, is now simply unavailable from the SDOs at any price.

Some SDOs have created online reading rooms in which the public can view standards that agencies have incorporated by reference into federal regulations without payment of a fee. But these reading rooms do not consistently make all relevant standards available, and the organizations uniformly reserve the right to revoke the access at will. Some IBR content in rules, particularly older ones, is now simply unavailable from the SDOs at any price.

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 1,000 standards. The ASTM foundry safety standard alone cross-references 35 other consensus standards and that is just the tip of the iceberg. . . .”).


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).

E.g., ANSI, IBR Standards Portal, ibr.ansi.org (May 2, 2016) (“I agree that ANSI may terminate my access to the Licensed Materials at any time and for any reason. . . .”); NFPA, "Accept Terms for Access," www.nfpa.org (May 2, 2016) (“NFPA may suspend or discontinue providing the Online Document to you with
To date, despite recent reviews by OFR and the Office of Management and Budget on related IBR practices, the executive branch has not acceded to proposals to provide for public access to IBR material in regulations without charge. In November 2013, OFR began a rulemaking in response to a 2012 rulemaking petition filed by Columbia Law School Professor Peter L. Strauss and joined by nearly two dozen signatories, mainly law professors. Arguing that the “reasonably available” language in 5 U.S.C. § 552(a) of the Freedom of Information Act had to be understood to require such access, the petition had asked OFR to approve IBR rules only if read-only access to the text without charge was provided to the public. Ultimately, however, OFR declined to significantly revise its approach. OFR has continued to approve the incorporation by reference of standards that remain difficult to locate and expensive to read.

II. THE RESOLUTION

A. Premises of the Resolution

This resolution would put the ABA on record in support of legislation that would promote public access to law, as well as public participation in federal regulation. The ABA should appeal to Congress now for two reasons: First, as noted, OFR has already engaged in a recent reexamination of its approach to implementing its responsibilities under the Freedom of Information Act. Adoption of the resolution would not signify any ABA view regarding OFR’s

or without cause and without notice.”); American Petroleum Institute Acceptance of Terms, http://publications.api.org/GocCited_Disclaimer.aspx ("API may suspend or discontinue providing the Online Document to you with or without cause and without notice.")

28 For example, the following editions of privately-drafted standards, both incorporated by reference into agency rules, seem completely unavailable to read or buy on the SDOs’ websites: American Conference of Governmental Industrial Hygienists, “Industrial Ventilation: A Manual of Recommended Practice” (22d ed. 1995), incorporated by reference in 29 C.F.R. 1910.124 (ventilation requirements for dip tanks); and ANSI 10.4-1963, “Safety Requirements for Personnel Hoists and Employee Elevators,” incorporated by reference in 29 CFR 1926.552(c) (hoist safety).


30 See Incorporation by Reference, 79 Fed. Reg. 66,267, 66,270 (Nov. 7, 2014) (final rule). 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). Further, although an agency is required to “summarize” in the preamble to a final rule “the material it incorporates by reference,” that summary does not have to include the full text. 1 C.F.R. § 51.5(a)(2); 1 C.F.R. § 51.5(b)(3) (2015). In any event, preambles are published neither in the Code of Federal Regulations nor on agency websites containing regulations.

31 The Nuclear Regulatory Commission is currently proposing to incorporate by reference a variety of standards for nuclear plants; as the agency reports, the purchase prices for individual documents range from $225 to $720, and the cost to purchase all documents is approximately $9,000. Nuclear Regulatory Commission, Proposed Rules: Incorporation by Reference of American Society of Mechanical Engineers Codes and Code Cases, 80 Fed. Reg. 56,820, 56,848 (Sept. 18, 2015).
interpretation of its authority under current law; it would, however, advocate a different approach under which a greater level of access would be required. Second, agency use of privately-drafted material incorporated into rules is likely to remain extensive, given continuing agency resource constraints, as well as executive and congressional policy favoring agency reliance on voluntary consensus standards. At this time, congressional action seems the most promising option to provide a higher, consistent level of public access.

As discussed above, facilitation of the public’s ability to know the contents of binding law is a longstanding tradition in this country, tangibly reflected in the provisions of the Freedom of Information Act. Indeed, this objective harmonizes with central principles of our constitutional tradition. After all, an essential element of due process of law is that “laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.” Similarly, broader access to the contents of regulations would advance principles underlying the First Amendment, because “a major purpose of that Amendment was to protect the free discussion of governmental affairs,” [and thereby] ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.

It should be noted that the public needs access to IBR material in proposed regulations no less than in adopted regulations. As well-established principles governing the rulemaking process require, an agency’s notice of a proposed rule must be published in the Federal Register with the detail needed to facilitate a meaningful opportunity to comment. These procedural requirements, which serve to maintain the legitimacy of agency rulemaking, require that “interested persons” be able to participate in rulemaking by submitting “data, views, or arguments” – public comments – to the agency. Yet 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. Requiring an “interested person” to pay a fee to learn the content of a proposed rule is a genuine obstacle impeding that person’s right to comment under the Administrative Procedure Act.

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On the other hand, many SDOs reportedly rely heavily upon the revenue derived from the sale of their copyrighted standards in order to conduct their operations. They maintain that unconstrained public access to such material would leave them unable to continue to develop and produce the standards themselves unless an alternative revenue stream were made available. At the same time, many agencies would be unable, unwilling, or without sufficient resources to replicate what the SDOs currently do. Indeed, as discussed above, agencies often find that they greatly benefit from their ability to make use of these standards. Consequently, any legislation in this area should avoid creating a situation in which access to IBR material in regulations would be provided without charge, but the standards themselves would cease to be developed by the SDOs due to inadequate funding.

As discussed in greater detail below, the resolution incorporates a number of limitations on the recommended public access requirements, so as to ameliorate any reduction in the economic value of copyrighted standards. In some instances, however, these limitations may not obviate the need for additional funding from the government to compensate SDOs for the use of their standards. The extent to which the access requirements contemplated by the resolution would give rise to a need for compensation in a host of different contexts cannot be predicted with certainty. The resolution leaves these determinations to be made between agencies and SDOs during the process through which authorization for use of copyrighted material is secured. The ultimate point, however, is that society benefits from the public’s ability to obtain access to requirements incorporated by reference into federal regulations; thus, in situations in which agencies elect to continue to rely on IBR rules and conclude, in consultation with SDOs, that compensation is appropriate, the expenditure of public resources to support such access should be considered legitimate and worthwhile, and Congress should be willing to fund such expenditures.


In light of the objectives discussed above, the resolution urges Congress to enact carefully limited statutory requirements that would come into play when a federal agency proposes or issues a substantive rule of general applicability that incorporates by reference any portion of a standard drafted by a private organization. The agency must make the portion of the standard that the agency intends to incorporate by reference accessible, without charge, to members of the public. To the extent that the material is subject to copyright protection, the agency must obtain authorization from the copyright holder for public access to that material. The agency might determine, as a threshold matter, that the particular material that the agency intends to incorporate by reference is not copyrightable or that the intended use is within the scope of fair use. But if the material is indeed subject to copyright protection, authorization from the copyright holder would be required. The Copyright Office should consider providing guidance to agencies as to how to handle copyright questions that would frequently arise in this connection, and agencies themselves should consider promulgating their own rules or internal guidance to regularize their responses to recurring situations that fall within their respective fields of authority.
The resolution also urges Congress to give agencies permanent authority to enter into agreements with copyright holders to implement the access requirements of the proposed legislation, such as license or assignment agreements, that would grant the agencies the right to implement the access requirements of the proposed legislation and to pay the copyright holders any negotiated fees. Long-term authorization would contribute greatly to the stability of the proposed regime by providing a basis for agency-SDO negotiations to ensure the newly required level of access.

C. Access Provisions

Under the legislation proposed in the resolution, the public access provided by the agency should include, at a minimum, true read-only access to the incorporated portions of the standard, available without charge on a website. The legislation should also provide that such access must be available on computer facilities at government depository libraries; this requirement would address “digital divide” concerns by ensuring meaningful access for persons who do not have computers of their own. The recommended legislation would not, however, require access to a hard-copy version of the incorporated material. This limitation is one way in which the resolution seeks to respect the proprietary interests of SDOs. Read-only access should generally be sufficient to enable citizens to ascertain the contents of proposed or final rules that may affect their rights or obligations. On a voluntary basis, however, SDOs might choose (as some already do) to allow the agency to make downloadable text freely available, or to permit access to hard copies at depository libraries.

Furthermore, as noted, the public access required by the legislation would apply only to the portions of a standard that have been incorporated by reference into a regulation. This limitation is another accommodation to the interests of SDOs. To the extent that those organizations have customers that are willing to purchase an entire copy of a given standard, or other products or services derived from it, the organizations would continue to be able to rely on profits from sales to such customers to recoup costs of creating the standards.

