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<td>Urges the Supreme Court of the United States to establish a panel of attorneys, with criteria and assignment procedures that are publicly available from which to appoint amicus curiae, special masters, and other counsel in proceedings before it and to consider diversity in the selection process for appointment.</td>
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<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 SECTION OF BUSINESS LAW</td>
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<td>STANDING COMMITTEE ON THE AMERICAN JUDICIAL SYSTEM</td>
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<td>Urges all state courts to develop and implement a plan to improve the delivery of civil justice guided by the Recommendations and Commentary of Call to Action: Achieving Civil Justice for All urges bar associations to promote those Recommendations and Commentary.</td>
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<td>SECTION OF INTELLECTUAL PROPERTY LAW</td>
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<td>Supports the adoption of the nominative fair use doctrine as an affirmative defense to allegations of trademark infringement and unfair competition.</td>
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<td>112B</td>
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<td>Urges prosecutor’s offices to adopt and implement internal conviction-integrity policies when an office supports a defendant’s motion to vacate a conviction based on the office’s doubts about the defendant’s guilt of the crime for which the defendant was convicted, or about the lawfulness of the defendant’s conviction.</td>
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<td>112C</td>
<td>CRIMINAL JUSTICE SECTION</td>
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<td>112D</td>
<td>CRIMINAL JUSTICE SECTION</td>
<td>Health Law and Life Sciences</td>
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<td>Urges law enforcement authorities to develop and use prior to custodial interrogation of suspects translations of Miranda warnings in as many languages and dialects as necessary to accurately and fully inform individuals of their Miranda rights.</td>
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<td>116</td>
<td>HEALTH LAW SECTION</td>
<td>Health Law and Life Sciences</td>
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<td>Urges the repeal and/or modification of the discriminatory prohibitions on blood donations by gay men and for the Food and Drug Administration (“FDA”) to develop non-discriminatory but medically safe means of accepting blood donations and testing for infectious diseases.</td>
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<td>117C</td>
<td>NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS</td>
<td>Cyberspace Law, Banking Law, Consumer Financial Services</td>
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<td></td>
<td>Approves the Uniform Employee and Student Online Privacy Protection Act, promulgated by the National Conference of Commissioners on Uniform State Laws, as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.</td>
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<td>117D</td>
<td>NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS</td>
<td>Banking Law, Consumer Financial Services, Federal Regulation of Securities, State Regulation of Securities</td>
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<td>Approves the Revised Uniform Unclaimed Property Act, promulgated by the National Conference of Commissioners on Uniform State Laws, as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.</td>
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<td>117E</td>
<td>NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS</td>
<td>Business and Corporate Litigation</td>
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<td>Approves the Uniform Unsworn Domestic Declarations Act, promulgated by the National Conference of Commissioners on Uniform State Laws, as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.</td>
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<td>118</td>
<td>VETERANS LEGAL SERVICES INITIATIVE COMMISSION</td>
<td>Council</td>
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<td></td>
<td>Urges all lawmakers and the legal profession to collaborate in the identification and removal of systemic barriers to veterans’ access to housing, education, employment, benefits and services, particularly those provided by the Department of Veterans Affairs.</td>
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RESOLVED, That the American Bar Association urges the Supreme Court of the United States to establish a panel of attorneys, with criteria and assignment procedures that are publicly available, from which to appoint *amicus curiae*, special masters, and other counsel in proceedings before it; and

FURTHER RESOLVED, That the American Bar Association urges the Supreme Court of the United States to consider racial, ethnic, disability, sexual orientation, gender identity, and gender diversity in the selection process to the panel and for appointment of *amicus curiae*, special masters, and other counsel.
REPORT

Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.

- Louis D. Brandeis, Associate Justice of the Supreme Court of the United States

Advancing diversity and inclusion in the judiciary and government is especially important. These fields not only administer, but also represent democratic rule of law in our multicultural society. The absence of diversity and inclusion in the judiciary and government can malign the legitimacy of not only lawyers, but also of the law itself.

- American Bar Association, Diversity in the Legal Profession: The Next Steps

BACKGROUND

Every year, the Supreme Court of the United States appoints counsel in cases before it. This occurs most often when certiorari has been granted in a case where all parties have conceded that the lower court committed error. In such a circumstance, the U.S. Supreme Court appoints an attorney to appear as an amicus curiae to defend the lower court’s decision on appeal.1 However, the U.S. Supreme Court may also appoint counsel if it has agreed to hear a case where one of the parties has appeared pro se,2 or where it has questioned its own subject-matter jurisdiction despite the parties’ agreement that jurisdiction exists.3 Moreover, it also frequently appoints attorneys to serve as special masters to hear evidence and issue non-binding recommendations in original jurisdiction cases.4

When it is necessary to appoint an attorney to represent a party in a proceeding, the lower federal courts virtually always select court-appointed counsel from a panel of attorney volunteers.5 Although appointment of attorneys from a panel is statutorily-mandated by Congress in criminal cases,6 many lower federal courts also utilize a panel system to appoint counsel in civil cases as well, and limit appointments of non-panel attorneys only to rare cases, such as where no members

1 Since 1926, it appears that the U.S. Supreme Court has appointed amicus curiae counsel for this purpose in 59 cases. Katherine Shaw, Friends of the Court: Evaluating the Supreme Court’s Amicus Invitations, 101 CORNELL L. REV. 1533, 1594 (2016). However, it has done so more frequently in recent years, with nineteen such appointments having been made since 2008. Id. at 1594-95.
2 For example, after it agreed to hear Gideon v. Wainwright—which Clarence Earl Gideon had originally filed pro se—the U.S. Supreme Court appointed future Associate Justice Abe Fortas to represent Gideon on appeal. See ANTHONY LEWIS, GIDEON’S TRUMPET 49, 54 (1989).
3 In fact, the U.S. Supreme Court did so just last term, when it sua sponte appointed an attorney to argue against its own subject-matter jurisdiction in Montgomery v. Louisiana, 577 U.S. ___ (2016).
of the panel possess the necessary expertise to undertake the representation. Likewise, virtually all states and territories utilize a panel or contract system to appoint counsel in cases where the public defender’s office or similar entity is not able to undertake the representation. Even though pay is low (or sometimes non-existent), the application process to become a member of a panel is highly competitive.

THE NEED FOR REFORM

The U.S. Supreme Court does not appoint counsel in the same manner as the lower federal courts or America’s state and territorial courts. Rather than making appointments from a panel of volunteers through a formalized process, the U.S. Supreme Court typically assigns such cases to its former law clerks on an ad hoc basis. For instance, forty of the fifty-nine attorneys invited to serve as amicus curiae counsel by the U.S. Supreme Court served as a former law clerk to one of the Justices. However, “of the twenty-five most recent invitations, all twenty-five went to the Justices’ former clerks.”

Unlike the panels established by federal, state, and territorial courts, which often possess minimum experience requirements, virtually all of the attorneys appointed by the U.S. Supreme Court “[a]re making their Supreme Court debuts.” Therefore, a former law clerk who receives an appointment from the U.S. Supreme Court is receiving a “big break” for a young lawyer that is tantamount to “plac[ing] a young attorney in the ‘pipeline to power.’”

The practice of providing appointments to former law clerks on an ad hoc basis without any written procedures or guidelines has deprived women and minority lawyers from entering this “pipeline to power.” Of the last fifty-nine amicus curiae appointments made by the U.S. Supreme Court, a mere six—or slightly over 10 percent—were to women attorneys. In fact, prior to 2009, only one woman had ever been invited by the U.S. Supreme Court to argue a case as an amicus curiae. This is significantly lower than the percentage of women who argue before the U.S. Supreme Court on a regular basis, which studies show range between 17% to 23%. Similarly,

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11 Shaw, supra note 1, at 1556.
12 Id. (emphasis added).
14 Id.
15 Shaw, supra note 1, at 1564 & n.164 (quoting Linda Greenhouse, Keynote Speech at the 2012 Pipeline to Power Symposium (2012)).
16 Id. at 1561.
17 Id.
18 Id. at 1562 (collecting studies).
only three of the last fifty-nine attorneys—or 5%—appointed as an amicus curiae were African-American, Latino, or Asian-American, in contrast to 11% of U.S. Supreme Court practitioners.  

THE ROLE OF THE AMERICAN BAR ASSOCIATION

The American Bar Association, as the national representative of the legal profession, has established goals to further its mission of defending liberty and delivering justice. Specifically, the American Bar Association has made it its objective to “[p]romote pro bono and public service by the legal profession,” ABA Goal II.3, to “[p]romote full and equal participation in . . . our profession, and the justice system by all persons,” ABA Goal III.1, and to “[w]ork for just laws . . . and a fair legal process.” ABA Goal IV.3.

The ABA has already adopted The Ten Principles of a Public Defense Delivery System, which includes the principle that “[t]he appointment process should never be ad hoc, but should be according to a coordinated plan.”20 The ABA has adopted virtually identical policies in the case of civil appointments as well.21 And just last year, the ABA urged the U.S. Supreme Court to increase transparency in other aspects of its operations by providing for video recordings of its oral arguments.22 A formal and transparent appointment system not only promotes public confidence in the Judicial Branch, but also ensures that all interested lawyers are able to volunteer their time, regardless of who they know.

At its most recent Annual Meeting, the ABA urged the federal courts “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.”23 The same reasons that support promoting diversity within the Judicial Branch also apply to promoting diversity amongst those appointed to argue cases before the U.S. Supreme Court. Given the significant career advantages that are associated with arguing a U.S. Supreme Court case, providing these opportunities to women attorneys and to lawyers of color would not just diversify the Supreme Court Bar, but also promote the pipeline that feeds into the federal bench as well as the most elite positions in the private and public sector.

CONCLUSION

Virtually every federal, state, and territorial court appoints counsel—whether at the trial or appellate level—from a panel of attorney volunteers, using a transparent appointment process. The U.S. Supreme Court should do the same.

Respectfully submitted,

J. Russell B. Pate
President, Virgin Islands Bar Association
February 2017

19 Id.
20 ABA Resolution 107 (approved by the ABA House of Delegates at the February 2002 ABA Midyear Meeting).
21 See, e.g., ABA Resolution 105 (adopted by the ABA House of Delegates at the August 2010 ABA Annual Meeting); ABA Resolution 112A (adopted by the ABA House of Delegates at the February 1996 ABA Midyear Meeting).
22 ABA Resolution 110 (adopted by the ABA House of Delegates at the February 2016 ABA Midyear Meeting).
23 ABA Resolution 102 (approved by the ABA House of Delegates at the August 2016 ABA Annual Meeting).
GENERAL INFORMATION FORM

Submitting Entity: Virgin Islands Bar Association
Submitted By: J. Russell B. Pate, President

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

This resolution urges the U.S. Supreme Court to appoint counsel from a panel of attorneys, and to recognize the importance of diversity in the appointments process.

2. **Approval by Submitting Entity.**

Approved by the Virgin Islands Bar Association Board of Governors on November 14, 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?**

The resolution directly advances the following ABA policies:

ABA Goal II.3 – Promote pro bono and public service by the legal profession.

ABA Goal III.1 – Promote full and equal participation in the association, our profession, and the justice system by all persons.

ABA Goal IV.3 – Work for just laws, including human rights, and a fair legal process.

In addition, the resolution is a natural extension of the following previously adopted resolutions:

ABA Resolution 102 (August 2016; 16A102) – among other things, urges the federal courts “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.”

ABA Resolution 110 (February 2016; 16M110) – urges the U.S. Supreme Court to provide transparency in its operations by providing video recordings of its oral arguments.

ABA Resolution 105 (August 2010; 10A105) – adopted the *Basic Principles of a Right to Counsel in Civil Legal Proceedings* and the accompanying commentary, which among other things provides that appointed counsel “has the relevant experience and ability . . . to fulfill the basic duties appropriate for each type of assigned case.”
ABA Resolution 107 (February 2002; 02M107) – adopted The Ten Principles of a Public Defense Delivery System and accompanying commentary which, among other things, includes the principle that “[t]he appointment process should never be ad hoc, but should be according to a coordinated plan.”

ABA Resolution 112A (February 1996; 96M112A) – adopted the Standards of Practice for Representing a Child in Abuse and Neglect Cases and accompanying commentary, which among other things “reject the concept of ad hoc appointments of counsel that are made without regard to prior training or practice.”

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.

A copy of the resolution would be distributed to the Chief Justice of the United States.

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

None, other than the costs of transmitting the resolution.

9. Disclosure of Interest. (If applicable)

N/A

10. Referrals.

American Bar Association Coalition on Racial & Ethnic Justice
American Bar Association Commission on Disability Rights
American Bar Association Commission on Hispanic Legal Rights & Responsibilities
American Bar Association Commission on Racial & Ethnic Diversity in the Profession
American Bar Association Commission on Sexual Orientation and Gender Identity
American Bar Association Commission on Women
American Bar Association Council for Racial & Ethnic Diversity in the Educational Pipeline
American Bar Association Criminal Justice Section
American Bar Association Judicial Division
American Bar Association Judicial Division Appellate Judges Conference
American Bar Association Judicial Division Lawyers Conference
American Bar Association Judicial Division National Conference of the Admin. Law Judiciary
American Bar Association Judicial Division National Conference of Federal Trial Judges
American Bar Association Judicial Division National Conference of Specialized Court Judges
American Bar Association Judicial Division National Conference of State Trial Judges
American Bar Association Section of Civil Rights and Social Justice
American Bar Association Section of Litigation
American Bar Association Section of State & Local Government Law
American Bar Association Standing Committee on the American Judicial System
American Bar Association Standing Committee on Legal Aid and Indigent Defendants
American Bar Association Tort Trial and Insurance Practice Section
American Bar Association Young Lawyers Division

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

Anthony M. Ciolli  
P.O. Box 590  
St. Thomas, VI 00804  
aciolli@gmail.com  
917-362-1355

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

Anthony M. Ciolli  
P.O. Box 590  
St. Thomas, VI 00804  
aciolli@gmail.com  
917-362-1355
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges the U.S. Supreme Court to appoint counsel from a panel of attorneys, and to recognize the importance of diversity in the appointments process.

2. Summary of the Issue that the Resolution Addresses

The U.S. Supreme Court currently appoints counsel through an ad hoc process that differs from the formalized process utilized by other federal, state, and territorial courts.

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

The proposed policy addresses this issue by urging the U.S. Supreme Court to establish a panel of attorney volunteers from which to appoint counsel, and to further urge the Court to consider diversity in the appointment process.

4. Summary of Minority Views

No minority views were expressed when the Virgin Islands Bar Association considered this issue.
RESOLVED, That the American Bar Association urges Congress to amend Title 28 of the United States Code to authorize the appointment of additional bankruptcy judges sufficient to meet the demands within each district; and for other purposes;

FURTHER RESOLVED, That the American Bar Association urges Congress, as recommended by the Judicial Conference of the United States, to convert certain temporary bankruptcy judges to permanent bankruptcy judges in Florida, Maryland, Nevada, North Carolina, Puerto Rico, Tennessee, and Virginia and to authorize the appointment of additional bankruptcy judges in Delaware, Michigan, and the Middle District of Florida; and

FURTHER RESOLVED, That the American Bar Association urges Congress, in the event that Title 28 is not amended in needed time, to consider, as recommended by the Judicial Conference of the United States, a one-year extension of seven judgeships, which includes two positions in Delaware, two in Florida-Southern, one in Virginia, one in Michigan-Eastern and one in Puerto Rico.
REPORT

Introduction

The purpose of this Resolution is to encourage Congress to pass legislation which would convert certain temporary bankruptcy judgeships to permanent positions and create additional bankruptcy judgeships to meet the demonstrated demands for bankruptcy court services within each district, in order to allow the courts to perform their function and to maintain the administration of justice.