Another practical issue is that the “incorporated portion” of a standard may contain cross-references to a separate part of the standard, which in turn contains cross-references to a different part, and so forth. Agencies will need to be given discretion to make reasonable judgments about how much cross-referenced text they will need to make available through public access. In view of the competing policy considerations underlying the resolution, the legislation should make clear that the goal of this discretion should be to make available enough of the standard to enable members of the public to have access to and understand the portions of the standard that have been made part of federal law, but need not provide more than that limited amount.

Agencies providing public access should ensure that the incorporated material will be presented in a manner that enables reading such material in the context of the relevant section(s)
of the associated regulation. For example, the software might provide for a hyperlink between the text of the regulation and the IBR text. However, data formats may vary according to the characteristics of the software platform and may evolve over time. Accordingly, the resolution leaves the details to Congress and the agencies to work out as present and future circumstances may warrant. Agencies providing public access will also need to be attentive generally to other accessibility concerns, including ensuring that the relevant text is available over time and that the public is readily able to locate and use the website on which the text appears.

D. Transition and Ancillary Provisions

Under the resolution, the foregoing requirements and expectations would apply to regulations issued after the effective date of the proposed legislation. In principle, access to IBR text in existing regulations is also highly desirable. However, the administrative burdens of bringing all existing IBR regulations into compliance with the access requirements of the proposed legislation would be considerable. Accordingly, the resolution urges Congress to require each agency to establish a reasonable plan and timeline to provide public access to IBR text in regulations as described herein, including obtaining relevant authorizations and amending or repealing regulations to eliminate incorporations by reference for which authorization is not obtained. The availability of funding to compensate SDOs for use of copyrighted material may be one factor that such plans would need to take into account.

Finally, the proposed legislation should provide that it will have no effect on any rights or defenses that any person may possess under the Copyright Act or other currently applicable law. For example, whatever rights a copyright holder may possess under current law to bring suit against a third party for infringement of their copyright interests in IBR material in regulations would continue to exist under the regime that the resolution advocates.

E. The Scope of the Resolution

By adopting the resolution, the ABA would not, itself, endorse any view regarding the copyright status of any privately developed standards currently incorporated by federal agencies into regulations. Thus, the resolution would not imply a position regarding any pending litigation related to that issue. Nor would the resolution imply any ABA view regarding the desirability of additional legislation that would require public access on any broader basis than the statute that the resolution itself advocates.

However, voluntary agreements between agencies and SDOs to provide broader public access to IBR text than would be required by the legislation recommended herein would be entirely compatible with the spirit of the resolution. In considering the possibility of entering into those agreements, agencies and organizations should take account of the guidelines stated in Recommendation 2011-5 of the Administrative Conference of the United States and Circular

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A-119 of the Office of Management and Budget. Other recommendations to agencies in these pronouncements also deserve sympathetic consideration, such as their admonition that agencies should update incorporations by reference on a timely basis.

III. CONCLUSION

This resolution seeks to protect and promote two essential public interests: the ability of the public to ascertain the requirements imposed by binding regulations governing private conduct, and the intellectual property interests of private entities whose standards may be incorporated by reference into those regulations. It is submitted that the resolution proposes a reasonable balance between these interests and deserves favorable consideration by the House of Delegates, and then by Congress.

Respectfully submitted,

Jeffrey A. Rosen
Chair, Section of Administrative Law and Regulatory Practice
August 2016

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

The resolution proposes legislation that would require federal agencies to provide an online source at which material that has been incorporated by reference into proposed or final regulations can be consulted without charge. At least read-only access would have to be afforded. This requirement would serve to enhance citizens’ ability to see the law, to ascertain their legal obligations, and to comment on pending rulemaking proposals. The proposed legislation would contain limitations that are designed to accommodate the intellectual property interests of organizations that create incorporated standards.

2. **Approval by Submitting Entity.**

The Council of the Section of Administrative Law and Regulatory Practice voted to approve the resolution on May 2, 2016.

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

Resolution 106A, dealing with similar subject matter, was submitted to the House for consideration at the 2016 Midyear Meeting. Opposition to that resolution led to its withdrawal and to formation of an inter-entity task force. That task force, after deliberations, drafted and recommended this resolution.

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

None is 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.

The five Sections that are cosponsoring the resolution were represented (along with Administrative Law, the principal sponsor) on the task force that drafted and recommended the resolution. The Government and Public Sectors Lawyers Division was also represented on the task force.

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 proposes legislation that would expand public access to material that has been incorporated by reference into proposed or final federal regulations.

2. Summary of the Issue that the Resolution Addresses

Thousands of binding federal regulations “incorporate by reference” material that is contained in standards drafted by private organizations. In many instances, members of the public can obtain access to such material only by visiting a reading room in Washington, D.C., or by purchasing a copy of the standard from the organization that created it. This limited access can create a cost barrier for small businesses that wish to ascertain their obligations under these regulations, as well as for citizens who wish to comment on pending regulations. The policy challenge is to ensure public access to incorporated material in a manner that acknowledges the intellectual property interests of standards development organizations and that does not unduly impair their ability and incentive to continue to produce such standards.

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

The resolution urges Congress to require that when a federal agency intends to incorporate material from an industry code into a proposed or final regulation, it must obtain authorization from the copyright holder for any portion of the incorporated material that is subject to copyright protection. The authorization must at least provide for members of the public to have access without charge to a read-only online copy of the incorporated material. Access to the online content must be available on computer facilities in depository libraries. The proposed legislation would also permanently authorize agencies to enter into agreements with copyright holders to accomplish the access requirements. Under the legislation, agencies would be expected to apply the access requirements directly to newly adopted regulations and to establish reasonable plans and timelines to bring existing regulations into conformity with the same regime.

4. Summary of Minority Views

None identified.
RESOLUTION

RESOLVED, That the American Bar Association urges all providers of legal services, including law firms and corporations, to expand and create opportunities at all levels of responsibility for diverse attorneys; and

FURTHER RESOLVED, That the American Bar Association urges clients to assist in the facilitation of opportunities for diverse attorneys, and to direct a greater percentage of the legal services they purchase, both currently and in the future, to diverse attorneys; and

FURTHER RESOLVED, That for purposes of this resolution, “diverse attorneys” means attorneys who are included within the ambit of Goal III of the American Bar Association.
I. Introduction

The American Bar Association ("ABA") has four Goals. When the Goals were established, it was determined that no one goal is more important or carries more weight than the others. Goal III is to eliminate bias and enhance diversity, and was borne as an extension of former Goal IX. As amended, Goal IX was “to promote the full and equal participation in the profession by minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities.” It is well established that when organizations are diverse and inclusive at every level, clients and the public are better served, which favorably impacts the ABA’s Goal II, to improve our profession. Moreover, the well-established business case for diversity and inclusion demonstrates that clients, the legal profession and society are best served when the makeup of lawyers reflects the community in which legal services are provided. Against this backdrop, the ABA President created the Diversity & Inclusion 360 Commission (the “DI360 Commission”) to examine the many facets of diversity and inclusion in the profession, and to formulate methods, policy, standards and practices to best advance diversity and inclusion over the next ten years.

The underlying sense of urgency for the DI360 Commission’s work and its one-year timeframe stem from the crisis in confidence that many Americans – particularly young Americans – feel about the fairness of our justice system. The ABA has the responsibility to do what only a national association of nearly 400,000 attorneys and judges can do: help restore confidence in our justice system. The ABA strives to uphold the principles of fairness, equality and inclusion, yet the legal profession lags behind other professions in reflecting the diversity of our nation.

1 Goal III: Eliminate Bias and Enhance Diversity. Objectives:
1. Promote full and equal participation in the association, our profession, and the justice system by all persons.
2 See, e.g.,
Roellig, Mark, “‘WHY’ Diversity and Inclusion Are Critical to the Success of Your Law Department” (paper presented at the PLI Corporate Counsel Institute, New York, New York, October 2012).
To fulfill its mission, the DI360 Commission is developing sustainable action plans, producing practical tools, and recommending specific action items to move the needle on diversity and inclusion in an impactful way. The DI360 Commission has conducted its 360-degree review through four working groups, one of which is the Economic Case working group, which seeks to identify specific ways to expand economic opportunities for diverse attorneys.\(^4\)

The economic well-being and success of diverse attorneys makes a difference and is crucial to moving the needle on diversity and inclusion. Diverse attorneys need meaningful opportunities to compete for and attain the best client work. Their success would positively impact other aspects of diversity and inclusion. The economic success of diverse attorneys would attract others into the profession, thereby building the pipeline; upend the implicit bias that stifles opportunities now; and result in the full and unhindered participation of diverse attorneys in the profession, thereby making the profession more representative of the populations it serves. Undoubtedly, a win for diversity and inclusion and the realization of Goal III is a win for our entire profession and the society we serve. As explained below in Section II of this report, the resolution is consistent with Goal III and would take diversity and inclusion to the next level by calling for specific and measurable action by entities that employ lawyers and by clients.

II. Justification for Expanding Economic Opportunities for Diverse Attorneys

A. Survey Data

Despite significant efforts, the legal profession lags behind other professions when it comes to diversity and inclusion. Members of racial and ethnic groups, women, members of LGBT groups and lawyers with disabilities continue to be vastly underrepresented in the legal profession.\(^5\) According to the Report of the Ninth Annual NAWL National Survey on Retention and Promotion of Women in Law Firms,\(^6\) the nation’s largest law firms have made virtually no progress since the first survey conducted by the National Association of Women Lawyers (NAWL) in 2006 in promoting women into the highest ranks, whether measured by the percentage of equity partners, compensation, representation on the firm’s highest governance committees, or rainmaking credit. While focusing its attention on the status of women lawyers in law firms, the NAWL survey reveals that the data are just as challenging for other diverse groups, including lawyers of color and LGBT lawyers.

\(^{\text{4}}\) For an explanation of the term “diverse attorneys,” see note 1, \textit{supra}.

\(^{\text{5}}\) For example, 88 percent of lawyers are white – women (although 47 percent of law students and more than one-third of the profession) account for only about one-fifth of law firm partners, general counsels of Fortune 500 corporations and law school deans, and people of color make up fewer than 7 percent of law firm partners and 9 percent of general counsels of large corporations. See \url{http://www.nalp.org/lawfirmdiversity_feb2015} for statistics on under-representation of lawyers with disabilities (based on lawyers with disabilities in 740 law offices, covering 73,081 lawyers). See \url{http://www.nalp.org/1215research} for statistics on LGBT representation among lawyers (for openly LGBT lawyers based in 943 offices/firms reporting counts.)

The demographics of large law firms have not kept pace with an increasingly diverse pool of talent. The percentage of law school graduates of color has almost doubled in the past two decades to just over 25 percent. And the percentage of associates who are of color increased to 21.63 in 2014 from 8.36 percent in 1993. Yet, lawyers of color accounted for only 7.33 percent of partners in the nation’s top 200 law firms in 2014. According to the latest Vault/MCCA Law Firm Diversity Survey Report, “[a] higher proportion of minority partners are salaried than hold equity in their firms. Attorneys of color represent 10.21% of non-equity partners, compared to 7.53% of equity partners. Among women of color specifically, the contrast between equity and non-equity status is even greater: just 2.27% of equity partners are minority women, compared to 4.35% of non-equity partners.”

B. The Role of Law Firms

Many law firms have diversity and inclusion programs. Despite valiant and commendable efforts, however, our profession has been unable to move the needle in a meaningful way. This resolution urges law firms to expand and increase opportunities at all levels of responsibility for diverse attorneys. Due to the increasing numbers of diverse law school graduates, the partnership pipeline is richer today more than ever. Yet women comprise just 18 percent of the equity partners in firms responding to the Ninth Annual NAWL Survey. Attorneys of color comprise a mere 8 percent of equity partners, of whom few are women, and at firms reporting data for partners who identify as LGBT, only 2 percent of female and 1 percent of male equity partners are LGBT. Information about lawyers with disabilities is difficult to come by in reported surveys. According to a press release issued in February 2015 by the National Association for Law Placement, “the information that is available suggests that partners with disabilities (of any race or gender) are scarce, with about one-third of 1 percent of partners reported as having a disability in the three most recent years.”

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9 Id.


11 While the resolution focuses on the ability of clients to impact economic opportunities for diverse attorneys in the law firms with which they do business, it also urges all providers of legal services to increase opportunities at all levels of responsibility for diverse attorneys. This could include entities that employ attorneys in both the public and private sectors.


13 Id.

Equity partnership is but one measure of economic success for diverse attorneys in law firms. The ABA must urge law firms to provide opportunities for diverse attorneys to develop and advance to meaningful levels and positions of responsibility within their firms, including:

- Firm chair, managing partner, or co-managing partner
- Senior leadership (Executive/Management Committee or equivalent)
- Regional office managing partner
- Practice group or department leader
- Committee chair
- Partner Review Committee (or equivalent) member
- Compensation Committee member
- Hiring partner or equivalent
- Relationship partner receiving origination credit
- Lead partner for significant matters
- Equity partner

C. The Role of Clients

Corporate clients are frustrated. Despite the business imperative for diversity, law firm demographics have not kept pace with the demand by clients for meaningfully diverse teams to handle their matters. In order for clients to understand and properly demand results, clients must collect specific data on the diversity and inclusion practices of firms they engage or are considering engaging; set clear expectations with law firms; and include diversity and inclusion performance as a criterion in their decisions on which firms they retain. To assist in these efforts and to provide efficiency and uniformity in the collection of data, the DI360 Commission has developed a Model Diversity Survey, as described and explained below in Section II.D of this report.

Specifically, this resolution urges clients to assist in the facilitation of opportunities for diverse attorneys and to direct a greater percentage of the legal services they purchase to diverse attorneys (whether practicing as solo practitioners, in firms whose majority ownership is by diverse attorneys, or in majority-owned firms).

Many corporations have supported diversity within their approved law firms for years, if not over a decade, and more companies join this quest each year. These corporations have collectively spent hundreds of millions of dollars in support of legal diversity through sponsorship, legal spend, and otherwise. Yet, data reveal that little has changed in our nation’s law firms and, for some, it is getting worse.

Corporations want to see a return on their investment and they want to know that they are using law firms that reflect the diversity of their employees, customers, other stakeholders, and society as a whole. Corporations as clients need a resource to help ensure that they are engaging law
firms that embrace these laudable goals. Law firms that are truly reflective of our diverse society at all levels need a uniform way to demonstrate their dedication. More importantly, corporations that are new to, but interested in, this effort need guidance and uniform information on the metrics that are most important to fulfilling our shared goals. Law firms that are not currently part of these efforts need inspiration and a uniform tool to help them move forward.

The business case for diversity applies equally to other clients, including municipal corporations, state and federal agencies, and other governmental entities. In their procurement of legal services, they, too, would benefit from the ability to understand the diversity and inclusion practices of law firms with which they do business.

D. The Role of the ABA

To serve these needs, the DI360 Commission is creating a means for all stakeholders to understand and improve diversity and inclusion through use of a model survey and accompanying guidance on best practices for its effective use. No organization but the ABA has the breadth and diversity of membership to take on this task and fulfill our collective goal of increasing diversity and inclusion in our profession.

Specifically, the DI360 Commission has developed a Model Diversity Survey ("ABA Model Survey")\(^\text{15}\) that will enable clients to measure the effectiveness of diversity and inclusion in the legal teams that they engage. The ABA Model Survey will allow clients to gather diversity data from law firms that are uniform and consistent, and not based just on anecdotal brochures. Uniformity of data will allow for: (1) uniform measurement and comparison; (2) better business decisions by clients and law firms; and (3) reduction in the time, cost and burden for legal professionals to respond to myriad and voluminous requests for diversity data.\(^\text{16}\)

Although other organizations conduct surveys on law firm diversity, these surveys have significant limitations. Many are directed to large law firms only, to the exclusion of mid-to-small firms and, significantly, to women-owned and minority-owned firms, which often fall in the small-firm category. Some surveys focus on only a subset of Goal III attorneys, so they fail to capture comprehensive data on all diverse attorneys. The results of some surveys are available only for a fee, and yet another survey charges a fee to law firms in order to complete the survey.

The ABA Model Survey will overcome these limitations by capturing key data from law firms of all sizes on their diversity and inclusion practices as they apply to all attorneys considered diverse under Goal III. The ABA Model Survey will be available at no cost and its accompanying toolkit will provide guidance to corporate clients on how best to use the tool in

\(^\text{15}\) The current version of the ABA Model Survey is available by clicking on this hyperlink: http://www.americanbar.org/content/dam/aba/images/office_president/presidents_diversity_inclusion_model_survey.pdf.

\(^\text{16}\) According to a law firm diversity professional who is a member of the DI360 Commission, a firm typically receives more than 50 diversity surveys per year from existing or prospective clients.
making decisions about which law firms to retain and in evaluating their performance and progress in the diversity and inclusion arena. In addition, the ABA Model Survey will relieve law firms of the burden of completing many different, well-intentioned surveys, developed by various clients and groups. It will become the “gold standard” and will continue to evolve and improve over time.

The ABA is uniquely qualified to take the lead in spearheading a much-needed model tool in the diversity arena. The ABA will provide law firms and clients the means to accomplish the objective of the resolution by introducing the ABA Model Survey and providing instruction and guidance to corporate clients on its most effective use. Further, the work of the DI360 Commission lays the foundation for the collection and aggregation of law firm data gathered by the uniform survey. Through publication of the aggregate data on the ABA website, the profession and the public we serve will be able to assess annual changes in diversity metrics and gain an understanding of the legal providers that are making the most progress on diversity. In addition, a buyer of legal services will be able to compare responses from the firms they use to the aggregated data. This will enable clients to determine how focused – or not – their providers are on improving diversity.