Background

Presently, there are twenty-nine judgeships in the bankruptcy system with a lapse date of May 25, 2017; without congressional action by May 25, 2017, all twenty-nine of these temporary judgeships would be eliminated, unless they are later created by new legislation.\(^1\) A judge sitting in a temporary position can sit in that district to fulfill his or her term after May 25, 2017, and can seek reappointment. However, if any sitting judge in that district retires, dies, resigns, or becomes disabled after that date, the temporary position lapses, reducing the number of judgeships in that district.\(^2\)

These temporary judgeships were originally created in 2005 under the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA).\(^3\) The temporary judgeships were created with the goal of more closely tying the growth of the judiciary with case filings, which tend to be cyclical.\(^4\) The positions are temporary because Congress set a time period, most often five years, when it figured case filings in those districts would no longer justify the need for additional judges.\(^5\) Congress provided that, at the expiration of that time period, the additional judgeships would be lost after the first vacancies thereafter, bringing the districts to their prior judgeship levels.\(^6\) After the lapse of these positions, new legislation would be necessary to create any new judgeship positions, allowing Congress to tie the growth of the judiciary to its need for judges.\(^7\) At the time, Congress thought bankruptcy issues arising as a result of the new law would die down due to the changes it had made in BAPCPA making bankruptcy less attractive to many parties.\(^8\)

Bankruptcy filings are highly correlated to the performance of the economy; therefore, they are also highly volatile, without a clear trend on a year-to-year basis. However, non-business filings have shown a clear trend of increasing. While business bankruptcies rose in 2009 to levels of the early 1990s, the trend is still down. Yet, the trend does not counter the overall increasing trend due to the fact that consumer filings have consistently represented ninety percent of the docket.

\(^1\) Bankruptcy Judgeship Act Would Add, Extend Badly Needed Judgeships, ABI JOURNAL, June 2016, at 8, 71.
\(^2\) Id.
\(^4\) Bankruptcy Judgeship Act Would Add, Extend Badly Needed Judgeships, Supra note 1, at 8.
\(^5\) Id.
\(^6\) Id.
\(^7\) Id.
\(^8\) Diane Davis, Supra Note 3.
In line with prior experience, any persistent downturn or stagnation of the economy will result in a dramatic increase in filings. The caseloads will keep these courts permanently busy.

Thus, unless the sunset date of May 2017 is extended, or the judgeships are made permanent, any retirement or departure of a temporary judgeship will not be filled and many districts will lose judgeships. The loss of judgeships has a huge impact on the remaining judges’ workloads.

Pending Legislation

Recognizing this problem, the bills before Congress [H.R. 4225; S. 2448] create six new judgeships and convert sixteen temporary judgeships to permanent. The Judicial Conference of the United States, the policy-making arm of the federal court system, has also recommended converting these sixteen temporary bankruptcy judgeships to permanent judgeships in nine districts that, for a variety of reasons, continue to have high caseloads. Specifically, the pending bills and Judicial Conference recommend converting temporary bankruptcy judgeships in the following: Puerto Rico (First Circuit); Delaware (Third Circuit); Maryland, North Carolina-Eastern District, and Virginia-Eastern District (Fourth Circuit); Michigan-Eastern District and Tennessee-Western District (Sixth Circuit); Nevada (Ninth Circuit); and Florida-Southern District (Eleventh Circuit). In addition, the bills call for additional bankruptcy judges in Delaware, the Eastern District of Michigan, and in the Middle District of Florida.

The Judicial Conference has explained that the nine districts in need of relief have a fifty-five percent increase in weighted bankruptcy filings from December 31, 2006, which was the last time new bankruptcy judges were authorized, through September 30, 2014. In making this decision, the Judicial Conference measured the weighted caseloads of all bankruptcy districts. This analysis justified the need for new judgeships in certain districts. Delaware, for example, where a disproportionate number of large business cases are filed, has one of the highest weighted caseloads for bankruptcy judges in the country, and filings are on the rise. The U.S. Bankruptcy Court for the District of Delaware has six judges, five of which are temporary judgeships. Thus, after May 25, 2017, if one of the five temporary judges departs for any reason or retires, the position would not be filled, and eventually, Delaware would be left with one judge to handle all cases. This would make it impossible for that judicial district to continue to serve the business community.

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9 Id.
10 Id.
11 Bankruptcy Judgeship Act Would Add, Extend Badly Needed Judgeships, Supra note 1, at 8.
12 Diane Davis, Supra Note 3.
13 Id.; see also H.R. 4225, 114th Congress (2015-2016); S.2448, 114th Congress (2015-2016)
14 See H.R. 4225; S.2448, Supra Note 13.
15 Diane Davis, Supra Note 3.
16 Bankruptcy Judgeship Act Would Add, Extend Badly Needed Judgeships, Supra note 1, at 8.
17 Diane Davis, Supra Note 3.
18 Id.
19 Id.
Potential Negative Impact

Nevertheless, Congress remains reluctant to create these new judgeships with the current budget.\(^{20}\) While current case filings in most districts are lower than recent years and allow for many bankruptcy courts to perform their critical functions with the present judge allocations, case filings are expected to increase.\(^{21}\) Once this happens, “the courts’ ability to timely and efficiently conduct hearings would be at risk. The threat to case administration becomes even more serious if the temporary judgeships are not made permanent and those districts are exposed to the loss of those positions upon retirement, death, resignation or disability of any sitting judge.”\(^{22}\)

Since the temporary judgeship positions were created, there have been lapses or losses of judgeships in five districts, including South Carolina, Colorado, New Hampshire, New York-Southern and Alabama-Northern.\(^{23}\) The South Carolina position was restored by legislation, but the loss of the four judgeships, along with a position in Mississippi-Southern that lapsed and will create a loss at the next vacancy, coupled with the twenty-nine temporary judgeships set to lapse after May 25, 2017, “expose the bankruptcy system to a potential loss of [thirty-three] positions, which is roughly ten percent of the present judicial workforce.”\(^{24}\) The last time the temporary judgeship positions were extended, Congress required new funding to balance the budget scoring, with the mindset that the loss of positions would reduce costs, so their continuation should be funded again.\(^{25}\) At that time, funding came from a national increase in the Chapter 11 filing fee, which remains in effect today.\(^{26}\)

Chapter 11 bankruptcy exists to protect the assets of financially distressed firms from seizure by creditors while the firm considers how to restructure in a way that allows for their value to exceed liquidation value.\(^{27}\) Bankruptcy proceedings filter distressed firms that are still economically viable from those whose assets should be redeployed, causing an important impact on the allocation of capital in our economy.\(^{28}\) Efficient allocation of resources through restructuring also preserves and creates jobs. “Because bankruptcy proceedings can affect allocation of capital by changing the outcome of a case, the efficiency of the court itself significantly impacts the costs of financial distress and the ultimate outcome of the bankruptcy.”\(^{29}\) A judge whose caseload is overflowing, or who has time constraints, may find it harder to closely consider all the information for each case, increasing the risk of error.\(^{30}\) An overburdened judge may not be able to meet the tight deadlines often presented by cases. Studies demonstrate that as judges become busier, they become pro-debtor; firms whose cases

\(^{20}\) Id.
\(^{21}\) Id.
\(^{22}\) Id.
\(^{23}\) Bankruptcy Judgeship Act Would Add, Extend Badly Needed Judgeships, Supra note 1, at 71.
\(^{24}\) Id.
\(^{25}\) Id.
\(^{26}\) Id.
\(^{28}\) Id.
\(^{29}\) Id.
\(^{30}\) Benjamin Iverson, Supra note 11 at 2.
are dismissed from busy courts have a higher chance of refiling for bankruptcy again.\textsuperscript{31} Additionally, given that bankruptcy filings rise nationwide by about 32\% during economic recessions, crowded courts impose additional costs on distressed firms, including increased time spent in bankruptcy.\textsuperscript{32}

If Congress fails to pass a conversion bill before May 25, 2017, there will, in time, be a major impact on bankruptcy practitioners practicing in the related districts; this will occur as those judges retire, resign or die in office.\textsuperscript{33} At that time, practitioners and the public will likely experience a slowdown of case processing.\textsuperscript{34} Emergency hearings may become difficult to schedule, with an overall slowdown of the system, and compliance with statutory deadlines, such as relief from stay motions, could be threatened.\textsuperscript{35} Moreover, the efficient resolution of issues, necessary for reorganizations and fresh start and claims distribution, would be at risk without a complete judiciary.\textsuperscript{36} All of these factors would be further exacerbated by the expected increase in case filings.\textsuperscript{37}

### A Temporary Solution

Because the related bills are stuck in respective House and Senate Judiciary Committees, and the potential to lose critical temporary judgeships looms, the Judicial Conference has requested consideration of a one-year extension of seven judgeships in the Fiscal Year 2017 appropriations bill.\textsuperscript{38} On March 25, 2016, the Judicial Conference submitted a request to the House and Senate Appropriations Committees identifying districts that combine high caseloads with even higher likelihood of judicial vacancies soon after the lapse date.\textsuperscript{39} This group includes two positions in Delaware, two in Florida-Southern, one in Virginia, one in Michigan-Eastern and one in Puerto Rico.\textsuperscript{40} If this extension is passed, Congress would have a little more time to consider retaining those judicial positions.\textsuperscript{41} While this step is positive, and supported by groups such as the National Conference of Bankruptcy Judges, it is important to remember the remaining nine judgeships identified as necessary in the pending bills.\textsuperscript{42}

Respectfully submitted,

Hon. Frank J. Bailey, Chair
National Conference of Federal Trial Judges
February 2017

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\textsuperscript{31} Benjamin Iverson, Supra note 11 at 2-3.
\textsuperscript{32} Id.
\textsuperscript{33} Bankruptcy Judgeship Act Would Add, Extend Badly Needed Judgeships, Supra note 1, at 71.
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Id.
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GENERAL INFORMATION FORM

Submitting Entity: National Conference of Federal Trial Judges

Submitted By: Hon. Frank J. Bailey, Chair, National Conference of Federal Trial Judges

1. Summary of Resolution(s).

This Resolution urges Congress to amend Title 28 of the United States Code to authorize the appointment of additional bankruptcy judges sufficient to meet the demands within each district; and for other purposes. Moreover, in the event that Title 28 is not amended in needed time, this Resolution urges Congress to consider, as recommended by the Judicial Conference of the United States, a one-year extension of seven judgeships, which includes two positions in Delaware, two in Florida-Southern, one in Virginia, one in Michigan-Eastern and one in Puerto Rico.

2. Approval by Submitting Entity.

The National Conference of Federal Trial Judges voted unanimously to sponsor and submit this Resolution and Report for consideration of the ABA House of Delegates during its business meeting at the 2016 ABA Annual Meeting on Friday, August 5, 2016. After providing input, the Judicial Division voted to cosponsor at its JD Council meeting on September 21, 2016. The Business Law Section also provided input and voted to cosponsor at its Council meeting on September 8, 2016. Other Judicial Division conferences provided input and voted to cosponsor at various times thereafter, including the National Conference of State Trial Judges, the National Conference of Specialized Court Judges, the National Conference of the Administrative Law Judiciary and the Appellate Judges Conference.

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?

At the 2013 ABA Annual Meeting, the ABA House of Delegates adopted “Recommendation 115,” calling for, among other items, the enactment of comprehensive legislation to authorize needed permanent and temporary federal judgeships, with particular focus on the federal districts with identified judicial emergencies so that affected courts may adjudicate all cases in a fair, just and timely manner. While this policy targeted the Article III judiciary, and Bankruptcy judges are Article I adjuncts, it also supports the concept that district courts need a full complement of bankruptcy judges to perform all the functions assigned to them. This Resolution would complement that existing policy. This Resolution is also fully in sync with Goal IV of the ABA, to advance the Rule of Law by increasing public understanding of and respect for the rule of law, the legal process, and the role of the legal profession at home and throughout the world; holding government accountable under law; working for just laws, including human rights, and a fair
legal process; assuring meaningful access to justice for all persons; and preserving the independence of the legal profession and the judiciary.

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

N/A


H.R.4225, known as the Bankruptcy Judgeship Act of 2015, was introduced in House on 12/10/2015. On 12/10/2015, it was referred to the House Committee on the Judiciary, and on 01/15/2016, it was referred to the Subcommittee on Regulatory Reform, Commercial and Antitrust Law. There was no further action taken during the 114th Congress and it is unclear what will happen in the next session.

The related Senate bill, S.2448, known as the Bankruptcy Judgeship Act of 2016, was introduced in the Senate on 01/19/2016. It was then read twice and referred to the Committee on the Judiciary. There was no further action taken during the 114th Congress and it is unclear what will happen in the next session.

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

The Judicial Division will work with its members, lawyers and judges, along with related ABA entities and outside entities such as the National Conference of Bankruptcy Judges, to bring this policy and the importance of amending Title 28 of the United States Code to authorize the appointment of additional bankruptcy judges sufficient to meet the demands within each district, to the attention of Congress. With support of the full ABA, the Judicial Division intends to make this issue a focus of its “Lawyers Conference Day on the Hill” program, at which time members of the Lawyers Conference will lobby members of Conference on issues of significant importance to the federal judiciary.

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

None.

9. Disclosure of Interest. (If applicable)

N/A

10. Referrals.

Judicial Division
National Conference of State Trial Judges
National Conference of the Administrative Law Judiciary
National Conference of Specialized Court Judges  
Lawyers Conference  
Appellate Judges Conference  
Section of Antitrust Law  
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  
Solo, Small Firm and General Practice Division  
Tort Trial & Insurance Practice Section  
Young Lawyers Division  
Law Student Division  
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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felice.schur@americanbar.org
12. **Contact Name and Address Information.** (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

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Boston, Massachusetts  
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T: 617.748.6650  
Frank.Bailey@mab.uscourts.gov
EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution urges Congress to amend Title 28 of the United States Code to authorize the appointment of additional bankruptcy judges sufficient to meet the demands within each district; and for other purposes. Moreover, in the event that Title 28 is not amended in needed time, this Resolution urges Congress to consider, as recommended by the Judicial Conference of the United States, a one-year extension of seven judgeships, which includes two positions in Delaware, two in Florida-Southern, one in Virginia, one in Michigan-Eastern and one in Puerto Rico.

2. Summary of the Issue that the Resolution Addresses

The purpose of this Resolution is to encourage Congress to pass legislation which would convert certain temporary bankruptcy judgeships to permanent positions, and create additional bankruptcy judgeships where needed, in order to allow the courts to perform their function and to maintain the administration of justice.

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

The proposed policy position addresses the issue by calling on Congress to take action on pending legislation which resolves the issue at stake. The official approval of the ABA is a powerful voice of support for this issue.

4. Summary of Minority Views

There are no minority views known at this time.
RESOLVED, That the American Bar Association urges all state courts to consider the
Recommendations of Call to Action: Achieving Civil Justice for All as appropriate guidance in
their endeavors to achieve demonstrable civil justice improvements with respect to the
expenditure of time and costs to resolve civil cases; and

FURTHER RESOLVED, That the American Bar Association urges all state courts to develop
and implement a civil justice improvements plan to improve the delivery of civil justice guided
by the Recommendations of Call to Action: Achieving Civil Justice for All as endorsed by the
Conference of Chief Justices in 2016; and

FURTHER RESOLVED, That the American Bar Association urges bar associations to promote
the Recommendations of Call to Action: Achieving Civil Justice for All and to collaborate with
judges and lawyers to improve the delivery of civil justice.
I. Introduction

Everyone deserves access to a legal process that promptly resolves disputes, but high costs, delays, and complexity plague the American civil justice system. In 2013, the Conference of Chief Justices (“CCJ”) created a Civil Justice Improvements (“CJI”) Committee to examine the civil justice system holistically, consider the impact and outside assessments of recent pilot projects, and develop a comprehensive set of recommendations for civil justice reform to meet the needs of the 21st century. In 2016, the CJI Committee issued its report, *Call to Action: Achieving Civil Justice for All*,1 setting forth 13 recommendations, which were endorsed by the CCJ and the Conference of State Court Administrators (“COSCA”).2

The Standing Committee on the American Judicial System is the entity within the ABA that shall “make recommendations to improve and enhance the American judicial system” and assist courts to prepare for and respond to “threats to the fair, impartial and efficient administration of justice.” Its Subcommittee on State Courts is specifically directed to maintain liaison with organizations concerned with judicial reform related to state courts, including the Conference of Chief Justices and the National Center for State Courts (“NCSC”). In fulfillment of those duties, SCAJS drafted this Resolution with the cooperation of the CCJ, NCSC, and IAALS, the Institute for the Advancement of the American Legal System.