The DI360 Commission anticipates that the ABA Model Survey will be the most utilized survey of its kind due to the fact that it will be made available, unlike similar surveys, for free and to the widest selection of law firms and corporations in the legal world. The survey and resulting data should become the standard-bearer for measuring our profession’s progress in this imperative, yet slow-moving, charge. While we create uniformity, simplicity, and education in this space, we also believe that collection and aggregation of this data will facilitate the addition of newcomers to this effort.

III. Why the ABA Should Take Action Now

A. Why is the House of Delegates Being Asked to Adopt this Resolution?

The ABA serves as the national representative of the legal profession, and also is the world’s largest organization of lawyers and judges. Leadership by the ABA can stir the conscience of the legal profession and inspire individual and collective commitments and, most importantly, action and results. Consistent with its status as the world’s leading organization of lawyers and judges, the Association must take a leadership position. Adoption of this resolution would provide an example for other organizations and the profession to follow. By urging action, this resolution would increase economic opportunities for diverse lawyers and thereby help realize the objective of Goal III.

B. The ABA Plays a Unique Role in the Legal Profession

No segment of society is so strategically positioned to address the issues of diversity as the legal profession. No other profession has a higher duty to do so. That duty arises out of the unique
offices that lawyers hold as ministers of the law and guardians of its conscience. The legal profession has a long and proud heritage as champions of individual rights and freedoms. The Association is uniquely qualified for the task. If adopted by the House of Delegates, this resolution would allow the ABA to play a crucial role in leading the legal profession to embrace and promote diversity at a higher level in law firms and corporations. Adoption of this Resolution would proclaim the Association’s unwavering commitment to equality for all lawyers.

C. The ABA’s Historical Stances on Diversity in the Legal Profession

The ABA has a long and proud history of demanding equality for lawyers of color and women. With the passage of Goal IX, “to achieve the full and equal participation of minorities and women within the profession,” and the creation of the Commission on Opportunities For Minorities in the Profession (currently known as the Commission on Racial & Ethnic Diversity in the Profession) in 1986, the ABA took bold steps to create its first and now the oldest entity to deal with facilitating racial and ethnic change in the ABA and the legal profession. The ABA’s creation of the Commission demonstrates one of the most successful, decisive and comprehensive actions taken by the legal profession to achieve the goal of equal opportunities for diverse lawyers.

Among the recommendations from the 1986 Report that created the Commission on Racial & Ethnic Diversity, Recommendation 3.4 directed the ABA to “take concrete actions with regard to the hiring, recruitment, promotion and advancement of minority lawyers.” 17 In fact, the 1986 Report laid the foundation for the issues that this resolution addresses. Then, in 2008, the ABA adopted Goal III to eliminate bias and enhance diversity. Goal III replaced original Goal IX and demonstrated to the legal profession and the greater public that the ABA embraced diversity and inclusion as a core value. As a testament to the ABA’s leadership and influence, we witnessed an increase in the adoption of goals similar to Goal III by bar associations, law firms, corporations, and other legal entities throughout the country.

This resolution provides continuity with the 1986 Report and fulfills its mandate for “concrete actions.” This resolution also goes beyond the mandate of the 1986 Report by applying to all Goal III attorneys.

IV. Conclusion

The ABA represents the earliest coalescence of the legal profession. It is the seminal foundation for myriad legal organizations around the world and is, without question, the most diverse and influential of all voluntary legal organizations. The stated mission of the ABA includes serving equally its members, our profession, and the public, by defending liberty and delivering justice as the national representative of the legal profession. In order to achieve that mission, our

profession must be truly diverse at all levels, in all areas, and in all occupations. We must relentlessly pursue Goal III by promoting full and equal participation in the ABA, the profession, and the justice system. In order to do so, all areas of the profession must be wholly reflective of the diversity we find in our society. While we have work to do in all areas of the profession, we have great work to do in law firms.

As the buyers of legal services, corporations and other types of clients may have the greatest impact in increasing diversity in the legal profession. They can use their power to drive change through the buying choices they make in their retention of legal services and their decisions regarding the continued use of certain legal providers, all based on the diversity of the firms and their progress toward improvement. Corporate America is well aware of the value of embracing diversity and inclusion and the correlation between its support and corporate results, employee engagement, and the need to focus on the broad customer base. With more consistent data available, corporates boards, chief executive officers, and general counsels can rationally and consistently measure and be held accountable for how they are doing.

This resolution calls for a two-pronged approach by urging law firms to focus on their diversity and inclusion practices in a meaningful way, and clients to use their purchasing power to increase economic opportunities for diverse attorneys. Working together, law firms and clients can have tangible impact in moving the needle on diversity and inclusion in the legal profession.

The Diversity and Inclusion 360 Commission respectfully urges the House of Delegates to adopt this resolution.

Respectfully submitted,

Eileen M. Letts, Co-Chair David B. Wolfe, Co-Chair
Diversity & Inclusion 360 Commission
**GENERAL INFORMATION FORM**

Submitting Entity: Diversity & Inclusion 360 Commission Submitted

By: Eileen Letts and David Wolfe,

Co-Chairpersons, ABA Presidential 360 Commission

1. **Summary of Resolution(s).** The resolution is not proposed to exclude any demographic, but to be more inclusive of those covered within the ambit of Goal III. To that end, the resolution urges (a) all providers of legal services, including corporations and law firms, to expand and create opportunities at all levels of responsibilities for diverse attorneys; and (b) clients to assist in the facilitation of opportunities for diverse attorneys, and to direct a greater percentage of the legal services they purchase, both currently and in the future, to diverse attorneys.

2. **Approval by Submitting Entity.** This Resolution and Report was formally approved by a vote of the Diversity & Inclusion 360 Commission during its meeting in Short Hills, New Jersey, on April 18, 2016. (Commission member Paul Fishman abstained due to conflict of interest issues related to his employment.)

3. **Has this or a similar resolution been submitted to the House or Board previously?** This specific resolution has not been previously submitted. In 1986, however, the HOD adopted a resolution for the ABA to “take concrete actions with regard to the hiring, recruitment, promotion and advancement of minority lawyers.” The instant resolution is the logical progression of the 1986 resolution passed by the HOD and is necessary to further advance diversity and inclusion in the legal profession.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** The relevant policies are referenced in the Introduction of this Report: specifically, Goal II, “improving our profession,” and Goal III, “eliminate bias and enhance diversity.” Adopted in 2008, Goal III objectives are to “1. Promote full and equal participation in the association, our profession and the justice system by all persons. 2. Eliminate bias in the legal profession and the justice system.” The 360 Commission’s proposed policy resolution supports ABA Goals II and III.

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

Since the HOD adopted the resolution in 1986 to “take concrete actions with regard to the hiring, recruitment, promotion and advancement of minority lawyers,” unfortunately, very little has changed. Additionally, based upon available research from NALP, Catalyst and other reputable organizations, including the American Bar Association, over the past few decades, little progress has been made. Thus, this resolution not only addresses those concerns, but, expands the covered group to include all attorneys who are within the ambit of Goal III, including women, racially and ethnically diverse attorneys, attorneys with disabilities and attorneys who are members of LGBT groups.
There is further urgency because without regard to how noble our profession is, it remains the least diverse profession of all comparable professions. It is submitted that more diversity will occur if those attorneys covered by Goal III believe economic and promotional opportunities will be available to them on an equal basis. The fact that the legal profession is the least diverse in many ways contributes to 50% of all young people believing the justice system is not fair (according to a recent Harvard study). Despite noble efforts, our apparent inability to adequately address such serious deficiencies in our own profession causes this resolution to be extremely urgent.

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.**

   A newly formed Corporate Counsel Subcommittee of the Commission on Racial and Ethnic Diversity will be responsible for implementation of the policy resolution and the ABA Model Diversity Survey. It is reasonably certain that a research organization (to collect and codify data relating to the survey) will assist in the implementation of the Resolution.

   This Resolution will allow the ABA to be a leader in diversity and inclusion, playing a crucial and unique role, as the national voice of the legal profession in the U.S. The ABA will lead the profession to embrace and promote diversity at higher levels in law firms and corporations.

8. **Cost to the Association.** (Both direct and indirect costs) Modest funding (**$20,000**) has been requested for FY2017 for costs associated with the implementation of this policy resolution and the ABA Model Diversity Survey.

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

10. **Referrals.**

    Judicial Division  
    Section of Litigation  
    Section of Tort Trial and Insurance Practice  
    Business Law Section  
    Family Law Section  
    Section of Civil Rights and Social Justice  
    Section of Intellectual Property Law  
    International Law Section  
    Labor and Employment Law Section  
    Law Practice Management Section
Law Student Division
Section of Real Property, Trust and Estate Law
Senior lawyers Division
Solo, Small Firm and General Practice Division
Section of State and Local Government Law
Taxation Section
Young Lawyers Division
Council for Racial and Ethnic Diversity in the Educational Pipeline
Commission on Disability Rights
Coalition on Racial and Ethnic Justice
Center for Racial and Ethnic Diversity
Commission on Racial and Ethnic Diversity in the Profession
Commission on Sexual Orientation and Gender Identity
Commission on Hispanic Legal Rights
National Bar Association
National Hispanic Bar Association
National Asian Pacific American Bar
National Native American Bar Association

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

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   818.257.1260
   wendy.shiba@me.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.)

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EXECUTIVE SUMMARY

1. **Summary of the Resolution**

The resolution is not proposed to exclude any demographic, but to be more inclusive of those covered within the ambit of Goal III. To that end, the resolution urges (a) all providers of legal services, including corporations and law firms, to expand and create opportunities at all levels of responsibilities for diverse attorneys; and (b) clients to assist in the facilitation of opportunities for diverse attorneys, and direct a greater percentage of legal services they purchase, both currently and in the future, to diverse attorneys.

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

For years organizations have worked to achieve greater diversity and inclusion in the legal profession. Unfortunately, the legal profession remains the least diverse profession of all comparable professions (e.g. physicians, engineers, accountants, et al.). Well-recognized studies report very little or no progress has been made to increase diversity and inclusion in our profession. We are a proud and noble profession that can do better. It is well settled that the public, the legal profession and clients are best served when lawyers reflect the demographics of the community in which legal services are provided. Increasing economic opportunities for diverse attorneys will be highly impactful in changing the trajectory of diversity and inclusiveness in the legal profession. The economic success of diverse attorneys is an effective means by which legal service providers can attract and retain more diverse attorneys to the profession.

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

The policy, through the use of various recommended tools, including a uniform survey for use by both clients and lawyers who represent them, will assist law firms, lawyers and clients in achieving greater diversity and inclusiveness in the profession, consistent with Goal III, enhancing diversity and by application, also Goal II, improving our profession.

4. **Summary of Minority Views**

   N/A
RESOLVED, That the American Bar Association urges courts and other governmental entities, bar associations, non-profit organizations and entrepreneurial entities that make forms for legal services available to individuals through the Internet to provide clear and conspicuous information on how people can access a lawyer or a lawyer referral service to provide assistance with their legal matters.
REPORT

This resolution is designed to expand access to legal services that are provided by lawyers in an affordable manner to those who are otherwise attempting to address their legal matters without the assistance of a lawyer and may otherwise not understand the value of the lawyer’s role in providing that assistance.

Self-help legal resources first emerged 50 years ago with the publication of a book entitled “How to Avoid Probate,” which helped guide people through a complicated legal system in New York on their own. In the 1970s, Nolo Press emerged as a self-help legal publishing house, first providing do-it-yourself books in California and then on a national basis. The Standing Committee on the Delivery of Legal Services first charted the trend toward self-representation 30 years ago. Researching both divorce and bankruptcy cases in Maricopa County, Arizona, the Committee documented the increases in self-representation in those matters. Self-help divorces nearly doubled over six years. In 1980, 24 percent of divorce cases proceeded pro se. By 1985, that number had grown to 47 percent. Self-help bankruptcy, on the other hand, was limited, increasing from seven percent to 11 percent over that time.

A 1992 report from the National Center for State Courts examined the incidence of divorce cases with and without lawyers in 16 US cities. In seven of those cities, at least a third of the cases proceeded without a lawyer representing either party. In none of the cities were both parties represented by a lawyer in more than half the cases. In the 25 years since then, domestic relations matters have transitioned from those that are primarily lawyer represented to those that are primarily self-represented. Self-representation has also increased in other areas of the law, but less substantially.

A 1998 report from the American Judicature Society and State Justice Institute speculated on the reasons for the rise of pro se litigation, including:

- Anti-lawyer sentiment;
- The cost of litigation;
- The growth in “do-it-yourself” law businesses;
- The breakdown in social institutions;
- Cuts in governmental legal services appropriations; and

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• Improved “customer service” by the courts.⁴

Another perspective suggests the determination of whether a person proceeds with a lawyer or through self-representation focuses on the specific types of matters and identifies the factors as:

• Affordability;
• Value;
• The complexity of the matter; and
• The consequences, including whether the outcome is with prejudice.⁵

The increased incidence of self-representation, particularly in family law matters, led to responses from various stakeholders. Based on the research from the ABA Standing Committee on the Delivery of Legal Services in the 1980s and 1990s, the district court in Maricopa County, Arizona, first dedicated a court clerk to specifically assist self-represented litigants. This model of dedicated clerks was then adopted by courts in California and Washington State. The Maricopa County court did not find this resource to be sufficient to meet the needs of self-represented litigants and subsequently redesigned a portion of its public law library to create the nation’s first court-based self-help center. The center included legal forms, how-to-do-it instructions, access to legal aid lawyers for those who qualified and folders with resumes of mediators and lawyers who were experienced in unbundled legal services. The center opened shortly before the Internet became a widely available resource and all of the documents were paper-based. That has, of course, evolved to a point where court forms and related materials are widely available online. Over the past 20 years, the self-help center model has been adopted in approximately 500 venues and serves about 3.7 million users annually.⁶

As noted above, the American Judicature Society report indicates that self-representation may have increased in part as a result of the growth in do-it-yourself law businesses. This may be a cyclical circumstance where do-it-yourself businesses have grown as a result of the increases in self-representation. Regardless of the cause and effect, these businesses, which began with self-help books in the 1960s, evolved into software and now fundamentally provide services via the Internet, have proliferated in the past 20 years.

In addition, lawyers have adapted their delivery model to include limited scope representation, or unbundled legal services, in order to recapture a portion of that market that has been proceeding on a pro se basis.⁷ Nearly half of solo and small firm lawyers – those most likely to provide

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⁴ Supra note 1.
⁷ See ABA Resolution 108 (February 2013) indicating the ABA’s support for unbundled legal services, at
personal legal services – offer their services on an unbundled basis. Consequently, some of those who may appear to be self-represented litigants in fact receive assistance from a lawyer to the extent the litigant desires.

Seemingly, no single factor has done more to change the dynamics of the delivery of personal legal services in general and self-representation in particular over the past 20 years than technology overall and the availability of the Internet specifically. While the legal profession frequently associates technology with entrepreneurial endeavors that provide online forms and document preparation for fees, the Internet is also the conduit for distribution of legal forms and information by courts, other governmental entities such as state secretaries of state and attorneys general and federal agencies, bar associations, and non-profit organizations.

Both long-established and recently-emerging authorities recognize that legal matters that seem to be straight-forward can have complex twists as a result of the specific factual circumstances and therefore legal matters that a computer has the technological capacity to accomplish can benefit from the scrutiny of a lawyer.

Texas amended its definition of the practice of law in 1999 to specifically preclude materials distributed on the Internet as long as those materials “clearly and conspicuously state that the products are not a substitute for the advice of an attorney.”

A 2015 consent judgment in North Carolina determined that an online document vendor was not providing legal services in violation of the unauthorized practice of law provisions in the state if it met a series of conditions, including one requiring the vendor to “communicate to the North Carolina consumer that the forms or templates are not a substitute for the advice or services of an attorney.”

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9 See, for example, Can Robots Replace Lawyers? Computers, Lawyers and the Practice of Law, Remus & Levy, Dec. 30, 2015, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2701092, where the authors write extensively about commercial vendors that provide online legal forms, but make no mention of similar forms provided by courts, governmental entities, bar associations or non-profit organizations.
10 Section 81.101(c) of the Texas Government Code states, “(c) In this chapter, the 'practice of law' does not include the design, creation, publication, distribution, display, or sale, including publication, distribution, display, or sale by means of an Internet web site, of written materials, books, forms, computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney. This subsection does not authorize the use of the products or similar media in violation of Chapter 83 and does not affect the applicability or enforceability of that chapter.”
11 LegalZoom.com, Inc. v. N.C. State Bar, 2015 NCBC 96
While these authorities clearly indicate it is in the public interest to require commercial vendors to inform potential customers that those customers may benefit from the advice of a lawyer, no requirements exist nor encouragement extended to help people who are using online legal documents from any source to find a lawyer.

The Standing Committee on the Delivery of Legal Services has reviewed self-help resource and online forms from the judiciaries of every state, from the secretaries of state offices of every state and from a sampling of federal agencies. These sites vary considerably in terms of their layout, content and navigation, presumably as a result of the organic nature of the emergence of the Internet and limited use of uniform templates. Critically, they vary substantially in their assistance to users who may benefit by being able to access the services of lawyers to the matters those users are pursuing.