This Resolution urges all state courts to consider the Recommendations of *Call to Action: Achieving Civil Justice for All* as appropriate guidance in their endeavors to achieve demonstrable civil justice improvements with respect to the expenditure of time and costs to resolve civil cases. It further urges all state courts to develop and implement a civil justice improvements plan to improve the delivery of civil justice.3 The Resolution also urges bar associations to promote the Recommendations of *Call to Action: Achieving Civil Justice for All* and to collaborate with judges and lawyers to improve the delivery of civil justice. While many of the Recommendations to reduce delay and improve access to justice can be implemented within existing budgets and under current rules of procedure, others will require steadfast, strong leadership to achieve these goals. To the extent that implementation of some of the Recommendations may require additional funding, existing ABA policy urges state, territorial, and local legislative bodies and governmental agencies to adopt laws and policies that ensure full and adequate court funding.4

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1 The majority of this Report is taken from *Call to Action: Achieving Civil Justice for All*, © 2016, National Center for State Courts.
2 See CCJ/COSCA Resolution 8 In Support of the Call to Action and Recommendations of the Civil Justice Improvements Committee to Improve Civil Justice in State Courts, adopted July 27, 2016.
3 CCJ/COSCA Resolution 8 encourages CCJ and COSCA members to consider *Call to Action: Achieving Civil Justice for All* “as a worthy guide for their own state endeavors to improve the delivery of civil justice for all” and encourages “each state to develop and implement a civil justice improvements plan to improve the delivery of civil justice.”
4 2013 AM 10C (adopting *Principles for Judicial Administration*); see also 2011 AM 302; 2004 AM 107.
II. Background, Fundamental Principles of the CJI Committee, and Research

State courts and the lawyers that practice in them are well aware of the cost, delay, and unpredictability of civil litigation. The dramatic rise in self-represented litigants and strained court budgets from two severe recessions have further hampered the ability of courts to promptly and efficiently resolve cases. In response, many litigants have begun to seek solutions outside of the courts and, in some instances, to forgo legal remedies entirely. As a result, public trust and confidence in the courts have decreased. While these concerns have been raised for more than a century and continue to worsen in many respects, court leaders in some states have begun to take concrete steps toward change. They are updating court rules and procedures, using technology to empower litigants and court staff, and rethinking longstanding customs about the process for resolving civil cases. A dozen states have implemented civil justice reforms over the past five years, either on a “pilot” or statewide basis. These reforms are encouraging, but limited in scope.

Given the profound challenges facing the civil justice system and the many recent reform efforts, the CCJ decided the time was right to take the lead in restoring function and faith in a system that is too important to lose. With the assistance of NCSC and IAALS, the CCJ named a diverse 23-member CJI Committee to research and prepare the recommendations. The members included trial and appellate court judges, trial and state court administrators, experienced lawyers representing the plaintiff and defense bars and legal aid, representatives of corporate legal departments, and legal academics. The CJI Committee was charged with “developing guidelines and best practices for civil litigation based upon evidence derived from state pilot projects and from other applicable research, and informed by implemented rule changes and stakeholder input; and making recommendations as necessary in the area of caseflow management for the purpose of improving the civil justice system in state courts.”

Throughout the process of developing the recommendations, the CJI Committee followed a set of eight fundamental principles aimed at achieving demonstrable civil justice improvements that are consistent with each state’s existing substantive law.

FUNDAMENTAL FRAMEWORK/PRINCIPLES FOR RECOMMENDATIONS:

1. Recommendations should aim to achieve demonstrable improvements with respect to the expenditure of time and costs to resolve civil cases.
2. Outcomes from recommendations should be consistent with existing substantive law.
3. Recommendations should protect, support, and preserve litigants’ constitutional right to a civil jury trial and honor procedural due process.
4. Recommendations should be capable of implementation within a broad range of local legal cultures and practices.
5. Recommendations should be supported by data, experiences of Committee members, and/or “extreme common sense.”

5 Arizona, Colorado, Minnesota, New Hampshire, and Utah have changed their civil rules and procedures to require mandatory disclosure of relevant documents, to curb excessive discovery, and to streamline the process for resolving discovery disputes and other routine motions.
6. Recommendations should not systematically favor plaintiffs or defendants, types of litigants, or represented or unrepresented litigants.
7. Recommendations should promote effective and economic utilization of resources while maintaining basic fairness.
8. Recommendations should enhance public confidence in the courts and the perception of justice.

The CJI Committee worked for more than 18 months to examine and incorporate insights from courts around the country. Committee members reviewed existing research on the state of the civil justice system in American courts and extensive additional fieldwork by NCSC on the current civil docket; recent reform efforts, including evaluations of a number of state pilot projects; and technology, process, and organizational innovations.

To inform the deliberations of the CJI Committee, NCSC undertook a multijurisdictional study of civil caseloads in state courts. The Landscape of Civil Litigation in State Courts focused on non-domestic civil cases disposed between July 1, 2012 and June 30, 2013 in state courts exercising civil jurisdiction in 10 urban counties. The dataset, encompassing nearly one million cases, reflects approximately 5% of civil cases nationally.

The Landscape findings presented a very different picture of civil litigation than most lawyers and judges envisioned based on their own experiences and on common criticisms of the American civil justice system. Although high-value tort and commercial contract disputes are the predominant focus of most debates, collectively they comprised only a small proportion of the Landscape caseload. Nearly two-thirds (64%) of the caseload was contract cases. The vast majority of those were debt collection, landlord/tenant, and mortgage foreclosure cases (39%, 27%, and 17%, respectively). An additional 16% of civil caseloads were small claims cases involving disputes valued at $12,000 or less, and 9% were characterized as “other civil” cases involving agency appeals and domestic or criminal-related cases. Only 7% were tort cases, and 1% were real property cases.

The composition of contemporary civil caseloads stands in marked contrast to caseloads of two decades ago. Secondary analysis was undertaken comparing the Landscape data with civil cases disposed in 1992 in 45 urban general jurisdiction courts. In the 1992 Civil Justice Survey of State Courts, the ratio of tort to contract cases was approximately 1:1. In the Landscape dataset, this ratio had increased to 1:7. While population-adjusted contract filings fluctuate somewhat due to economic conditions, they have generally remained fairly flat over the past 30 years. Tort cases, in contrast, have largely evaporated.

To the extent that damage awards recorded in final judgments are a reliable measure of the monetary value of civil cases, the cases in the Landscape dataset involved relatively modest sums. In contrast to widespread perceptions that much civil litigation involves high-value commercial and tort cases, only 0.2% had judgments that exceeded $500,000 and only 165 cases (less than 0.1%) had judgments that exceeded $1 million. Instead, 90% of all judgments entered were less than $25,000; 75% were less than $5,200.
Only 4% of cases were disposed by bench or jury trial, summary judgment, or binding arbitration. The overwhelming majority (97%) of these were bench trials, almost half of which (46%) took place in small claims or other civil cases. Three-quarters of judgments entered in contract cases following a bench trial were less than $1,800.

Most cases were disposed without trial. A judgment without a trial was entered in nearly half (46%) of the *Landscape* cases, most of which were likely default judgments. One-third of cases were dismissed (possibly following a settlement, although only 10% were explicitly coded by the courts as settlements). Summary judgment is a much less favored disposition in state courts compared to federal courts. Only 1% were disposed by summary judgment. Most of these would have been default judgments in debt collection cases, but the plaintiff instead chose to pursue summary judgment, presumably to minimize the risk of post-disposition challenges.

The traditional view of the adversarial system assumes the presence of competent attorneys zealously representing both parties. One of the most striking findings in the *Landscape* dataset, therefore, was the relatively large proportion of cases (76%) in which at least one party was unrepresented, usually the defendant. Tort cases were the only case type in which attorneys represented both parties in a majority (64%) of cases. Surprisingly, small claims dockets in the *Landscape* courts had an unexpectedly high proportion (76%) of plaintiffs who were represented by attorneys. This suggests that small claims courts, which were originally developed as a forum for self-represented litigants to access courts through simplified procedures, have become the forum of choice for attorney-represented plaintiffs in debt collection cases.

The Recommendations arise from the realities made clear by the *Landscape* data as well as the experiences of pilot projects and rule changes around the country. They are founded on the premise that current civil justice processes are largely not working for litigants. A core contributing factor is that lawyers often control the pace of litigation, which has led to unnecessary delays in case resolution. Thus, the first recommendation advocates that courts take definitive responsibility for managing civil cases from filing to disposition. This includes effective enforcement of rules and orders designed to promote the just, prompt, and inexpensive resolution of civil cases. That recommendation is the lynchpin for all that follow.

The concept of effective civil caseflow management is not new. Recognizing that few judges have the luxury of a caseload small enough to permit individual judicial attention in every case, the Recommendations promote the expansion of responsibility for managing civil cases from the judge as an individual to the court as a collective institution. The term “court” encompasses the entire complement of courthouse personnel—judges, staff, and infrastructure resources including information technology. This in turn will free the judge to focus on tasks that require the unique expertise of a judicial officer, such as issuing decisions on dispositive motions and conducting evidentiary hearings, including bench and jury trials.

The Recommendations also recognize that uniform rules that apply to all civil cases are not optimally designed for most civil cases. They provide too much process for the vast majority of cases, including uncontested cases. And they provide too little management for complex cases that comprise a small proportion of civil caseloads, but which inevitably require a disproportionate amount of attention from the court. Instead, cases should be “right-sized” and
triaged into appropriate pathways at filing. However, those pathways should be flexible enough to permit reassignment if the needs of the case change over time.

The pathway approach described in the Recommendations improves existing court structures and differentiated case management (“DCM”) systems. Many court systems are currently characterized by a tiered structure of general and limited jurisdiction courts that limit where civil cases can be filed based on case type or amount-in-controversy or both. DCM is a rule-based system that, at varying times after filing, assigns civil cases to case-processing tracks, usually based on case type or amount-in-controversy. Each DCM track features its own case-processing rules concerning presumptive deadlines for case events.

Tiered court systems and DCM offer little flexibility once the initial decision has been made concerning the court in which to file or the assigned DCM track. A case filed in the general jurisdiction court cannot gain access to procedures or programs offered to cases in the limited jurisdiction court and vice versa. A case assigned to one DCM track usually cannot be reassigned later to another track. The rules and procedures for each court or DCM track typically apply to all cases within that court or track, even if a case would benefit from management under rules or procedures from another court or track. Furthermore, experience has found that case type and amount-in-controversy—the two factors most often used to define the jurisdiction of courts in tiered systems or DCM procedures—do not reliably forecast the amount of judicial management that each case demands.

For these reasons it is imperative that courts develop rules and procedures for promptly assigning all cases to pathways designed to give each case the amount of attention that properly fits the case’s needs. As importantly, courts must implement business practices that ensure that rules and procedures are enforced. Rules and procedures for each pathway should move each case toward resolution in an expeditious manner. For example, empirical research shows that fact-pleading standards and robust mandatory disclosures induce litigants to identify key issues in dispute more promptly and help inform litigants about the merits of their respective claims and defenses. Other rules and procedures that have been shown to be effective are presumptive restrictions on the scope of necessary discovery and strictly enforced deadlines. These promote completion of key stages of litigation up to and including trials.

It is axiomatic that court rules, procedures, and business practices are critical for maintaining forward momentum in cases where all litigants are fully engaged in the adversarial process to resolve their disputed issues. These rubrics are even more critical in the substantial proportion of civil caseloads comprised of uncontested cases and cases involving large asymmetries in legal expertise. While most of these cases resolve relatively quickly, the Landscape study makes clear that significant numbers of cases languish on civil calendars for long periods of time for no apparent reason. Research shows that poor management of high-volume dockets can especially affect unrepresented parties.

Guided by the fundamental principles, existing research and that undertaken by NCSC, recent reform efforts, and lessons learned from their own experience as lawyers, judges, and administrators, the CJI Committee made 13 recommendations that provide courts with a roadmap to make justice for all a reality.
III. The Recommendations of *Call to Action: Achieving Civil Justice for All*

Courts must improve how they serve citizens in terms of efficiency, cost, and convenience and make the court system a more attractive option to achieve justice in civil cases. The 13 recommendations of the CJI Committee provide appropriate guidance for those states desiring to implement reforms to achieve demonstrable civil justice improvements with respect to the expenditure of time and costs to resolve civil cases.

The Recommendations of *Call to Action: Achieving Civil Justice for All* include:

- **Recommendation 1:** Courts must take responsibility for managing civil cases from time of filing to disposition.
- **Recommendation 2:** Beginning at the time each civil case is filed, courts must match resources with the needs of the case.
- **Recommendation 3:** Courts should use a mandatory pathway-assignment system to achieve right-sized case management.
- **Recommendation 4:** Courts should implement a Streamlined Pathway for cases that present uncomplicated facts and legal issues and require minimal judicial intervention but close court supervision.
- **Recommendation 5:** Courts should implement a Complex Pathway for cases that present multiple legal and factual issues, involve many parties, or otherwise are likely to require close court supervision.
- **Recommendation 6:** Courts should implement a General Pathway for cases whose characteristics do not justify assignment to either the Streamlined or Complex Pathway.
- **Recommendation 7:** Courts should develop civil case management teams consisting of a responsible judge supported by appropriately trained staff.
- **Recommendation 8:** For right-size case management to become the norm, not the exception, courts must provide judges and court staff with training that specifically supports and empowers right-sized case management. Courts should partner with bar leaders to create programs that educate lawyers about the requirements of newly instituted case management practices.
- **Recommendation 9:** Courts should establish judicial assignment criteria that are objective, transparent, and mindful of a judge’s experience in effective case management.
- **Recommendation 10:** Courts must take full advantage of technology to implement right-size case management and achieve useful litigant-court interaction.
- **Recommendation 11:** Courts must devote special attention to high-volume civil dockets that are typically composed of cases involving consumer debt, landlord-tenant, and other contract claims.
- **Recommendation 12:** Courts must manage uncontested cases to assure steady, timely progress toward resolution.
- **Recommendation 13:** Courts must take all necessary steps to increase convenience to litigants by simplifying the court-litigant interface and creating on-demand court assistance services.
These Recommendations will not be easy to implement. Doing so will require that state courts and judges take significant institutional and personal responsibility. It will require buy-in from the lawyers who practice in those courts. Everyone involved in the civil justice system will have to be open to new rules and procedures and changes that may not always be comfortable at first. Call to Action: Achieving Civil Justice for All provides useful commentary to assist courts as they work through the implementation of the Recommendations. Developing a civil justice improvements plan can serve as a useful tool to guide implementation. Other resources to assist with implementation include a roadmap, demonstration projects, and technical assistance by NCSC. However, successful implementation will only be possible through the commitment and hard work of state court judges, administrators, and staff and with the cooperation of the lawyers who practice in state courts.

IV. Bar Associations Must Educate Lawyers and Judges

A key to implementing these Recommendations is to persuade civil justice actors that there is a problem and that lawyers and judges have a shared responsibility to create solutions. When judges and lawyers honestly confront the facts about the civil justice system, they can work cooperatively to find ways to make civil litigation affordable, efficient, and fair for all.

The only way for implementation of these Recommendations to be successful is if lawyers, and not just judges, acknowledge there is a problem and are willing to participate in new methods of case management with open minds. Lawyers will need to learn new rules and procedures and implement processes in their own practices to ensure compliance. Lawyers will need to adequately evaluate cases and obtain relevant documents from their clients in a timely manner in order to comply with mandatory disclosures and be prepared for case management conferences. Lawyers will also have to be willing and able to explain to clients why changes are being implemented and how those changes will ultimately benefit the clients.

Bar associations should partner with judges and court administrators to create CLE programs and bench/bar conferences that help lawyers understand why changes are being undertaken and what will be expected of lawyers. Bar associations and other lawyer groups can also educate key constituencies about the state’s civil justice needs, and the demonstrated effectiveness of these Recommendations. Advocates for any Recommendations can use the findings, proposals, and evidence-based resources in Call to Action: Achieving Civil Justice for All to build trust among legislators, executive branch leaders, and the general public.

Bar associations should also provide training for judges in cooperation with offices of judicial education or other entities devoted to judicial education. As reforms are implemented, judges will not only need to learn the new rules and procedures, but will also benefit from training that enhances their ability to implement the changes, including how to fully utilize technology improvements, strategies for guiding their staff through transitional periods, and skills for how to effectively respond if and when they encounter resistance from lawyers. Judges will also benefit from programs that help them understand why changes are being undertaken, what the expectations are, and how the reforms will help ensure that the courts are once again the place where all people feel they can go to have their disputes fairly and promptly resolved.
V. Conclusion

The ABA should adopt this Resolution, because change is imperative in order for the American civil justice system to deliver justice in a fair, efficient, timely manner for all people, and the Recommendations of *Call to Action: Achieving Civil Justice for All* provide appropriate guidance to improve the civil justice system.

Respectfully submitted,
Wm. T. (Bill) Robinson III
Chair, Standing Committee on the American Judicial System
February 2017
RECOMMENDATION 1
Courts must take responsibility for managing civil cases from time of filing to disposition.

1.1 Throughout the life of each case, courts must effectively communicate to litigants all requirements for reaching just and prompt case resolution. These requirements, whether mandated by rule or administrative order, should at a minimum include a firm date for commencing trial and mandatory disclosures of essential information.

1.2 Courts must enforce rules and administrative orders that are designed to promote the just, prompt, and inexpensive resolution of civil cases.

1.3 To effectively achieve case management responsibility, courts should undertake a thorough statewide civil docket inventory.

COMMENTARY
Our civil justice system has historically expected litigants to drive the pace of civil litigation by requesting court involvement as issues arise. This often results in delay as litigants wait in line for attention from a passive court—be it for rulings on motions, a requested hearing, or even setting a trial date. The wait-for-a-problem paradigm effectively shields courts from responsibility for the pace of litigation. It also presents a special challenge for self-represented litigants who are trying to understand and navigate the system. The party-take-the-lead culture can encourage delay strategies by attorneys, whose own interests and the interests of their clients may favor delay rather than efficiency. In short, adversarial strategizing can undermine the achievement of fair, economical, and timely outcomes.

It is time to shift this paradigm. The Landscape of Civil Litigation makes clear that relying on parties to self-manage litigation is often inadequate. At the core of the Committee’s Recommendations is the premise that the courts ultimately must be responsible for ensuring access to civil justice. Once a case is filed in court, it becomes the court’s responsibility to manage the case toward a just and timely resolution. When we say “courts” must take responsibility, we mean judges, court managers, and indeed the whole judicial branch, because the factors producing unnecessary costs and delays have become deeply imbedded in our legal system. Primary case responsibility means active and continuing court oversight that is proportionate to case needs. This right-sized case management involves having the most appropriate court official perform the task at hand and supporting that person with the necessary technology and training to manage the case toward resolution. At every point in the life of a case, the right person in the court should have responsibility for the case.

RE: 1.1
The court, including its personnel and IT systems, must work in conjunction with individual judges to manage each case toward resolution. Progress in resolving each case is generally tied both to court events and to judicial decisions. Effective caseflow management involves establishing presumptive deadlines for key case stages, including a firm trial date. In overseeing civil cases, relevant court personnel should be accessible, responsive to case needs, and engaged with the parties—emphasizing efficiency and timely resolution.

**RE: 1.2**
During numerous meetings, Committee members voiced strong concern (and every participating trial lawyer expressed frustration) that, despite the existence of well-conceived rules of civil procedure in every jurisdiction, judges too often do not enforce the rules. These perceptions are supported by empirical studies showing that attorneys want judges to hold practitioners accountable to the expectations of the rules. For example, the chart below summarizes results of a 2009 survey of the Arizona trial bar about court enforcement of mandatory disclosure rules.

Surely, whenever it is customary to ignore compliance with rules “designed to secure the just, speedy, and inexpensive determination of every action and proceeding,” cost and delay in civil litigation will continue.

**RE: 1.3**
Courts cannot meaningfully address an issue without first knowing its contours. Analyzing the existing civil caseload provides these contours and gives court leaders a basis for informed decisions about what needs to be done to ensure civil docket progression.

**RECOMMENDATION 2**
Beginning at the time each civil case is filed, courts must match resources with the needs of the case.

**COMMENTARY**
Virtually all states have followed the federal model and adopted a single set of rules, usually similar and often identical to the federal rules, to govern procedure in civil cases. Unfortunately, this pervasive one-size-fits-all approach too often fails to recognize and respond effectively to individual case needs.

The one-size-fits-all mentality exhibits itself at multiple levels. Even where innovative rules are implemented with the best of intentions, judges often continue to apply the same set of rules and mindset to the cases before them. When the same approach is used in every case, judicial and staff resources are misdirected toward cases that do not need that kind of attention. Conversely, cases requiring more assistance may not get the attention they require because they are lumped in with the rest of the cases and receive the same level of treatment. Hence, the civil justice system repeatedly imposes unnecessary, time-consuming steps, making it inaccessible for many litigants.

Courts need to move beyond monolithic methods and recognize the importance of adapting court process to case needs. The Committee calls for a “right sizing” of court resources. Right sizing aligns rules, procedures, and court personnel with the needs and characteristics of similarly
situated cases. As a result, cases get the amount of process needed—no more, no less. With right sizing, judges tailor their oversight to the specific needs of cases. Administrators align court resources to case requirements—coordinating the roles of judges, staff, and infrastructure.

With the advent of e-filing, civil cover sheets, and electronic case management systems, courts can use technology to begin to right size case management at the time of filing. Technology can also help identify later changes in a case’s characteristics that may justify management adjustments.

This recommendation, together with Recommendation 1, add up to an imperative: Every case must have an appropriate plan beginning at the time of filing, and the entire court system must execute the plan until the case is resolved.

**RECOMMENDATION 3**
Courts should use a mandatory pathway-assignment system to achieve right-sized case management.

3.1 To best align court management practices and resources, courts should utilize a three-pathway approach: Streamlined, Complex, and General.

3.2 To ensure that court practices and resources are aligned for all cases throughout the life of the case, courts must triage cases at the time of filing based on case characteristics and issues.

3.3 Courts should make the pathway assignments mandatory upon filing.

3.4 Courts must include flexibility in the pathway approach so that a case can be transferred to a more appropriate pathway if significant needs arise or circumstances change.

3.5 Alternative dispute resolution mechanisms can be useful on any of the pathways provided that they facilitate the just, prompt, and inexpensive disposition of civil cases.

**COMMENTARY**
The premise behind the pathway approach is that different types of cases need different levels of case management and different rules-driven processes. Data and experience tell us that cases can be grouped by their characteristics and needs. Tailoring the involvement of judges and professional staff to those characteristics and needs will lead to efficiencies in time, scale, and structure. To achieve these efficiencies, it is critical that the pathway approach be implemented at the individual case level and consistently managed on a systemwide basis from the time of filing.

Implementing this right-size approach is similar to, but distinct from, differentiated case management. DCM is a longstanding case management technique that applies different rules and procedures to different cases based on established criteria. In some jurisdictions the track determination is made by the judge at the initial case management conference. Where assignment to a track is more automatic or administratively determined at the time of filing, it is usually based merely on case type or amount-in-controversy. There has been a general assumption that a
majority of cases will fall in a middle track, and it is the exceptional case that needs more or less process.

While the tracks and their definitions may be in the rules, it commonly falls upon the judges to assign cases to an appropriate track. Case automation or staff systems are rarely in place to ensure assignment and right-sized management, or to evaluate use of the tracking system. Thus, while DCM is an important concept upon which these Recommendations build, in practice it has fallen short of its potential. The right-sized case management approach recommended here embodies a more modern approach than DCM by (1) using case characteristics beyond case type and amount-in-controversy, (2) requiring case triaging at time of filing, (3) recognizing that the great majority of civil filings present uncomplicated facts and legal issues, and (4) requiring utilization of court resources at all levels, including non-judicial staff and technology, to manage cases from the time of filing until disposition.

**RE: 3.2**
Right-sized case management emphasizes transparent application of case triaging early and throughout the process with a focus on case characteristics all along the way. Pathway assignment at filing provides the opportunity for improved efficiencies because assignment does not turn on designation by the judge at a case management conference, which may not occur or be needed in every case. Entry point triage can be accomplished by non-judicial personnel, based upon the identified case characteristics and through the use of more advanced technology and training. Triage is done more effectively early in the process, with a focus on case issues and not only on case type or monetary value.

**RE: 3.3**
There has been much experimentation around the country with different processes for case designation upon filing, particularly for cases with simpler issues. Courts and parties invariably underutilize (and sometimes ignore) innovations that are voluntary. Hence, the Committee recommends mandatory application of a triage-to-pathway system. When all civil cases are subject to this right-sized treatment, courts can achieve maximum cost-saving and timesaving benefits.

**RE: 3.4**
While mandatory assignment is critical, the Committee recognizes that right sizing is dynamic. It contemplates that a case may take an off ramp to another pathway as a case unfolds and issues change. This flexibility comes from active participation of the court and litigants in assessing case needs and ensuring those needs are met.

**RE: 3.5**
In some jurisdictions, the availability of alternative dispute resolution (ADR) mechanisms is viewed as an invaluable tool for litigants to resolve civil cases quickly and less expensively than traditional court procedures. In others, it is viewed as an expensive barrier that impedes access to a fair resolution of the case. To the extent that ADR provides litigants with additional options for resolving cases, it can be employed on any of the pathways, but it is imperative that it not be an opportunity for additional cost and delay.
RECOMMENDATION 4
Courts should implement a Streamlined Pathway for cases that present uncomplicated facts and legal issues and require minimal judicial intervention but close court supervision.

4.1 A well-established Streamlined Pathway conserves resources by automatically calendaring core case processes. This approach should include the flexibility to allow court involvement and/or management as necessary.

4.2 At an early point in each case, the court should establish deadlines to complete key case stages including a firm trial date. The recommended time to disposition for the Streamlined Pathway is 6 to 8 months.

4.3 To keep the discovery process proportional to the needs of the case, courts should require mandatory disclosures as an early opportunity to clarify issues, with enumerated and limited discovery thereafter.

4.4 Judges must manage trials in an efficient and time-sensitive manner so that trials are an affordable option for litigants who desire a decision on the merits.

COMMENTARY
Streamlined civil cases are those with a limited number of parties, routine issues related to liability and damages, few anticipated pretrial motions, limited need for discovery, few witnesses, minimal documentary evidence and anticipated trial length of one to two days. Streamlined pathway cases would likely include these case types: automobile tort, intentional tort, premises liability, tort-other, insurance coverage claims arising out of claims listed above, landlord/tenant, buyer plaintiff, seller plaintiff, consumer debt, other contract, and appeals from small claims decisions. For these simpler cases, it is critical that the process not add costs for the parties, particularly when a large percentage of cases end early in the pretrial process. Significantly, the Landscape of Civil Litigation informs us that 85 percent of all civil case filings fit within this category.

RE: 4.1
The Streamlined Pathway approach recognizes resource limits. Resource intensive processes like case management conferences are rarely necessary in simple cases. Instead, the court should establish by rule presumptive deadlines for the completion of key case stages and monitor compliance through a management system powered by technology. At the same time, the process should be flexible and allow court involvement, including judges, as necessary. For example, a case manager or judge can schedule a management conference to address critical issues that might crop up in an initially simple case.

RE: 4.2
Too many simple cases languish on state court dockets, without forward momentum or resolution. At or soon after filing, the court should send the parties notice of the presumptive deadlines for key case stages, including a firm trial date. The parties may always come to the court to fashion a different schedule if there is good cause. This pathway contemplates conventional fact finding by either the court or a jury, with a judgment on the record and the
ability to appeal. Because this process is intended for the vast majority of cases in the state courts, it is important that the process ensure a final judgment and right to appeal to safeguard the rights of litigants and to gain buy-in from attorneys.

RE: 4.3
Mandatory disclosures provide an important opportunity in streamlined cases to focus the parties and discovery early in the case. With robust, meaningful initial disclosures, the parties can then decide what additional discovery, if any, is necessary. The attributes of streamlined cases put them in this pathway for the very reason that the nature of the dispute is not factually complex. Thus, streamlined rules should include presumptive discovery limits, because such limits build in proportionality. Where additional information is needed to make decisions about trial or settlement, the parties can obtain additional discovery with a showing of good cause. Presumptive discovery maximums have worked well in various states, including Utah and Texas, where there are enumerated limits on deposition hours, interrogatories, requests for production, and requests for admission.

RE: 4.4
While the vast majority of cases are resolved without trial, if parties in a Streamlined Pathway case want to go to trial, the court should ensure that option is accessible. Because trial is a costly event in litigation, it is critical that trials be managed in a time-sensitive manner. Once a trial begins in a case, the trial judge should give top priority to trial matters, making presentation of evidence and juror time fit into full and consecutive days of business. A thorough pretrial conference can address outstanding motions and evidentiary issues so that time is not wasted and a verdict can be reached in one or two days.

RECOMMENDATION 5
Courts should implement a Complex Pathway for cases that present multiple legal and factual issues, involve many parties, or otherwise are likely to require close court supervision.

5.1 Courts should assign a single judge to complex cases for the life of the case, so they can be actively managed from filing through resolution.

5.2 The judge should hold an early case management conference, followed by continuing periodic conferences or other informal monitoring.

5.3 At an early point in each case, the judge should establish deadlines for the completion of key case stages, including a firm trial date.

5.4 At the case management conference, the judge should also require the parties to develop a detailed discovery plan that responds to the needs of the case, including mandatory disclosures, staged discovery, plans for the preservation and production of electronically stored information, identification of custodians, and search parameters.

5.5 Courts should establish informal communications with the parties regarding dispositive motions and possible settlement, so as to encourage early identification and narrowing of the issues for more effective briefing, timely court rulings, and party agreement.
5.6 Judges must manage trials in an efficient and time-sensitive manner so that trials are an affordable option for litigants who desire a decision on the merits.

COMMENTARY
The Complex Pathway provides right-sized process for those cases that are complicated in a variety of ways. Such cases may be legally complex or logistically complex, or they may involve complex evidence, numerous witnesses, and/or high interpersonal conflict. Cases in this pathway may include multi-party medical malpractice, class actions, antitrust, multi-party commercial cases, securities, environmental torts, construction defect, product liability, and mass torts. While these cases comprise a very small percentage (generally no more than 3%) of most civil dockets, they tend to utilize the highest percentage of court resources.

Some jurisdictions have developed a variety of specialized courts, such as business courts, commercial courts, and complex litigation courts. They often employ case management techniques recommended for the Complex Pathway in response to longstanding recognition of the problems complex cases can pose for effective civil case processing. While implementation of a mandatory pathway assignment system may not necessarily replace a specialized court with the Complex Pathway, courts should align their case assignment criteria for the specialized court to those for the Complex Pathway. As many business and commercial court judges have discovered, not all cases featuring business-to-business litigants or issues related to commercial transactions require intensive case management. Conversely, some cases that do not meet the assignment criteria for a business or commercial court do involve one or more indicators of complexity and should receive close individual attention.

RE: 5.1
To ensure proportionality for complex cases, a single judge should be assigned for the life of these cases. Judges can do much to prevent undue cost and delay. A one-judge-from-filing-through-resolution policy preserves judicial resources by avoiding the need for a fresh learning curve whenever a complex case returns to court for a judicial ruling. The parties are also better served if a single judge is engaged on a regular basis. During the course of the case, attorneys can build upon prior communications rather than repeat them.

RE: 5.2
Research and experience confirms the importance of having a mandatory case management conference early in the life of complex cases. Case conferences provide an ideal opportunity to narrow the issues, discuss and focus dispositive motions prior to filing, and identify and address discovery issues before they grow into disputes. Periodic communications with the court create the opportunity for settlement momentum and reassessment of pathway designation if complexities are eliminated. For the Colorado Civil Access Pilot Project, the focus on early, active, and ongoing judicial management of complex cases was essential and received more positive feedback than any other part of the project.

RE: 5.3
Cases in which the parties are held accountable for completing necessary pretrial tasks tend to resolve more quickly. The longer a case goes on, the more it costs. Effective oversight and
enforcement of deadlines by a vigilant civil case management team can significantly reduce cost and delay.

RE: 5.4
Once a discovery plan is determined, the court must continue to monitor progress over the course of discovery. Everyone involved in the litigation, and particularly the court, has a continuing responsibility to move the case forward according to established plans and proportionality principles. Litigation expense in complex lawsuits, especially discovery costs, easily can spin out of control absent a shepherding hand and guiding principles. Thus, proportionality must be a guiding standard in discovery and the entire pretrial process to ensure that the case does not result in undue cost and delay.

While proportionality is a theme that runs across all of the pathways, in the complex pathway this concept is more surgical. Given the complexities inherent in these cases, proportionality standards should be applied to rein in time and expense while still recognizing that some legal and evidentiary issues require time to sort out.

Mandatory disclosures can also play a critical role in identifying the issues in the litigation early, so that additional discovery can be tailored and proportional, although it is possible that the disclosures, like some discovery, will need to occur in phases.

RE: 5.5
Courts should utilize informal processes, such as conference calls with counsel, to encourage narrowing of the issues and concise briefing that in turn can promote more efficient and effective rulings by the court.