The state self-help materials from the judiciaries fall into five categories:

- A few states provide forms but no disclaimers, no advice about the benefits of obtaining counsel and no linkage to additional resources.

- Other states provide disclaimers in an effort to limit their responsibilities when users rely on their information and forms, with nothing more. For example, one state indicates: “[Court] presents this information without warranties, express or implied, regarding the information's accuracy, timeliness, or completeness. Use of the information is the sole responsibility of the user.”

- A few states take another step and inform the user that the site “cannot replace the advice of competent legal counsel licensed in the state” or that they may benefit from the assistance of a lawyer, but the sites do not provide the user with linkage to further resources.

- Most states provide users with resources for additional help. These include law librarians, self-help centers, legal aid offices and lawyer referral services. In some states this information is conspicuous, but in others it is obscure, particularly for the consumer who is not familiar with legal issues. For example, in one state, the user must go to the “self help” tab at the top of the page of the court’s website, then to the “self help center” tab on the left-hand navigation bar, then to the “lawhelp.org” tab on the left-hand navigation bar, then to the “legal assistance” tab at the top of that page. Notwithstanding the good intentions of these courts, it is unlikely novice consumers will be able to navigate sites with code words or trade terms such as “lawhelp” when they may be looking for a tab that simply states, “find a lawyer.”

- The fifth category employed by state court websites to help those who come to their self-help resources is uncommon. It involves an explanation of the importance of consulting
with a lawyer, along with conspicuous linkage. For example, the Court Assistance Office of the State of Idaho Judicial Branch states\textsuperscript{12}:

\section*{When should I consider talking to an attorney?}

The materials and assistance you receive on this web site or in your local Court Assistance Office are no substitute for talking with a lawyer. Laws and court rules are very complex. Consequently, keep in mind, even if you follow the instructions provided and use our forms you are not guaranteed to win your case.

The materials on this site are meant to help you educate yourself through the process. It is always advisable to talk to a lawyer before proceeding on your own, especially if your situation is complicated or you expect difficulties. Visit the Idaho State Bar Lawyer Referral Service to find a lawyer.

Some governmental sites provide similar narratives. For example, the US Patent and Trademark Office website includes this statement\textsuperscript{13}:

\begin{footnotesize}
\begin{enumerate}
\item At \url{http://www.courtselpidaho.gov/}
\item At \url{http://www.uspto.gov/trademarks-getting-started/using-legal-services/do-i-need-trademark-attorney}
\end{enumerate}
\end{footnotesize}
Do I Need a Trademark Attorney?

**WARNING:** While an applicant *can* file his or her own trademark application, and while these videos highlight aspects of the filing process, attorneys (not associated with the USPTO) who are familiar with trademark matters represent most applicants. Some trademark owners may have valid and protected trademark rights that do not result from federal registration with the USPTO, and those marks may not appear in the USPTO’s Trademark Electronic Search System (TESS) database. Before ever filing a trademark application, a trademark attorney can conduct a more comprehensive search for potential problems with your use of a proposed mark than you will be able to conduct in TESS. The attorney then can counsel you regarding use of the mark, recommend whether to file a trademark application, and advise you on your likelihood of success in the registration process.

The filing of a trademark application begins a legal proceeding having many legal requirements and strict time deadlines. Not all applied-for trademarks register, and filing fees are not refunded. Whether you ultimately proceed on your own behalf or a trademark attorney represents you, all substantive and procedural requirements of the Trademark Act and Trademark Rules of Procedure must be met. Should you wish to consult an attorney, you can find the names of attorneys who handle trademark matters in telephone listings or by using the attorney referral service of a state bar or local bar association (see American Bar Association Lawyer Referral Directory). The USPTO cannot aid in the selection of an attorney, nor can the Trademark Assistance Center provide any legal advice.

On the other hand, the US Bankruptcy Court provides online forms, including one for the voluntary petition for individuals filing bankruptcy. That form includes a provision, which must be acknowledged and signed, that states, in part, “The law allows you, as an individual, to represent yourself in bankruptcy court, but you should understand that many people find it extremely difficult to represent themselves successfully. Because bankruptcy has long-term financial and legal consequences, you are strongly urged to hire a qualified lawyer.”

Yet, neither the form nor the web page from which it is launched provide viewers with any direction on how to obtain a lawyer or any linkage to lawyers who are qualified to provide these services.14

In addition, a review of the state secretaries of state websites shows that every state provides consumers with the opportunity to fill out and/or file articles of incorporation online. Some states provide FAQ’s or instructional information, but no state provides people with direction on obtaining assistance from a lawyer or linkage that helps people find one.

Selecting, completing and filing forms online can be convenient and efficient for consumers. However, the consequences of making a mistake - of selecting the wrong form, of providing the wrong or incomplete information, of failing to properly follow through – can be grave. Sometimes these mistakes become readily obvious, where, for example, the litigant attempts to file inappropriate or mistaken forms for a divorce. Other times, the errors can lay dormant for

long periods. The owner of an improperly formed corporation may not realize the problem until efforts are made to sell or dissolve the company or to become involved in litigation. Of course, an improperly or insufficiently executed will is not likely to be discovered until the testator has died and the estate is executed or challenged. Leaving decision-making about which form to use or what information to provide to the novice consumer with limited guidance on obtaining additional resources creates substantial risks on an unparalleled scale.

To illustrate this scale, recent research conducted by the American Bar Foundation shows that a substantial portion of people with justiciable problems are likely to turn to self-help remedies. Nearly half of those with legal matters (46 percent) indicated they address problems through self-help, while only 15 percent turn to an advisor or representative.\(^{15}\) Put another way, three times the number of people pursue their legal matters through self-help than through an advisor of any nature.

As the 1986 report from the Standing Committee on the Delivery of Legal Services concludes, “Self-help law is here to stay.”\(^{16}\) Yet, we have evolved to a point where self-help does not, and should not, be at the total exclusion of a lawyer. Unbundled legal services expand the affordability for those who pursue legal matters fundamentally on their own and enable those consumers to get just the resources they need as they make decisions about which forms to use, what information to provide and how to follow up for the necessary compliances.

The creation of pipelines to lawyers or referral services through clear and conspicuous links from online self-help materials generated by those in all settings can improve access to affordable and trusted personal legal services in ways that are designed to limit the risk of errors that may have catastrophic consequences to the consumer. In creating such pipelines, efforts should be made to broaden access by following the ABA Standards for Language Access in Courts, adopted by the ABA House of Delegates at the 2012 Midyear Meeting.\(^{17}\)

Respectfully Submitted,

William T. Hogan III, Chair
Standing Committee on the Delivery of Legal Services

August 2016

\(^{15}\) Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study, Sandefur, American Bar Foundation, 2014, at 12, at.

\(^{16}\) Supra note 2, at 71.

\(^{17}\) At
http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_s
claid_standards_for_language_access_proposal.authcheckdam.pdf
GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on the Delivery of Legal Services

Submitted By: William T. Hogan, III, Chair, Standing Committee on the Delivery of Legal Services

1. **Summary of Resolution(s).** This resolution calls upon courts and other entities that provide online legal forms that are accessible by those who are self-represented to include clear and conspicuous direction on how those form users may gain access to a lawyer to provide them with assistance with their legal matters. Given the scope of self-representation and the complexity of legal matters, the resolution will enable people to have better access to the information necessary to properly complete legal forms and move forward with the resolution of their legal matters in a cost-effective manner.

2. **Approval by Submitting Entity.** The Standing Committee on the Delivery of Legal Services approved of this resolution on February 6, 2016.

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 108, passed by the House of Delegates at the 2013 Midyear Meeting “encourages practitioners, when appropriate, to consider limiting the scope of their representation, including the unbundling of legal services as a means of increasing access to legal services.” The resolution advances unbundled legal services.

   Resolution 108, passed by the House of Delegates at the 2014 Annual Meeting “urges national, state, local and territorial bar associations and foundations; courts; law schools; legal aid organizations; and law firms to create and advance initiatives that marshal the resources of newly-admitted lawyers to meet the unmet legal needs of underserved populations in sustainable ways.” The resolution advances access to underserved populations through the use of newly-admitted lawyers who are providing unbundled legal services.

   Resolution 113, passed by the House of Delegates at the 2012 Midyear Meeting adopted the ABA Standards for Language Access in the Courts. The Standards assist in creating language access services making the system of justice more fair and accessible.

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.** Implementation will involve three methods. First, the sponsors will reach out to organizations of entities that provide online legal documents, including the courts and other governmental units and bar associations, and encourage them to advocate for the implementation of the policy with their constituents. Second, the sponsors will reach out to secondary sources and advance use online legal documents, such as self-help centers, and encourage their advocacy for necessary changes. Finally, the sponsors will create and circulate examples of those entities that advance the use of lawyers and provide clear and conspicuous links to those resources.

8. **Cost to the Association.** (Both direct and indirect costs) No direct costs will result from this policy. Indirect costs will be from volunteer and staff resources that already exist within the ABA. No additional indirect costs will be incurred.

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

10. **Referrals.** The resolution has been circulated to the following entities, seeking their insights:

- Standing Committee on Lawyer Referral and Information Service
- Standing Committee on Group and Prepaid Legal Services
- Standing Committee on Legal Aid and Indigent Defendants
- Standing Committee on Pro Bono & Public Service
- Standing Committee on Legal Assistance for Military Personnel
- Commission on Homelessness & Poverty
- Solo, Small Firm and General Practice Division
- Law Practice Division
- Section of Family Law
- Business Law Section
- Section of Real Property, Trust and Estate Law
- Judicial Division
- Standing Committee on Ethics and Professional Responsibility
- Standing Committee on Specialization
- Standing Committee on Professional Discipline
- Standing Committee on Professionalism
- Standing Committee on Client Protection
- Standing Committee on Bar Activities and Services
- Committee on Disaster Response and Preparedness
- Young Lawyers Division
- Law Student Division
- Standing Committee on Paralegals
- Standing Committee on Technology & Information Systems
- Commission on Domestic & Sexual Violence
- Commission on Interest on Lawyers' Trust Accounts
- Commission on Immigration
- Commission on Sexual Orientation and Gender Identity
- Section of Dispute Resolution
- Government and Public Sector Lawyers Division
11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution calls upon courts and other entities that provide online legal forms that are accessible by those who are self-represented to include clear and conspicuous direction on how those form users may gain access to a lawyer to provide them with assistance with their legal matters. Given the scope of self-representation and the complexity of legal matters, the resolution will enable people to have better access to the information necessary to properly complete legal forms and move forward with the resolution of their legal matters in a cost-effective manner.

2. Summary of the Issue that the Resolution Addresses

Courts and other governmental entities, bar associations, non-profit organizations and entrepreneurial entities are providing online legal documents that enable self-represented people to advance their legal matters. Often the sites providing these materials do not offer users the information or resources necessary to enable them to be assured they are proceeding in a proper manner. Even when links are provided to resources such as lawyer referral services, those links are often not conspicuous, limiting the ability of users to find lawyers who would be able to assist them.

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

Urging entities that provide online legal documents to include clear and conspicuous links to lawyers provides a pipeline to those who have doubts about their decision-making when attempting to use the forms. At the modest end, the policy enhances the convenience of those making use of the forms and expands access to affordable legal services. At an outer end, the policy will protect consumers of legal services from mistakes they may make that would undermine their efforts and lead to adverse consequences.

4. Summary of Minority Views

The Section of Family Law states that it was not consulted in the development of the solutions included in this Resolution. The Section opposes the Resolution and Report in their present form and urges their withdrawal at this time. The Section believes that the Resolution and Report fail to address many issues specific to the needs of and dangers to the public in decision-making and drafting of documents with legal consequences in family law cases.
RESOLUTION

RESOLVED, That the American Bar Association amends Principles 2(B) and 6 of the ABA Principles for Juries and Jury Trials as follows:

2(B) Eligibility for jury service should not be denied or limited on the basis of race, national origin, gender, age, religious belief, income, occupation, disability, marital status, sexual orientation, gender identity, gender expression or any other factor that discriminates against a cognizable group in the jurisdiction other than those set forth in A. above.

6(C) The court should:

1. Instruct the jury on implicit bias and how such bias may impact the decision making process without the juror being aware of it; and

2. Encourage the jurors to resist making decisions based on personal likes or dislikes or gut feelings.
REPORT

The Commission on the American Jury recommends amendments to two of the ABA Principles for Juries and Jury Trials that were approved by the House of Delegates in 2005. The first recommendation amends the list of those groups which should not be excluded from jury service to include marital status, gender identity and gender expression. The second recommends that jurors be educated as to implicit bias and how to avoid such bias in the decision making process.

Principle 2

The purpose behind Principle 2 is to make certain that the jury pool and ultimately juries are representative of the communities that they serve. The broader the participation, the greater will be the public trust and confidence in the decisions made by the jury and the judgements of the court. The United States has had a long history of continuously expanding jury participation, however slow it has been to change. The first change amends the list of groups which should not be denied or limited eligibility for jury service to include marital status, gender identity and gender expression (Principle 2(B)). The American Bar Association’s Goal III -- Eliminating Bias an Enhancing Diversity -- is one of the Association’s four core goals. Goal III has two objectives: 1) Promoting full and equal participation in the association, the profession, and the justice system by all persons; and 2) Eliminating bias in the legal profession and the justice system. The proposed resolution addresses this second objective.

Appreciation for the ABA’s longstanding commitment to Goal III and recognition that the legal profession needs to make more meaningful progress in advancing diversity and inclusion led President Brown to request that the Board of Governors (BOG) create the ABA Diversity & Inclusion 360 Commission (360 Commission). The 360 Commission is charged with taking a comprehensive “360 degrees” look at the state of diversity and inclusion in the legal profession and producing sustainable action plans that will significantly move the needle forward. Consistent with this charge, the 360 Commission analyzed diversity and inclusion in the legal profession, the judicial system, and the American Bar Association with a goal of developing sustainable action plans.

The 360 Commission has four Working Groups: 1) Pipeline Projects, which is working to address the barriers facing diverse students at critical points along the pipeline - K-12, College/Pre-Law, and Law School/Bar Passage as well as exploring other entry points into the profession; 2) Diversity & Inclusion Guidelines and Implementation, which is examining what the ABA can do to lead efforts around diversity and inclusion for itself and local and state bar associations; 3) Economic Case, which is expanding economic opportunities for diverse attorneys by developing model tools for use by corporations and law firms to benchmark diversity, and proposing a policy that urges greater economic opportunities for diverse lawyers. The final 360 Working Group addresses implicit bias. The Implicit Bias Working Group is creating training materials and videos for judges, prosecutors and public defenders to explore what can be done to address inherent bias. It is also advancing this policy resolution to ensure that jurors are aware of and consider their implicit biases before trial proceedings commence.
As part of this effort, the 360 Commission is working to expand the definition of Goal III to encompass the full range of diversity so that it includes not only race, national origin, gender, disability, and sexual orientation but also age, religious belief, income, occupation, marital status, gender identity and gender expression. Thus, the resolution calls for revisions to Jury Principle 2(B) so that eligibility for jury service is not denied or limited on the basis any of the above or any other factor that discriminates against a cognizable group.

The proposed amendment would include the groups "gender identity" ("gender identity" refers to one's innermost concept of self as male, female, a blend of both or neither — how individuals perceive themselves and what they call themselves. One's gender identity can be the same or different from their sex assigned at birth. http://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions); "gender expression" ("gender expression" refers to external appearance of one's gender identity, usually expressed through behavior, clothing, haircut or voice, and which may or may not conform to socially defined behaviors and characteristics typically associated with being either masculine or feminine. http://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions); and "marital status" ("marital status" refers to a person's state of being single, married, separated, divorced, or widowed. http://www.oxforddictionaries.com).

Principle 6

The second change is to insert a new Principle 6(C) to include education of jurors on the impact of implicit bias on the decision making process.

According to Professor Jerry Kang, a UCLA Law Professor who specializes in implicit bias training for the legal profession, "implicit bias refers to the attitudes, or stereotypes that affect our understanding, actions, and decisions in an unconscious manner. These biases, which encompass both favorable and unfavorable assessments, are activated involuntarily and without an individual’s awareness or intentional control…” (See Jerry Kang, A Primer For State Courts, August 2009).


Studies show that implicit racial bias is something that can be controlled, if individuals are equipped with the tools necessary to address it. Educational programs on implicit bias offer judges and court staff those tools.

Exercising fairness and equality in the court system is of critical importance to lawyers, judges, jurors and staff. Jurors and judges must be held to an even higher standard due to the significant importance of their decisions on the lives and future of all consumers of the justice system.
This Amendment requests that an important educational instruction be given to juries regarding what implicit bias is and how it might affect outcomes and decisions in the courtroom.