RE: 5.6
Judges must lead the effort to avoid unnecessary time consumption during trials. A robust pretrial conference should address outstanding motions and evidentiary issues so that the trial itself is conducted as efficiently as possible. The court and the parties should consider agreeing to time limits for trial segments. Once a trial begins, the trial judge should give top priority to trial matters, making presentation of evidence and juror time fit into full and consecutive days of business.

RECOMMENDATION 6
Courts should implement a General Pathway for cases whose characteristics do not justify assignment to either the Streamlined or Complex Pathway.

6.1 At an early point in each case, the court should establish deadlines for the completion of key case stages including a firm trial date. The recommended time to disposition for the General Pathway is 12 to 18 months.

6.2 The judge should hold an early case management conference upon request of the parties. The court and the parties must work together to move these cases forward, with the court having the ultimate responsibility to guard against cost and delay.
6.3 Courts should require mandatory disclosures and tailored additional discovery.

6.4 Courts should utilize expedited approaches to resolving discovery disputes to ensure cases in this pathway do not become more complex than they need to be.

6.5 Courts should establish informal communications with the parties regarding dispositive motions and possible settlement, so as to encourage early identification and narrowing of the issues for more effective briefing, timely court rulings, and party agreement.

6.6 Judges must manage trials in an efficient and time-sensitive manner so that trials are an affordable option for litigants who desire a decision on the merits.

COMMENTARY

Like the other pathways, the goal of the General Pathway is to determine and provide “right-sized” resources for timely disposition. The General Pathway provides the right amount of process for the cases that are not simple, but also are not complex. Thus, General Pathway cases are those cases that are principally identified by what they are not, as they do not fit into either the Streamlined Pathway or the Complex Pathway. Nevertheless, the General Pathway is not another route to “litigation as we know it.” Like the streamlined cases, discovery and motions for these cases can become disproportionate, with efforts to discover more than what is needed to support claims and defenses. The goal for this pathway is to provide right-sized process with increased judicial involvement as needed to ensure that cases progress toward efficient resolution.

As with the other case pathways, at an early point in each case courts should set a firm trial date. Proportional discovery, initial disclosures, and tailored additional discovery are also essential for keeping General Pathway cases on track.

RE: 6.1 to 6.3

The cases in the General Pathway may need more active management than streamlined cases. A judge may need to be involved from the beginning to understand unusual issues in the case, discuss the anticipated pretrial path, set initial parameters for discovery, and be available to resolve disputes as they arise. The court and the parties can then work together to move these cases forward, with the court having the ultimate responsibility to guard against cost and delay.

A court’s consistent and clear application of proportionality principles early in cases can have a leavening effect on discovery decisions made in law offices. Parties and attorneys typically make their decisions about what discovery to do next without court involvement. A steady court policy with respect to proportionality provides deliberating parties and attorneys with guidance.

RE: 6.4 to 6.5

As in the Complex Pathway, courts should utilize informal processes, such as conference calls with counsel, to encourage narrowing of the issues and concise briefing that in turn can promote more efficient and effective rulings by the court. In addition, an in-person case management conference can play a critical role in reducing cost and delay by affording the judge and parties the opportunity to have an in-depth discussion regarding the issues and case needs.
Without doubt, alternative dispute resolution (ADR) is an important development in modern civil practice. However, to avoid it becoming an unnecessary hurdle or cost escalator, its appropriateness should be considered on a case-by-case basis. That said, settlement discussions are a critical aspect of case management, and the court should ensure that there is a discussion of settlement at an appropriate time, tailored to the needs of the case.

**RE: 6.6**
As with the other pathways, trial judges play a crucial role in containing litigation costs and conserving juror time by making time management a high priority once a trial begins.

**RECOMMENDATION 7**
Courts should develop civil case management teams consisting of a responsible judge supported by appropriately trained staff.

7.1 Courts should conduct a thorough examination of their civil case business practices to determine the degree of discretion required for each management task. These tasks should be performed by persons whose experience and skills correspond with the task requirements.

7.2 Courts should delegate administrative authority to specially trained staff to make routine case management decisions.

**COMMENTARY**
Recommendation 1 sets forth the fundamental premise that courts are primarily responsible for the fair and prompt resolution of each case. This is not the responsibility of the judge alone. Active case management at its best is a team effort aided by technology and appropriately trained and supervised staff. The Committee rejects the proposition that a judge must manage every aspect of a case after its filing. Instead, the Committee endorses the proposition that court personnel, from court staff to judge, be utilized to act at the “top of their skill set.”

Team case management works. Utah’s implementation of team case management resulted in a 54 percent reduction in the average age of pending civil cases from 335 days to 192 days (and a 54 percent reduction for all case types over that same period) despite considerably higher caseloads. In Miami, team case management resulted in a 25 percent increase in resolved foreclosure cases compared consistently at six months, twelve months, and eighteen months during the foreclosure crisis, and the successful resolution of a 50,000 case backlog. Specialized business courts across the country use team case management with similar success. In Atlanta, business court efforts resulted in a 65 percent faster disposition time for complex contract cases and a 56 percent faster time for complex business tort cases.

**RE: 7.1**
Using court management teams effectively requires that the court conduct a thorough examination of civil case business practices to determine the degree of discretion required for each. Based upon that examination, courts can develop policies and practices to identify case management responsibilities appropriately assignable to professional court staff or automated processes. Matching management tasks to the skill level of the personnel allows administrators to
execute protocols and deadlines and judges to focus on matters that require judicial discretion. Evaluating what is needed and who should do it brings organization to the system and minimizes complexities and redundancies in court structure and personnel.

**RE: 7.2**
Delegation and automation of routine case management responsibilities will generate time for judges to make decisions that require their unique authority, expertise, and discretion.

**RECOMMENDATION 8**
For right-size case management to become the norm, not the exception, courts must provide judges and court staff with training that specifically supports and empowers right-sized case management. Courts should partner with bar leaders to create programs that educate lawyers about the requirements of newly instituted case management practices.

**COMMENTARY**
Judicial training is not a regular practice in every jurisdiction. To improve, and in some instances reengineer, civil case management, jurisdictions should establish a comprehensive judicial training program. The Committee advocates a civil case management-training program that includes web-based training modules, regular training of new judges and sitting judges, and a system for identifying judges who could benefit from additional training.

Accumulated learning from the private sector suggests that the skill sets required for staff will change rapidly and radically over the next several years. Staff training must keep up with the impact of technology improvements and consumer expectations. For example, court staff should be trained to provide appropriate help to self-represented litigants. Related to that, litigants should be given an opportunity to perform many court transactions online. Even with well-designed websites and interfaces, users can become confused or lost while trying to complete these transactions. Staff training should include instruction on answering user questions and solving user process problems.

The understanding and cooperation of lawyers can significantly influence the effectiveness of any pilot projects, rule changes, or case management processes that court leaders launch. Judges and court administrators must partner with the bar to create CLE programs and bench/bar conferences that help practitioners understand why changes are being undertaken and what will be expected of lawyers. Bar organizations, like the judicial branch, must design and offer education programs to inform their members about important aspects of the new practices being implemented in the courts.

**RECOMMENDATION 9**
Courts should establish judicial assignment criteria that are objective, transparent, and mindful of a judge’s experience in effective case management.

**COMMENTARY**
The Committee recognizes the variety of legal cultures and customs that exist across the breadth of our country. Given the case management imperatives described in these Recommendations, the Committee trusts that all court leaders will make judicial competence a high priority. Court
leaders should consider a judge’s particular skill sets when assigning judges to preside over civil cases. For many years, in most jurisdictions, the sole criterion for judicial assignment was seniority and a judge’s request for an assignment. The judge’s experience or training were not top priorities.

To build public trust in the courts and improve case management effectiveness, it is incumbent upon court leaders to avoid politicization of the assignment process. In assigning judges to various civil case dockets, court leaders should consider a composite of factors including (1) demonstrated case management skills, (2) litigation experience, (3) previous training, (4) specialized knowledge, (5) interest, (6) reputation with respect to neutrality, and (6) professional standing within the trial bar.

RECOMMENDATION 10
Courts must take full advantage of technology to implement right-sized case management and achieve useful litigant-court interaction.

10.1 Courts must use technology to support a court-wide, teamwork approach to case management.

10.2 Courts must use technology to establish business processes that ensure forward momentum of civil cases.

10.3 To measure progress in reducing unnecessary cost and delay, courts must regularly collect and use standardized, real-time information about civil case management.

10.4 Courts should use information technology to inventory and analyze their existing civil dockets.

10.5 Courts should publish measurement data as a way to increase transparency and accountability, thereby encouraging trust and confidence in the courts.

COMMENTARY
This recommendation is fundamental to achieving effective case management. To implement right-sized case management, courts must have refined capacities to organize case data, notify interested persons of requirements and events, monitor rules compliance, expand litigant understanding, and prompt judges to take necessary actions. To meet these urgent needs, courts must fully employ information technologies to manage data and business processes. It is time for courts to catch up with the private sector. The expanding use of online case filing and electronic case management is an important beginning, but just a beginning. Enterprises as diverse as commercial air carriers, online retailers, and motor vehicle registrars have demonstrated ways to manage hundreds of thousands of transactions and communications. What stands in the way of courts following suit? If it involves lack of leadership, the Committee trusts that this Report and these Recommendations will embolden chief justices and state court administrators to fill that void.

RE: 10.1
Modern data management systems and court-oriented innovations, such as e-filing, e-scheduling, e-service, and e-courtesy, provide opportunities for personnel coordination not only within courthouses but also across entire jurisdictions.

**RE: 10.2**
To move cases efficiently towards resolution, case management automation should, at a minimum, (1) generate deadlines for case action based on court rules, (2) alert judges and court staff to missed deadlines, (3) provide digital data and searchable options for scheduled events, and (4) trigger appropriate compliance orders. Courts should seek to upgrade their current software to achieve that functionality and include those requirements when they acquire new software.

**RE: 10.3**
Experience and research tell us that one cannot manage what is unknown. Smart data collection is central to the effective administration of justice and can significantly improve decision making.

Although court administrators appreciate the importance of recordkeeping and performance measurement, few judges routinely collect or use data measurements or analytical reports. As made clear in previous Recommendations, the entire court system acting as a team must collect and use data to improve civil caseflow management and reduce unnecessary costs and delay. This can be accomplished by enlisting court system actors at different levels and positions in developing the measurement program, by communicating the purpose and importance of the information to all court staff, and by appointing a responsible oversight officer to ensure accuracy and consistency.

Courts must systematically collect data on two types of measures. The first is descriptive information about the court's cases, processes, and people. The second is court performance information, dictated by defined goals and desired outcomes.

To promote comparability and analytical capacity, courts must use standardized performance measures, such as CourTools, as the presumptive measures, departing from them only where there is good reason to do so. Consistency—in terms of what data are collected, how they are collected, and when they are collected—is essential for obtaining valid measures upon which the court and its stakeholders can rely.

**RE: 10.4**
As mentioned above, one cannot manage what is unknown. This is true at both the macro and the micro levels. A “30,000 foot” view allows court personnel to consider the reality of their caseload when making management decisions. As the *Landscape of Civil Litigation* provided the CJI Committee a representative picture of civil caseloads nationally, each court system should gain a firm understanding of its current civil case landscape. Using technology for this purpose will increase the ability of courts to take an active, even a proactive, approach to managing for efficiency and effectiveness.
An inventory should not be a one-time effort. Courts can regularly use inventories to gauge the effectiveness of previous management efforts and “get ahead” of upcoming caseload trends.

**RE: 10.5**
The NCSC and the Justice at Stake consortium commissioned a national opinion survey to identify what citizens around the country think about courts and court funding. The ultimate purpose of the project, entitled *Funding Justice: Strategies and Messages for Restoring Court Funding*, was to create a messaging guide to help court leaders craft more effective communications to state policymakers and the general public about the functions and resource needs of courts. Citizen focus groups indicated that certain narratives tend to generate more positive public attitudes to courts. These include (1) courts are effective stewards of resources, (2) the courts’ core mission is delivery of fair and timely justice, and (3) courts are transparent about how their funding is spent. In light of these findings, the Committee believes that smart civil case management, demonstrated by published caseflow data, can lead to increased public trust in the courts.

**RECOMMENDATION 11**
Courts must devote special attention to high-volume civil dockets that are typically composed of cases involving consumer debt, landlord-tenant, and other contract claims.

**11.1** Courts must implement systems to ensure that the entry of final judgments complies with basic procedural requirements for notice, standing, timeliness, and sufficiency of documentation supporting the relief sought.

**11.2** Courts must ensure that litigants have access to accurate and understandable information about court processes and appropriate tools such as standardized court forms and checklists for pleadings and discovery requests.

**11.3** Courts should ensure that the courtroom environment for proceedings on high-volume dockets minimizes the risk that litigants will be confused or distracted by over-crowding, excessive noise, or inadequate case calls.

**11.4** Courts should, to the extent feasible, prevent opportunities for self-represented persons to become confused about the roles of the court and opposing counsel.

**COMMENTARY**
State court caseloads are dominated by lower-value contract and small claims cases rather than high-value commercial or tort cases. Many courts assign these cases to specialized court calendars such as landlord/tenant, consumer debt collection, mortgage foreclosure, and small claims dockets. Many of these cases exhibit similar characteristics. For example, few cases are adjudicated on the merits, and almost all of those are bench trials. Although plaintiffs are generally represented by attorneys, defendants in these cases are overwhelmingly self-represented, creating an asymmetry in legal expertise that, without effective court oversight, can easily result in unjust case outcomes. Although most cases would be assigned to the Streamlined Pathway under these Recommendations, courts should attend to signs that suggest a case might
benefit from additional court involvement. Indicators can include the raising of novel claims or defenses that merit closer scrutiny.

**RE: 11.1**
Recent federal investigations and agency studies have found widespread instances of judgments entered in cases in which the defendant did not receive notice of the complaint or the plaintiff failed to demonstrate standing to bring suit or adequate documentation of compliance with statutory requirements for timeliness or the basis for the relief sought. Courts have an obligation to implement practices that prevent such abuse.

**RE: 11.2**
This recommendation complements Recommendation 13 with respect to making court services more accessible to litigants. Self-represented litigants need access to accurate information about court processes, including trained court staff that can help them navigate the civil justice system. This information should be available electronically or in person at the courthouse, and at other sites where litigants can receive free assistance. Standardized forms should use plain English and include check-off lists for basic claim elements, potential common defenses, and the ability to assert counter-claims.

**RE: 11.3**
Courts often employ block calendaring on high-volume dockets in which large numbers of cases are scheduled for the same period of time. The result is often overcrowded, noisy, and potentially chaotic environments in which litigants may not hear their case when it is called or may become distracted by competing activities in the courtroom. Frequently, courts sequence cases after the initial call to benefit attorneys, resulting in long wait times for self-represented litigants. The use of electronic sign-in systems can help ensure that litigants are not mistakenly overlooked and that their cases are heard in a timely manner.

**RE: 11.4**
Self-represented litigants often lack understanding about the respective roles of the court and opposing counsel. They may acquiesce to opposing counsel demands because they mistakenly assume that the opposing counsel is connected to the court. As a result, judges may not obtain complete information from both sides to ensure a legally correct judgment on the facts and the law. Self-represented litigants also may not appreciate the far-reaching implications of agreeing to settle a case (e.g., dismissal, entry of judgment). To curb misunderstandings, courts should provide clear physical separation of counsel from court personnel and services, and standardized guidelines to all litigants and counsel concerning how settlement negotiations are conducted and the consequences of settlement. Before accepting settlements, judges should ascertain that both parties understand the agreement and its implications.

**RECOMMENDATION 12**
Courts must manage uncontested cases to assure steady, timely progress toward resolution.

12.1 To prevent uncontested cases from languishing on the docket, courts should monitor case activity and identify uncontested cases in a timely manner. Once uncontested status is confirmed, courts should prompt plaintiffs to move for dismissal or final judgment.
12.2 Final judgments must meet the same standards for due process and proof as contested cases.

COMMENTARY
Uncontested cases comprise a substantial proportion of civil caseloads. In the Landscape of Civil Litigation in State Courts, the NCSC was able to confirm that default judgments comprised 20 percent of dispositions, and an additional 35 percent of cases were dismissed without prejudice. Many of these cases were abandoned by the plaintiff, or the parties reached a settlement but failed to notify the court. Other studies of civil caseloads also suggest that uncontested cases comprise a substantial portion of civil cases (e.g., 45 percent of civil cases subject to the New Hampshire Proportional Discovery/Automatic Disclosure (PAD) Rules, 84 percent of civil cases subject to Utah Rule 26). Without effective oversight, these cases can languish on court dockets indefinitely. For example, more than one-quarter of the Landscape cases that were dismissed without prejudice were pending at least 18 months before they were dismissed.

RE 12.1
To resolve uncontested matters promptly yet fairly requires focused court action. Case management systems should be configured to identify uncontested cases shortly after the deadline for filing an answer or appearance has elapsed. If the plaintiff fails to file a timely motion for default or summary judgment, the court should order the plaintiff to file such a motion within a specified period of time. If such a motion is not filed, the court should dismiss the case for lack of prosecution. The court should monitor compliance with the order and carry out enforcement as needed.

RE 12.2
Recent studies of consumer debt collection, mortgage foreclosure, and other cases that are frequently managed on high-volume dockets found that judgments entered in uncontested cases were often invalid. In many instances, the plaintiff failed to provide sufficient notice of the suit to the defendant. Other investigations found that plaintiffs could not prove ownership of the debt or provide accurate information about the amount owed. To prevent abuses, courts should implement rules to require or incentivize process servers to use smart technology to document service location and time. Courts should also require plaintiffs to provide an affidavit and supporting documentation of the legitimacy of the claim with the motion for default or summary judgment. Before issuing a final judgment, the court should review those materials to ensure that the plaintiff is entitled to the relief sought.

RECOMMENDATION 13
Courts must take all necessary steps to increase convenience to litigants by simplifying the court-litigant interface and creating on-demand court assistance services.

13.1 Courts must simplify court-litigant interfaces and screen out unnecessary technical complexities to the greatest extent possible.

13.2 Courts should establish Internet portals and stand-alone kiosks to facilitate litigant access to court services.
13.3 Courts should provide real-time assistance for navigating the litigation process.

13.4 Judges should promote the use of remote audio and video services for case hearings and case management meetings.

COMMENTARY
The importance of “access to substantive justice” is inherent in the mission of the CJI Committee and underpins all of these Recommendations. Recommendation 13 addresses “access” in terms of making the civil justice system less expensive and more convenient to the public. To mitigate access problems, we must know what they are. We also need to know how the public wants us to fix them. A national poll by NCSC in 2014 found that a high percentage of responders thought courts were not doing enough to help self-represented litigants, were out of touch, and were not using technology effectively. Responders frequently cited the time required to interact with the courts, lack of available ADR, and apprehensiveness in dealing with court processes. The poll found strong support for a wide array of online services, including a capacity for citizens to ask questions online about court processes.

RE: 13.1
Courts should simplify court forms and develop online “intelligent forms” that enable litigants to create pleadings and other documents in a manner that resembles a Turbo Tax interactive dialogue. Forms should be available in languages commonly spoken in the jurisdiction. Processes associated with the forms (attaching documents, making payments, etc.) should be simplified as much as possible.

RE: 13.2
To improve citizen understanding of court services, courts should install information stations inside and outside of courthouses as well as online. To expand the availability of important court information, courts might partner with private enterprises and public service providers, such as libraries and senior centers, to install interactive, web-based, court business portals at the host locations.

RE: 13.3
Courts should create online, real-time court assistance services, such as online chat services, and 800-number help lines. Litigant assistance should also include clear signage at court facilities to guide litigants to any on-site navigator personnel. Online resolution programs also offer opportunities for remote and real-time case resolution.

RE: 13.4
Vast numbers of self-represented litigants navigate the civil justice system every year. However, travel costs and work absences associated with attending a court hearing can deter self-represented litigants from effectively pursuing or defending their legal rights. The use of remote hearings has the potential to increase access to justice for low-income individuals who have to miss work to be at the courthouse on every court date. Audio or videoconferencing can mitigate these obstacles, offering significant cost savings for litigants and generally resulting in increased access to justice through courts that “extend beyond courthouse walls.”
The growing prevalence of smart phones enables participants to join audio or videoconferences from any location. To the extent possible and appropriate, courts should expand the use of telephone communication for civil case conferences, appearances, and other straightforward case events.

If a hearing or case event presents a variety of complexities, remote communication capacities should expand to accommodate those circumstances. In such instances video conferencing may be more fitting than telephone conferencing. The visual component may facilitate reference to documents and items under discussion, foster more natural conversation among the participants, and enable the court to “read” unspoken messages. For example the video may reveal that a litigant is confused or that a party would like an opportunity to talk but is having trouble getting into the conversation.
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GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on the American Judicial System (“SCAJS”)

Submitted By: Wm. T. (Bill) Robinson III, Chair

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

This Resolution urges all state courts to consider the Recommendations of *Call to Action: Achieving Civil Justice for All* as appropriate guidance in their endeavors to achieve demonstrable civil justice improvements with respect to the expenditure of time and costs to resolve civil cases. The Recommendations offer guidelines and best practices for civil litigation including specific Recommendations for caseflow management to achieve the efficient resolution of cases. To effectively implement reforms, the Resolution further urges all state courts to develop and implement a civil justice improvements plan to improve the delivery of civil justice.

The leading recommendation advocates that courts take definitive responsibility for managing civil cases from filing to disposition. In order for reforms to be successful, though, there must be a collaborative effort by judges and lawyers. Bar associations can play an important role in promoting the Recommendations and educating judges and lawyers about civil justice needs and their responsibility in making the Recommendations a reality. Therefore, the Resolution also urges bar associations to promote the Recommendations of *Call to Action: Achieving Civil Justice for All* and to collaborate with judges and lawyers to improve the delivery of civil justice.

The Recommendations and commentary set forth in the report to the Conference of Chief Justices (“CCJ”) by the Civil Justice Improvements Committee (“CJI”) were guided by fundamental principles, existing research and new research undertaken by the National Center for State Courts (“NCSC”) regarding the landscape of civil litigation, recent reform efforts, and lessons learned from CJI Committee members’ own experience as lawyers, judges, and administrators. The Recommendations have been strongly endorsed by the CCJ and the Conference of State Court Administrators (“COSCA”), and this Resolution seeks to support their implementation efforts.

2. **Approval by Submitting Entity.**

The Standing Committee on the American Judicial System approved this Resolution on October 28, 2016. The Commission on the American Jury approved co-sponsorship on December 5, 2016 by email consensus of its members. The Council of the Government and Public Sector Lawyers Division approved co-sponsorship on December 6, 2016. The Council of the Section of Litigation approved co-sponsorship on December 12, 2016.

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

Neither this resolution nor a similar resolution has been submitted to the House or Board previously other than the resolutions referred to below that have been adopted as ABA policy.
4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

The Principles for Judicial Administration promulgated by NCSC in 2012 were adopted by the ABA in 2013 (2013 AM 10C). The Principles for Judicial Administration enhance the ABA Standards Relating to Court Organization, adopted in 1974 (as the Standards of Judicial Administration), and amended in 1990. Although created for different eras, those resources all provide useful guidance to state courts and would not be affected by adoption of this Resolution.

The Discovery Guidelines for State Courts (1998 AM 122) and the Civil Discovery Standards (1999 AM 108) may arguably be implicated by some of the Recommendations, but would not be affected by adoption of this Resolution. This Resolution does not adopt any new standards nor does it alter any existing ABA guidelines or standards; it merely urges state courts to consider the Recommendations of Call to Action: Achieving Civil Justice for All as appropriate guidance.

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 CCJ and COSCA directed NCSC “to take all available and reasonable steps to assist court leaders who desire to implement civil justice improvements.” Therefore, SCAJS will coordinate all implementation efforts with NCSC. SCAJS will explore ways to bring Call to Action: Achieving Civil Justice for All to the attention of bar leaders, lawyers, and judges throughout the country.

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

None.

9. Disclosure of Interest. (If applicable)

N/A

10. Referrals.

Business Law Section
Government and Public Sector Lawyers Division (Co-Sponsor)
Judicial Division
Judicial Division Appellate Judges Conference
Judicial Division Lawyers Conference
Judicial Division National Conference of Specialized Court Judges
Judicial Division National Conference of State Trial Judges
Section of Labor and Employment Law
Section of Litigation (Co-Sponsor)
Senior Lawyers Division
Solo, Small Firm and General Practice Division
State and Local Government Law Section (Supporter)
Tort Trial & Insurance Practice Section
Young Lawyers Division
Standing Committee on Bar Activities and Services
Standing Committee on the Delivery of Legal Services
Standing Committee on Legal Aid and Indigent Defendants
Commission on the American Jury (Co-Sponsor)

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 urges all state courts to consider the Recommendations of Call to Action: Achieving Civil Justice for All as appropriate guidance in their endeavors to achieve demonstrable civil justice improvements with respect to the expenditure of time and costs to resolve civil cases. It further urges all state courts to develop and implement a civil justice improvements plan to improve the delivery of civil justice. The Resolution also urges bar associations to promote the Recommendations of Call to Action: Achieving Civil Justice for All and to collaborate with judges and lawyers to improve the delivery of civil justice.

The development of the Recommendations and commentary were guided by fundamental principles, existing research and new research undertaken by the National Center for State Courts regarding the landscape of civil litigation, recent reform efforts, and lessons learned from the Civil Justice Improvements (“CJI”) Committee members’ own experience as lawyers, judges, and administrators. The Conference of Chief Justices and the Conference of State Court Administrators endorsed the Recommendations, and this Resolution seeks to support their implementation efforts.

2. Summary of the Issue that the Resolution Addresses

State courts and the lawyers that practice in them are well aware of the cost, delay, and unpredictability of civil litigation. The dramatic rise in self-represented litigants and strained court budgets from two severe recessions have further hampered the ability of courts to promptly and efficiently resolve cases. In response, many litigants have begun to seek solutions outside of the courts and, in some instances, to forgo legal remedies entirely. As a result, public trust and confidence in the courts have decreased. While these concerns have been raised for more than a century and continue to worsen in many respects, court leaders in some states have begun to take concrete steps toward change. The reforms are encouraging, but limited in scope.

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

Call to Action: Achieving Civil Justice for All advocates that courts take responsibility for managing civil cases from filing to disposition and provides recommendations to guide courts in their efforts. However, reforms must be a collaborative effort by judges and lawyers. Bar associations can play an important role in promoting the Recommendations and educating judges and lawyers about civil justice needs and their responsibility in making the Recommendations a reality. This Resolution addresses the underlying issue of costs, delays, and complexities undermining the civil justice system, and also promotes the Recommendations as appropriate guidance so the work of the CJI Committee is more likely to result in meaningful reforms.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

None known at the time this Summary was prepared.
RESOLVED, That the American Bar Association supports the adoption of the nominative fair use doctrine as an affirmative defense to claims of trademark infringement and unfair competition.
REPORT

This Resolution and Report concerns the test federal courts apply to determine whether reference to a trademark by someone other than the mark owner, in the context of a commentary, comparison, or criticism of the mark owner’s product or service, for example, is a permissible fair use. There is currently a split in the federal circuits over which test to apply to determine whether a reference to a mark is a permissible nominative fair use. This resolution favors treating nominative fair use as an affirmative defense, because this approach would best achieve the policy goals of separating the issue of consumer confusion from the fairness of the use, by making the plaintiff prove confusion before placing any burden on defendants, and of permitting a finding of fair use even when some consumer confusion is created by the use.

Overly vigorous policing of trademark rights can chill speech. The “nominative fair use” doctrine protects those who reference the mark of another from liability when that use is to comment on the product or service. For example, it protects comparative advertising, product review, criticism, and parody. There is currently a split in the federal circuits over which test to apply to determine whether a reference to a mark is a permissible “nominative fair use.” The circuit split on the proper standard is extensive, and includes the application of several different tests: (1) nominative fair use as an affirmative defense once the plaintiff has proven infringement in the form of a likelihood of confusion between the parties’ marks or some other form of trademark-related unfair competition;1 (2) a supplemented likelihood-of-confusion test, which adds fair use considerations to the traditional likelihood-of-confusion” factors; (3) a new test, that replaces the likelihood of confusion test, in which the plaintiff must show that the defendant’s use was not a nominative fair use, but does not require plaintiff to prove a likelihood of confusion exists; or (4) no test, pursuant to which a court instead applies the traditional likelihood-of-confusion test without regard to special fair use considerations.

The need to protect speech is paramount. The usefulness of, and potential for reliance on, permitted nominative fair use applies to a wide range of marketplace and media participants, including competitors, commentators, consumer advocates, and critics. Therefore, the nominative fair use test adopted by the federal courts should be most consistent with preserving an individual’s right to comment on or express an opinion while referring to the mark owner’s goods or services without fear of sanctions. And the defense should analyze the fairness of the defendant’s use without unfairly weighing the determination towards a finding of confusion. The Resolution therefore favors adoption of the nominative fair use defense as an affirmative defense to trademark infringement that need only be asserted if the plaintiff first has proven that the defendant’s use of the disputed mark is likely to cause confusion. The Resolution does not advance a position on what factors are relevant to prove nominative fair use.

1 Although likelihood-of-confusion-based causes of action such as those available under the federal Lanham Act and the Uniform Deceptive Trade Practices Act are the most commonly-used mechanisms for protecting trademark rights, the Lanham Act and the law of most states also protect the fame and distinctiveness of marks against actual or likely dilution. Reported opinions addressing the nature of the nominative fair use doctrine in the dilution context are rare, but there is no readily apparent reason why the reasons underlying the policy proposed by this resolution should not apply with equal force in that context. Unless otherwise noted, this report therefore does not distinguish between the two.
The Section of Intellectual Property Law requests the House of Delegates to approve this Resolution, which would provide the basis for either Association support of legislation to codify nominative fair use doctrine as an affirmative defense by amending the federal trademark statute, the Lanham Act, 15 U.S.C. § 1051 et seq., or an Association amicus curiae brief in the U.S. Supreme Court in Security Univ., LLC. v. Int’l Information Sys. Security Certification Consortium, Inc., 823 F.3d 153 (2d Cir. 2016), petition for cert. filed, No. 16-352 (U.S. Sept. 15, 2016), should the petition for certiorari be granted in that case or some other relevant case. If Security University’s petition is 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.

A. Likelihood of Confusion and the “Polaroid” Factors

Trademarks and service marks allow consumers to identify the source of goods and services. As consumers become familiar with certain branded goods and services and the companies selling them, they come to expect consistent quality in in all of their products. Trademark law generally allows individuals and companies to protect their brand, and the expectation of quality or other goodwill they have established with their customers. It accomplishes that by preventing the use of a mark likely to cause confusion over whether the goods or services of one party originate with the other party or are otherwise sponsored, licensed, or affiliated with that party. This is the test for infringement under the Lanham Act and corresponding state law. See, e.g., 15 U.S.C. §§ 1114, 1125(a).

All circuits use a multifactor test to determine whether confusion is likely between two marks. The particular factors vary from circuit to circuit, but all of the tests are similar. One influential set of factors was set forth in Polaroid Corp. v. Polarad Elec. Corp., 287 F.2d 492 (2d Cir. 1961). These factors, often referred to as the “Polaroid factors,” generally include:

1. the strength of the senior user’s mark; the stronger or more distinctive the senior user’s mark, the more likely the confusion;
2. the similarity of the parties’ marks;
3. the similarity of the parties’ goods or services;
4. the likelihood of one party “bridging the gap” between the parties’ markets;
5. the junior user’s intent or bad faith;
6. evidence of actual confusion;
7. the sophistication of purchasers of the parties’ goods; and
8. the quality of the junior user’s products or services.

In applications of this test and those extant in other circuits, no single factor determines whether confusion is likely, and not all factors carry the same weight. Bd. of Supervisors for La. State Univ. Agric. & Mech. Coll. v. Smack Apparel Co., 550 F.3d 465, 478 (5th Cir. 2008).

B. The Nominative Fair Use Doctrine

To preserve their rights, mark owners must monitor and police the unauthorized use of their marks by others. A plaintiff’s failure to object to an infringing use might bar a later claim of
infringement under, for example, the doctrines of laches and acquiescence. Overly vigorous policing of a mark, however, may chill First Amendment-protected speech.