Courts must find practical ways of eliminating implicit bias in jurors. Due to the limited opportunities to educate jurors in the court room setting, the importance of a well-crafted, specialized jury instruction may be the only available practical option of making jurors aware of implicit bias. One study found that the greater impact would be from preliminary instructions rather than post-evidence instructions on judgments of guilt or innocence (Saul M. Kassin & Lawrence S. Wrightsman, On the Requirements of Proof: The Timing of Judicial Instruction and Mock Juror Verdicts, 37 J. Personality & Soc. Psychol. 1877, 1882 (1979)). Therefore this change to the principle encourages judges to give the instruction to jurors prior to trial. In addition, this approach is relatively inexpensive, expedient and easy to administer. This approach places the responsibility of managing implicit bias of jurors in the hands of the judge. Judges may be encouraged to utilize specialized instruction on implicit bias similar to the instructions developed and utilized by Judge Mark Bennett in the Northern District of Iowa. (Bennett, Mark W., Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problem of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions Harvard Law & Policy Review, Vol. 4, p. 149, 2010). Similarly The California courts use a model jury instructions on bias providing: “Each one of us has biases about or certain perceptions or stereotypes of other people. We may be aware of some of our biases, though we may not share them with others. We may not be fully aware of some of our other biases.” (California Civil Jury Instructions (CACI) 113). Courts should be encouraged to use these type of instructions in all cases.

This policy resolution seeks revision and amendment of Jury Principle 6 in order to provide the courts with inexpensive, expedient, fair and equitable ways of managing implicit bias of juries.

Respectfully Submitted,

Hon. Christopher Whitten
Chair, Commission on the American Jury

Eileen M. Letts
David B. Wolfe
Chairs, Diversity & Inclusion 360 Commission
August 2016
APPENDIX

PRINCIPLE 2 – CITIZENS HAVE THE RIGHT TO PARTICIPATE IN JURY SERVICE AND THEIR SERVICE SHOULD BE FACILITATED

A. All persons should be eligible for jury service except those who:

1. Are less than eighteen years of age; or

2. Are not citizens of the United States; or

3. Are not residents of the jurisdiction in which they have been summoned to serve; or

4. Are not able to communicate in the English language and the court is unable to provide a satisfactory interpreter; or

5. Have been convicted of a felony and are in actual confinement or on probation, parole or other court supervision.

B. Eligibility for jury service should not be denied or limited on the basis of race, national origin, gender, age, religious belief, income, occupation, disability, marital status, sexual orientation, gender identity, gender expression or any other factor that discriminates against a cognizable group in the jurisdiction other than those set forth in A. above.

PRINCIPLE 6 – COURTS SHOULD EDUCATE JURORS REGARDING THE ESSENTIAL ASPECTS OF A JURY TRIAL

A. Courts should provide orientation and preliminary information to persons called for jury service:

1. Upon initial contact prior to service;

2. Upon first appearance at the courthouse; and

3. Upon reporting to a courtroom for juror voir dire.
B. Orientation programs should be:

1. Designed to increase jurors' understanding of the judicial system and prepare them to serve competently as jurors;

2. Presented in a uniform and efficient manner using a combination of written, oral and audiovisual materials; and

3. Presented, at least in part, by a judge.

C. The court should:

1. Instruct the jury on implicit bias and how such bias may impact the decision making process without the juror being aware of it; and

2. Encourage the jurors to resist making decisions based on personal likes or dislikes or gut feelings.

D. Throughout the course of the trial, the court should provide instructions to the jury in plain and understandable language.

1. The court should give preliminary instructions directly following empanelment of the jury that explain the jury's role, the trial procedures including note-taking and questioning by jurors, the nature of evidence and its evaluation, the issues to be addressed, and the basic relevant legal principles, including the elements of the charges and claims and definitions of unfamiliar legal terms.

2. The court should advise jurors that once they have been selected to serve as jurors or alternates in a trial, they must consider only the applicable law and evidence presented in court, and must refrain from communicating about the case with anyone outside the jury room until the trial is over and the jury has reached a verdict. This instruction should explain that the ban on outside communication is broad, encompassing not only oral discussions in person or by phone, but also communications through e-mails, texts, Internet postings, blog postings, social media websites like Facebook or Twitter, and any other method for sharing information about the case with another person or gathering information about the case from another person. At the time of such instructions in civil cases, the court may inform the jurors about the permissibility of discussing the evidence among themselves as contemplated in Standard 13 F. The court should also instruct jurors that they do not themselves investigate the facts of the case, the law governing the case, or the parties, lawyers, or judges in the case. The court should explain that a juror's duties to avoid communicating about the case outside the jury room and to refrain from independent
investigations about the case are extremely important, and that the court has the authority to impose serious punishment upon jurors who violate those duties.

3. The court should give such instructions during the course of the trial as are necessary to assist the jury in understanding the facts and law of the case being tried as described in Standard 13 D. 2.

4. Prior to deliberations, the court should give such instructions as are described in Standard 14 regarding the applicable law and the conduct of deliberations.
GENERAL INFORMATION FORM

Submitting Entities: Commission on the American Jury and Diversity & Inclusion 360 Commission

Submitted By: Hon. Christopher Whitten, Chair, Commission on the American Jury
Eileen M. Letts and David B. Wolfe, Co-Chairs, Diversity & Inclusion 360 Commission

1. Summary of Resolution(s).
   The resolution asks the House to amend the *ABA Principles for Juries and Jury Trials* Principles 2(B) and 6(C).

2. Approval by Submitting Entity. The change to the Principles was approved by an email vote of the members of both the 360 Commission and the Commission on the American Jury.

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 asks the House of Delegates to amend the *ABA Principles for Juries and Jury Trials* adopted previously by the House of Delegates at the ABA Midyear Meeting in 2005 and amended by the House of Delegates at the ABA Midyear Meeting in 2013.

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) N/A.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.
   The 360 Commission intends to create curriculum and programming for training judges based on the Principles for dissemination to all state and federal trial judges and judicial educators. The Commission on the American Jury will disseminate the amended and new principles to all the courts that currently use the ABA Jury Principles; will disseminate them to the Conference of Chief Justices; and will post the principles to their website.
8. **Cost to the Association.** (Both direct and indirect costs)
   
   N/A

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

10. **Referrals.**

    **Commission Partners:**
    Judicial Division
    Section of Criminal Justice
    Section of Litigation
    Section of Tort Trial and Insurance Practice

    **Other Sections and Divisions:**
    Administrative Law and Regulatory Practice
    Antitrust Law
    Business Law
    Civil Rights and Social Justice
    Dispute Resolution
    Environment, Energy and Resources
    Family Law
    Government and Public Sector Lawyers Division
    Health Law
    Intellectual Property Law
    International Law
    Labor and Employment Law
    Law Practice Management
    Law Student Division
    Section of Litigation
    Public Contract Law
    Public Utility, Communications and Transportation Law
    Real Property, Trust and Estate Law
    Science and Technology Law
    Senior Lawyers Division
    Solo, Small Firm and General Practice Division
    State and Local Government Law
    Taxation
    Tort Trial Insurance Practice Section
    Young Lawyers Division
    Affordable Housing and Community Development Law
    Air and Space Law
    Communication Law
11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Eileen M. Letts  
55 West Monroe St., Suite 600  
Chicago, IL 60603  
(312) 346-1100  
emletts@greeneandletts.com

David B. Wolfe  
293 Eisenhower Pkwy  
Livingston, New Jersey 07039  
(973) 992-0900  
dwolfe@skoloffwolfe.com

Judge Christopher Whitten  
125 W Washington St.  
Phoenix, AZ 85003  
(602) 372-1164  
whitten@superiorcourt.maricopa.gov

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.)

Eileen M. Letts  
55 West Monroe St., Suite 600  
Chicago, IL 60603  
(312) 346-1100  
emletts@greeneandletts.com

David B. Wolfe  
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Judge Christopher Whitten  
125 W Washington St.  
Phoenix, AZ 85003  
(602) 372-1164  
whitten@superiorcourt.maricopa.gov
EXECUTIVE SUMMARY

1. Summary of the Resolution
The Resolution amends two of the 19 ABA Principles for Juries and Jury Trials previously passed by the House in 2005 and amended in 2012. The first amendment, which applies to Principle 2, amends the list of those groups which should not be excluded from jury service to include marital status, gender identity and gender expression. The second amendment, which applies to Principle 6, recommends that jurors be educated as to implicit bias and how to avoid such bias in the decision making process.

2. Summary of the Issue that the Resolution Addresses
1. The exclusion of potential jurors based on marital status, gender identity and gender expression. 2. The impact of implicit bias on the decision making process.

3. Please Explain How the Proposed Policy Position will address the issue
These amendments are needed to address critical issues that have arisen since the Principles were first drafted and last amended. The first amendment clarifies that eligibility for jury service should not be denied or limited on the basis of marital status, gender identity and gender expression, confirming that no diverse group should be excluded from access or participation in the justice system. Being able to fully participate as a juror enhances public support for and confidence in the justice system. The second amendment relays that exercising fairness and equality in the court system is of critical importance to lawyers, judges, jurors and staff. Jurors and judges must be held to an even higher standard due to the significant importance of their decisions on the lives and future of all consumers of the justice system. This amendment requests that an important educational instruction be given to juries regarding what implicit bias is and how it might affect outcomes and decisions in the courtroom.

4. Summary of Minority Views
None are known.
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