Although its name is of relatively recent origin, the nominative fair use doctrine has long protected the ability of defendants to use plaintiffs’ marks to refer to the plaintiffs’ own goods and services. (In other words, liability for infringement or unfair competition is possible only if a defendant has used a confusingly similar imitation of a plaintiff’s mark to refer to the defendant’s goods or services.) “Nominative use” is not a trademark use but rather a reference to a particular product for purposes of comparison, criticism, point of reference or any other such purpose.” See, e.g., New Kids on the Block v. News Am. Publ’ns, Inc., 971 F.2d 302, 306 (9th Cir. 1992). Without a strong nominative fair use standard that is appropriately respectful of commentary, criticism, or complaints about a given mark or brand, the successful assertion of trademark rights could violate the First Amendment, and, indeed, at least the Ninth Circuit has suggested the nominative fair use doctrine is grounded in the Amendment. See Toyota Motor Sales, U.S.A., Inc. v. Tabari, 610 F.3d 1171 (9th Cir. 2010)

The federal Lanham Act does not expressly recognize the nominative fair use doctrine in cases of infringement; instead, the doctrine is wholly judge-made in that context. In contrast, Section 43(c)(3)(A) of the Act does recognize nominative fair use in cases in which plaintiffs seek relief against the likely dilution of the distinctiveness of their marks, but that statute styles the doctrine as an “exclusion” from liability without defining “exclusion” as either an affirmative defense, on the one hand, or something to be overcome by a plaintiff as part of its prima facie of liability. See 15 U.S.C. § 1125(c)(A). Consequently, the Act itself provides little guidance on the nature of the doctrine and its parameters.

C. A Four-Way Circuit Split

While all circuits addressing the issue agree a nominative use of another’s mark is not an infringing or diluting use, there is no consensus among the circuits on whether the doctrine establishes an affirmative defense, acts to modify or replace the traditional likelihood of confusion infringement test, or even whether a nominative fair use test should apply. There is a four-way circuit split:

1. The Third Circuit treats nominative fair use as an affirmative defense employed only if the plaintiff has already proven a likelihood of confusion. Century 21 Real Estate Corp. v LendingTree Inc., 425 F.3d 211 (3d Cir. 2005).

2. The Ninth Circuit replaces the traditional likelihood-of-confusion test with a three-factor test for determining if the use is fair, and places the burden on the plaintiff to show the defendant’s use was not a nominative fair use. Toyota Motor Sales, U.S.A., Inc. v. Tabari, 610 F.3d 1171, 1175-76, 1183 (9th Cir. 2010). The Seventh and Eleventh Circuits’ tests are modeled after the Ninth Circuit’s test. See Int’l Stamp Art, Inc. v. U.S. Postal Serv., 456 F.3d 1270, 1277 (11th Cir. 2006) (citing Ninth Circuit test for the proposition that defendant’s use of a portion of plaintiff’s mark did not “implicate the source-identification function
that is the purpose of trademark”); Ill. High Sch. Ass’n v. GTE Vantage Inc., 99 F.3d 244, 246 (7th Cir. 1996) (citing Ninth Circuit test in dictum).


The First, Fourth, Eighth, Tenth, and D.C. Circuits appear undecided as to which test to apply.

D. The Supreme Court’s Prior Trademark Fair Use Analysis

The Supreme Court has addressed fair use issues three times in the trademark context.

In 1924, in Prestonettes, Inc. v. Coty, 264 U.S. 359 (1924), the Supreme Court faced the issue of whether a rebottled perfume bearing a disclaimer of non-affiliation naming the maker of the perfume infringed the owner’s mark. The Court held the relevant question was not whether the use of the maker’s name constitutes unfair competition but whether the maker had a right to prevent others from “making even a collateral reference to plaintiff’s mark.” Id. at 366-367, 369. The Court held a trademark does not “confer a right to prohibit the use of [a] word or words. It is not a copyright.” Id. at 369. “When the mark is used in a way that does not deceive the public we see no such sanctity in the word as to prevent its being used to tell the truth.” Id. Even in 1924, the Court appeared to have recognized the doctrine of nominative fair use and that a proper analysis separates issues of confusion from the question of the appropriateness of the use.

In a case dealing with second-hand goods, the Supreme Court applied the same reasoning to affirm a decree allowing a spark plug reconditioner to use the Champion trademark on the reconditioned spark plugs, so long as the reconditioned goods were clearly marked as ‘repaired’ or ‘used.’ After considering the lower cost and inferiority expected with second-hand goods, the Court observed that under the rule of Prestonettes, it is “wholly permissible” for the second-hand dealer to get some advantage of the mark, so long as the mark owner is not identified with the inferior condition resulting from wear and tear of use or the reconditioning. Id. at 130. As in Prestonettes, however, the Court did not address the parties’ respective burdens.

Finally, the Supreme Court has also grappled with the affirmative defense of descriptive fair use as provided for in 15 U.S.C. § 1115(b)(4). Descriptive fair use enables a defendant to use the
language found in another’s trademark merely to describe its own products or services, but only in a nontrademark sense and only in good faith. In *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111 (2004), Lasting owned the trademark “Micro Colors,” while both parties used the term “microcolor” to describe the pigment they used in the permanent makeup they sold. The Court held a defendant raising the statutory affirmative defense of descriptive fair use has no burden to negate a plaintiff’s prima facie showing of likely confusion. *Id.* at 117-21. In holding the likelihood-of-confusion test for infringement is a separate and distinct inquiry from the descriptive fair use defense, the Court observed:

> It is just not plausible that Congress would have used the descriptive phrase “likely to cause confusion, or to cause mistake, or to deceive” in §1114 to describe the requirement that a markholder show likelihood of consumer confusion, but would have relied on the phrase “used fairly” in §1115(b)(4) in a fit of terse drafting meant to place a defendant under a burden to negate confusion.

*Id.* at 118. The Court then held that the descriptive fair use defense requires the plaintiff to prove likely confusion as part of its prima facie case of infringement, and, additionally, that the defendant need only establish descriptive fair use to escape liability. Specifically, “some possibility of consumer confusion must be compatible with fair use.” *Id.* at 121.

**E. By Establishing an Affirmative Defense, The Third Circuit Approach Properly Separates the Likelihood-of-Confusion Factors from the Question of Fair Use**

A test that simply merges fair use considerations into the likelihood-of-confusion test is not a true fair use test. Such a merged test would likely diminish fair use considerations because two key factors for determining likelihood of confusion, the degree of similarity between the marks and the similarity of the owner’s goods or services, would often unfairly weigh the determination heavily towards a finding of confusion. In *Century 21 Real Estate Corp. v LendingTree Inc.*, 425 F.3d 211 (3d Cir. 2005), the Third Circuit noted the degree of similarity between the marks and the strength of the owner’s mark will always lead to a finding of confusion. *Id.* at 225. Similarly, the Fourth Circuit has acknowledged not all of the likelihood-of-confusion factors are relevant in the context of nominative use because “many of the factors are either unworkable or not suited or helpful as indicators of confusion in this context.” *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 153-54 (4th Cir. 2012) (internal quotation marks omitted).

A proper fair use analysis treats the likelihood-of-confusion determination separate from the question of the appropriateness of the use. Adoption of the nominative fair use defense as an affirmative defense achieves that goal. By adopting fair use as an affirmative defense, the Third Circuit’s approach best achieves the policy goals of separating the issue of consumer confusion from the fairness of the use by making the plaintiff prove confusion before placing any burden on defendants, while also permitting a finding of fair use even when some consumer confusion is created by the use.

The Third Circuit’s test treats nominative fair use as an affirmative defense employed only if the plaintiff has proven a likelihood of confusion. *Century 21 Real Estate Corp. v LendingTree Inc.*,
425 F.3d 211 (3d Cir. 2005). The Court reasoned this approach properly places the initial burden of proving likely confusion on the plaintiff, id. at 221, and, for nominative fair use to truly function as a defense, it must be applicable even in cases where a plaintiff is able to show a likelihood of confusion, id. at 222. The approach is bifurcated; it first requires the plaintiff to prove a likelihood of confusion and then offers the defendant the opportunity to demonstrate the use is fair.

The Third Circuit’s analysis is grounded in the Supreme Court’s analysis found in KP Permanent Make-Up. In the similar context of descriptive fair use, the Court also held that confusion and fair use were separate and distinct issues and that a defendant asserting a fair use defense had no obligation to demonstrate an absence of confusion, since likely confusion was part of the plaintiff’s case. 543 U.S. at 121. The Third Circuit held the Supreme Court’s reasoning should apply not only in a descriptive fair use case, but in the nominative fair use context as well. Century 21, 425 F.3d at 221. Thus, in a nominative fair use case in the Third Circuit, a plaintiff must demonstrate a likelihood of confusion, after which the defendant may offer evidence its use was fair, even if some likelihood of confusion had resulted. The court reasoned that, because the defendant ultimately uses the plaintiff’s mark the potential for confusion exists even in a true nominative sense. Id.

Although this Resolution does not recommend adoption of any specific set of factors to be used in the analysis, the Third Circuit has provided a good example of how such an affirmative test might be applied. In the Third Circuit, the plaintiff must first prove a likelihood of confusion exists using the traditional factors, known as the Lapp factors in the Third Circuit, Id. at 224. The Third Circuit focuses on four of the Lapp factors:

1. price of the goods and other factors indicative of the care and attention that may be expected of consumers when making a purchase;
2. length of time, if any, defendant has used the mark without actual confusion;
3. intent of defendant in using the mark; and
4. evidence of actual confusion.

Id. at 225-26.

The Third Circuit justified its focus on these factors on the ground “they analyze the likelihood that a consumer will be confused as to the relationship and affiliation between [the senior and junior users], the heart of the nominative fair use situation.” Id. at 226. The court did, however, note the remaining Lapp factors could be relevant in certain cases:

1. whether the goods, though not competing, are marketed through the same channels of trade and advertised through the same media;
2. the extent to which the targets of the parties’ sales efforts are the same;
3. the relationship of the goods in the mind of the consumers because of the similarity of function; and
other facts suggesting that the consuming public might expect the prior owner to manufacture a product in the defendant’s market or that he is likely to expand into that market.

*Id.* at 224-25.

Once the trademark owner meets its burden of proving confusion, the burden shifts to the defendant to prove the affirmative defense of nominative fair use. This requires the defendant to show:

1. The challenged use of plaintiff’s mark is necessary to describe both plaintiff’s product or service and defendant’s;
2. Defendant has used only so much of plaintiff’s mark as is necessary to describe plaintiff’s products or services; and
3. The defendant’s conduct or language reflects the true and accurate relationship between plaintiff and defendant’s products or services.

*Id.* at 228. This fair use test consists of factors emphasizing the nature of the defendant’s use of the disputed mark over the likelihood the use will cause confusion.

**F. Treating Nominative Fair Use as an Affirmative Defense is Consistent with the Statutory Scheme of Fair Use Provided in the Lanham Act**

Treating the judicially created defense of nominative fair use as an affirmative defense, rather than an alternative test or compliment to the likelihood of confusion or dilution test, fits into the statutory scheme of “fair use” in the Lanham Act.

Statutory fair use, also called “classic” or descriptive fair use, is an affirmative defense under the Lanham Act to a claim of trademark infringement if an accused infringer can prove three elements, namely that the mark was:

1. Not used as a trademark or service mark;
2. Used “fairly and in good faith;” and
3. Used “only to describe” the accused infringer’s goods or services.

*See* 15 U.S.C. § 1115(b)(4). So long as the use complies with the statute, the affirmative defense applies regardless of the strength of the mark along the distinctiveness spectrum. A defendant can prevail on statutory fair use grounds even if a plaintiff has established infringement in the form of likely confusion.

Within the context of dilution, descriptive fair use and nominative fair use are treated the same under the Lanham Act. Descriptive fair use and nominative fair use are statutorily created “exclusions” to dilution.

(3) Exclusions The following shall not be actionable as dilution by blurring or dilution by tarnishment under this subsection:

7
(A) Any fair use, including a nominative or descriptive fair use, or facilitation of such fair use, of a famous mark by another person other than as a designation of source for the person’s own goods or services, including use in connection with—
(i) advertising or promotion that permits consumers to compare goods or services; or
(ii) identifying and parodying, criticizing, or commenting upon the famous mark owner or the goods or services of the famous mark owner.

15 U.S.C. § 1125(c)(3). Treating the judicially-created doctrine of nominative fair use as an affirmative defense fits into the statutory scheme of descriptive fair use as written into the Lanham Act by Congress.

G. Conclusion

A significant split exists among the circuits on whether there should be a separate test for the nominative fair use of a challenged trademark and, if so, how courts should apply that test. Treating nominative fair use as an affirmative defense is the most reasonable approach because it strikes the right balance between protecting a plaintiff’s reputation and its valuable goodwill and protecting speech in the context of product comparisons, commentary, and criticism.

Respectfully submitted,

Donna P. Suchy, Chair
Section of Intellectual Property Law
February 2017
GENERAL INFORMATION FORM

Submitting Entity: Section of Intellectual Property Law
Submitted by: Donna Suchy, Section Chair

1. Summary of Resolution

The resolution calls for the Association to adopt policy supporting recognition of the nominative fair use doctrine as an affirmative defense to allegations of trademark infringement and unfair competition. While most circuits have adopted a test taking nominative fair use into account, not all tests treat the issue of likelihood-of-confusion-based test for infringement separate from the question of whether the use was fair. Some circuits allow issues of consumer confusion to be part of the analysis. But because key factors for determining likelihood of confusion will often unfairly weigh the determination heavily towards a finding of confusion, preferred fair use analysis treats likelihood of confusion separately from the question of the appropriateness of the use.

2. Approval by Submitting Entity

The Section Council approved the resolution on Nov. 11, 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 an Association *amicus* brief, if the Supreme Court grants certiorari in *Int’l Info. Systems Sec. Cert. Consortium, Inc. v. Security Univ., LLC*, 823 F.3d 153, 168 (2d Cir. 2016) or other appropriate judicial forum in a case presenting the issues that are addressed in the policy or for the Association to request that Congress amend the applicable statute.

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, Forums, and the Standing Committees of the Association.

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution and Report concerns the test federal courts apply to determine whether reference to a trademark by someone other than the mark owner, in the context of a commentary, comparison, or criticism of the mark owner’s own goods or services, for example, is a permissible nominative fair use. Treating nominative fair use as an affirmative defense is the best approach for preserving an individual’s right to comment on or express an opinion while referring to the mark owner’s goods or services without fear of sanctions.

The resolution calls for the Association to adopt policy supporting recognition of the nominative fair use doctrine as an affirmative defense to allegations of trademark infringement and unfair competition.

2. Summary of the Issue that the Resolution Addresses

Because key factors for determining the existence of trademark infringement in the form of likely confusion will often unfairly weigh the determination heavily towards a finding of liability, to protect freedom of expression, a proper nominative fair use analysis should treat likelihood of confusion separate from the question of the appropriateness of the use. Nominative fair use should be an affirmative defense required only after the plaintiff has proven likely confusion. Nevertheless, several circuits combine the two tests, leaving the right of others to comment on marks, free from the threat of trademark infringement, in doubt.

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

The resolution addresses the circuit split, favoring the Third Circuit’s approach of treating nominative fair use as an affirmative defense. The resolution will provide a basis for the Association to ask Congress to amend the applicable federal statute or submit a brief if the Supreme Court grants certiorari in Int’l Info. Systems Sec. Cert. Consortium, Inc. v. Security Univ., LLC, 823 F.3d 153, 168 (2d Cir. 2016) or in another appropriate case.

4. Summary of Minority Views

The Section of Intellectual Property Law is unaware of any inconsistent views among ABA entities.

Different views are reflected in the different treatments in different circuits. While all circuits addressing the issue agree the nominative use of another’s mark is not an infringing or diluting use, there is a four-way circuit split as to how the nominative fair use doctrine should be applied: as an affirmative defense to infringement (the approach
favored by the resolution); as an additional factor in the traditional likelihood-of-confusion test for infringement; in a three-factor test that replaces the traditional likelihood-of-confusion test, which places the burden on the plaintiff to show the defendant’s use was not a nominative fair use; or no specified application of a nominative fair use test.
RESOLVED, That the American Bar Association urges each federal, state, and territorial prosecutor’s office to adopt and implement the following internal conviction-integrity policy: When the prosecutor’s office supports a defendant’s motion to vacate a conviction based on the office’s doubts about the defendant’s guilt of the crime for which the defendant was convicted, or about the lawfulness of the defendant’s conviction, the office should not condition its support for the motion on an Alford plea, a guilty plea, or a no contest plea by the defendant to the original or any other charge. Nevertheless, the office may independently pursue any charge it believes is supported by admissible evidence sufficient to prove guilt beyond reasonable doubt, and may seek to resolve that matter with an Alford plea, no contest plea, or guilty plea to that charge.
For more than fifteen years, the American Bar Association has developed policies, rules, and standards directed at promoting the integrity of criminal convictions and remedying wrongful convictions. In 2008, the ABA adopted nine resolutions developed by the Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process. That same year, the ABA amended Rule 3.8 of the Model Rule of Professional Conduct to codify prosecutors’ post-conviction responsibilities to investigate significant new exculpatory evidence and to seek to remedy wrongful convictions. More recently, the 2015 amendments to the Prosecution and Defense Function Standards elaborated upon the expectations for both prosecutors and defense lawyers when new questions are raised about the reliability or lawfulness of a criminal conviction. Among other things, these Standards

1 AM. BAR ASS’N, ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY, REPORT OF THE ABA CRIMINAL JUSTICE SECTION’S AD HOC INNOCENCE COMMITTEE TO ENSURE THE INTEGRITY OF THE CRIMINAL PROCESS (Paul C. Giannelli & Myrna S. Raeder eds., 2006), reprinted in 37 SW. U. L. REV. 763, 766 (2008) (explaining that the rising tide of exonerations prompted the ABA to form an Ad Hoc Innocence Committee in 2002 to propose reforms to ensure the integrity of the criminal justice system) [hereinafter ACHIEVING JUSTICE]. This committee passed nine resolutions, id. at 774, and much of the committee’s work is reflected in the revised Prosecution and Defense Function Standards. The Standards for Prosecution and Defense Functions, first published in 1979, are built on the ethical obligations specific to criminal lawyers in the ABA’s Model Rules of Professional Conduct. See AM. BAR ASS’N CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION § 4–1.1(b) (4th ed. 2015) [hereinafter DEFENSE STANDARDS], http://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition-TableofContents.html (“For purposes of consistency, these Standards sometimes include language taken from the Model Rules of Professional Conduct; but the Standards often address conduct or provide details beyond that governed by the Model Rules of Professional Conduct.”); AM. BAR ASS’N CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3–1.1(b) (4th ed. 2015) [hereinafter PROSECUTION STANDARDS], http://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition-TableofContents.html. The Fourth Edition of the Standard was adopted by the ABA House of Delegates in February 2015. See DEFENSE STANDARDS, supra, Table of Contents; PROSECUTION STANDARDS, supra, Table of Contents. For a discussion of how the standards were revised, see Rory K. Little, The ABA’s Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions, 62 HASTINGS L.J. 1111, 1112–18 (2011) (describing the “challenging and professionally absorbing” process of editing the Criminal Justice Standards for Prosecution and Defense Functions, which have not been revised since 1991).


4 See DEFENSE STANDARDS, supra note 1, § 4–9.4. There is spirited debate about what “innocence” means as a legal concept. Some people distinguish between legal and factual innocence with the idea that those falling into the former category are exonerated based on constitutional or other rights violations while those falling into the latter category are factually innocent in that they did not commit the charged crime. See Cathleen Burnett, Constructions of Innocence, 70 UMKC L. REV. 971, 975–80 (2002); cf. William S. Laufer, The Rhetoric of Innocence, 70 WASH. L. REV. 329, 331 n.4 (1995) (arguing that legal, actual, and factual innocence are “three conceptually distinct determinations of innocence”); Margaret Raymond, The Problem with Innocence, 49 CLEV. ST. L. REV. 449, 456 (2001) (discussing “burden of proof,” factual, and legal innocence). These distinctions, however, obscure the fact that most exonerates, factually innocent or otherwise, are freed because of legal errors, as innocence is rarely recognized as a freestanding claim. See Lara Bazelon, Scalia’s Embarrassing Question, SLATE (Mar. 11, 2015, 9:37 a.m.), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/03/innocence_is_not_cause_for_exoneration Scalia_s_embarrassing_question_is.html. In other words, the categorization is misleading in that it implies there is no overlap when the overlap is practically speaking, almost complete. As Keith Findley, the former director of the Wisconsin Innocence Project, has argued: “[T]hese distinctions are largely meaningless
recognize that “[t]he prosecutor should not defend a conviction if the prosecutor believes the defendant is innocent or was wrongfully convicted, or that a miscarriage of justice associated with the conviction has occurred.” The ABA’s work in this area has responded to, and contributed to, a growing awareness within the legal community of the depth and breadth of the problem of wrongful convictions.5

In response to the growing concern about the problem of wrongful convictions, some prosecutors’ offices have developed conviction integrity units and/or policies regarding the office’s post-conviction responsibilities. The thoughtful development and promulgation of such policies are consistent with the Prosecution Function Standards.6

The proposed resolution, directed at prosecutorial policies regarding post-conviction proceedings, aims to build upon the American Bar Association’s extensive efforts to address the problem of wrongful convictions. In particular, the proposed resolution addresses the situation when, in response to its post-conviction investigation, the prosecutor’s office develops doubts about the integrity of a criminal conviction and takes remedial action by joining in a defense motion to vacate the conviction. In general, it is highly laudable for prosecutors to pursue judicial remedies even when their serious doubts about the convicted defendant’s guilt do not necessarily amount to “clear and convincing evidence” that the defendant was wrongly convicted.7 The resolution addresses the

5  Kimberley A. Clow et al., Public Perception of Wrongful Conviction: Support for Compensation and Apologies, 75 ALB L. REV. 1415, 1415 (2011/2012) (“With over 280 post-conviction DNA exonerations through Innocence Projects in the United States alone and half a dozen Commissions of Inquiry into wrongful convictions in Canada, the public may be more aware of wrongful convictions than ever before.”); Elizabeth S. Vartkessian & Jared P. Tyler, Legal and Social Exoneration: The Consequences of Michael Toney’s Wrongful Conviction, 75 ALB. L. REV. 1467, 1467 (2011/2012) (“In the last twenty years increasing scholarly attention has been devoted to understanding the causes and consequences of wrongful convictions.”).

6  See Prosecution Function Standard 3-2.4(a): “Each prosecutor's office should seek to develop general policies to guide the exercise of prosecutorial discretion, and standard operating procedures for the office. The objectives of such policies and procedures should be to achieve fair, efficient, and effective enforcement of the criminal law within the prosecutor’s jurisdiction.”

7  Rule 3.8(h) of the Model Rules of Professional Conduct requires a prosecutor to seek to remedy a wrongful conviction when the prosecutor “knows of clear and convincing evidence that [the defendant] was convicted of an offense that the defendant did not commit.” However, the “clear and convincing” standard was intended as a disciplinary floor, with the expectation that prosecutors would and do seek remedies based on serious doubts that do not necessarily amount to “clear and convincing evidence.” See Crim. Just. Sec., Am. Bar Ass’n, Report to the House of Delegates (2008), available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_am08104d.authcheckdam.pdf (accompanying proposed A.B.A. Model Rule 3.8(g) & (h); “The Rule and Comments are designed to provide clear guidance to prosecutors concerning their minimum disciplinary responsibilities, with the expectation that, as ministers of justice, prosecutors routinely will and should go beyond the disciplinary minimum.”).
occasional practice of conditioning the office’s support for a judicial remedy on a guilty plea, a no contest plea, or an *Alford* plea\(^8\) to the same charge or a related charge, usually in exchange for a sentence of time-served.

The prosecution’s conditioning of a plea in exchange for its support for a post-conviction remedy raises a host of concerns. One is the risk that the plea will be, or appear to be, coerced by the threat of continued imprisonment based on a conviction of doubtful reliability or legality. Second is the risk that the admission of guilt to the new charge is false, and that the charge itself is unfounded. Both of these concerns arise out of the extraordinary pressure placed on the convicted defendant. The public appearance, if not the reality, will often be that the prosecution insisted on the guilty plea as a “face-saving” measure or to prevent the defendant from pursuing civil remedies because of a wrongful conviction, not because the defendant is genuinely guilty of the new charge. \(^9\) This is especially likely to be the case where the prosecution lacks evidence, or appears to lack evidence, on which guilt could be proven beyond a reasonable doubt. \(^10\) But even when the prosecution believes in good faith that it could secure a conviction, it should not coerce a conviction by opposing a remedy for what it recognizes to be an unreliable or unlawful conviction. Rather, the appropriate measure is to support vacating that conviction, to file the new charge, and to conduct any negotiations anew.

Besides raising serious public policy concerns, the practice is also unfair to the individual defendant. Guilty pleas, no contest pleas, and *Alford* pleas render many people ineligible for transitional housing and other services. It complicates, if not eliminates, their ability to file a claim seeking compensation under state and federal law. Even within the Innocence Movement, these wrongfully convicted individuals are not considered exonerees: The National Registry of Exoneration does not include them on its list. \(^11\) This lack of recognition is psychologically harmful, putting a scarlet asterisk over their insistence that they are innocent.

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\(^{8}\) An *Alford* plea is distinct from a plea of no contest. An *Alford* plea allows a defendant who “professed belief in his innocence” to plead guilty if the State has a factual basis to support the charge. *North Carolina v. Alford*, 400 U.S. 25, 37-38 (1970). By contrast, a no contest plea “is not a plea, in the strict sense of that term in the criminal law, but a formal declaration by the accused, that he will not contend with the prosecuting authority under that charge. When accepted by the court, it becomes an implied confession of guilt, and, for the purpose of the case only, equivalent to a guilty plea, but distinguishable from such a plea in that it cannot be used against the defendant as an admission in any civil suit for the same act.” *Tucker v. United States*, 196 F. 260, 262 (7th Cir. 1912); see also 5 Wayne LaFave et. al., Criminal Procedure section 21.4(a) (2d ed. 1999).

\(^{9}\) As the Court of Appeals recognized in *MacDonald v. Musick*, 425 F.2d 373, 375 (9th Cir. 1970): “It is no part of the proper duty of a prosecutor to use a criminal prosecution to forestall a civil proceeding by the defendant . . ., even where the civil case arises from the events that are also the basis for the criminal charge.”

\(^{10}\) See PROSECUTION FUNCTION STANDARD 3-4.3(a) (“A prosecutor should seek or file criminal charges only if the prosecutor believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support a conviction beyond a reasonable doubt.”).

\(^{11}\) NAT’L REGISTRY OF EXONERATIONS, UNIV. OF MICH. LAW SCH., GLOSSARY 1, (2015), [https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx](https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx).
For all of these reasons, the Criminal Justice Section recommends that the ABA House of Delegates adopt this resolution.

Respectfully submitted,

Matthew Redle
Chair, Criminal Justice Section
February 2017
GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: Matthew Redle, Chair

1. **Summary of Resolution(s).** This resolution calls on prosecutors’ offices to adopt and implement internal conviction-integrity policies when an office supports a defendant’s motion to vacate a conviction based on the office’s doubts about the defendant’s guilt of the crime for which the defendant was convicted, or about the lawfulness of the defendant’s conviction. The resolution also makes it clear that, after the conviction has been vacated, prosecutors retain the discretion to bring charges—including the charges for which the person was wrongfully convicted—if they believe that the new charge, lesser included charge, or overturned and re-filed charge can be proved beyond a reasonable doubt by admissible evidence.

2. **Approval by Submitting Entity.** This resolution was passed by the Criminal Justice Council at the fall meeting in Washington, D.C., November 5, 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?**

   The ABA Criminal Justice Standards – Prosecution Function, address this issue tangentially. This resolution is consistent with those standards.

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

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

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

   If adopted, this policy will be used in local, state, and federal jurisdictions to promote the creation of conviction integrity policies for prosecutor’s offices and to guide the offices in pursuing criminal charges following the grant of a motion to vacate a conviction.

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

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

Concurrent with the filing of this resolution and Report with the House of Delegates, the Criminal Justice Section is sending the resolution and report to the following entities and/or interested groups:

- Commission on Veteran’s Legal Services
- Legal Aid & Indigent Defense
- Commission on Disability Rights
- Special Committee on Hispanic Legal Rights & Responsibilities
- Commission on Homelessness and Poverty
- Center for Human Rights
- Commission on Immigration
- Racial & Ethnic Diversity
- Racial & Ethnic Justice
- Youth at Risk
- Young Lawyer’s Division
- Civil Rights and Social Justice
- Government and Public Sector Lawyers
- International Law
- Federal Trial Judges
- State Trial Judges
- Law Practice Division
- Litigation
- Standing Committee on Ethics and Professional Responsibility
- GP Solo
- National Association of Attorney Generals
- State and Local Government Section
- Center for Professional Responsibility
- National Association of Legal Aid and Defender Association

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

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EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   This resolution calls on prosecutors’ offices to adopt and implement internal conviction-integrity policies when an office supports a defendant’s motion to vacate a conviction based on the office’s doubts about the defendant’s guilt of the crime for which the defendant was convicted, or about the lawfulness of the defendant’s conviction. The resolution also makes it clear that, after the conviction has been vacated, prosecutors retain the discretion to bring charges—including the charges for which the person was wrongfully convicted—if they believe that the new charge, lesser included charge, or overturned and re-filed charge can be proved beyond a reasonable doubt by admissible evidence.

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

   This resolution addresses post conviction motions to vacate convictions and a prosecutor’s decision to pursue the same or new charges, and the policies offices should implement in those proceedings.

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

   If adopted, this policy will be used in local, state, and federal jurisdictions to promote the creation of conviction integrity policies for prosecutor’s offices and to guide the offices in pursuing criminal charges following the grant of a motion to vacate a conviction.

4. **Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified**

   None.
RESOLVED, That the American Bar Association urges federal, state, local, territorial and tribal law enforcement authorities to develop and use, prior to custodial interrogation of suspects, translations of *Miranda* warnings in as many languages and dialects as necessary to accurately and fully inform individuals of their *Miranda* rights.
At the ABA annual meeting in San Francisco in August 2016, the House of Delegates approved Resolution 110 which urged jurisdictions to develop *Miranda* warnings in Spanish. This resolution expands upon Resolution 110 and urges jurisdictions to develop and use warnings prior to custodial interrogation that will accurately and fully inform as many individuals as possible of their *Miranda* rights in languages and dialects they can understand when they are not fluent in English.

The reality is that *Miranda* warnings vary slightly from jurisdiction to jurisdiction throughout the United States. Since the Supreme Court decided *Miranda v. Arizona*, 384 U.S. 436 (1966), there have been effort by the various law enforcement agencies throughout the Nation to agree on one set of words to convey the required warnings. The Supreme Court itself has determined that law enforcement agencies should be given some flexibility in the way they provide the warnings as long as the gist of the warnings is accurately conveyed. *California v. Prysock*, 451 U.S. 1301 (1981). It has clearly stated that it has never required that jurisdictions use the precise words contained in the *Miranda* opinion. *Duckworth v. Eagan*, 492 U.S. 195  (1989). After 50 years of a demonstrated inability to reach unanimity on the English version of the warnings, it seems unlikely that unanimity will be reached on a single translation of the English version of the warnings into Russian, Urdu, German or any language. Therefore, the ABA recommends that each jurisdiction take the English version of the warnings that it uses and translate that version into as many languages as are likely to be necessary to deal with suspects who are interrogated in custody and who are not fluent in English.

Many courts around the country have recognized the importance of providing information to individuals who are not fluent in English. For example, the District of Columbia adopted a District of Columbia Courts Language Access Plan (FY 2014-2015). The Introduction to the plan sets forth its goals:

Access to justice is paramount to guarantee people their rights under the law. Comprehensive, qualified language assistance enables individuals who have limited English proficiency (LEP) to have meaningful access to justice before the court as well as with respect to all other court-mandated programs and ancillary services. Pursuant to the DC Courts Strategic Plan (2013-2017), the Courts strive to promote access to justice for all persons:

**Goal 2.A**
The D.C. Courts will ensure access to court services for all persons.

**Goal 2.A.3**
Enhance assistance to the public by training court personnel on the unique needs of special populations such as the elderly, self-represented persons, and individuals with physical and mental health issues, and by providing services to meet the needs.
Goal 2.B
The D.C. Courts will promote understanding of court proceedings and processes through plain language initiatives, language interpretation and translation services and other approaches.

Goal 3.A.2
Foster understanding and respect for all persons by developing and implementing an Employee Code of Conduct and trainings on cultural competency, civility, generational differences, and the value of diversity.

It is the policy of the DC Courts to provide meaningful access at no cost to LEP persons in all court proceedings and operations. All personnel shall provide free language assistance services to LEP individuals whom they encounter or whenever an LEP person requests language assistance services. All personnel will inform members of the public that language assistance services are available free of charge to LEP persons and that the Court will provide these services to them.”

The resolution reflects the belief that it is not sufficient to postpone dealing with language issues until individuals are brought to court. Individuals with limited English proficiency need to have a fair opportunity to exercise their rights when they are arrested. Providing Miranda warnings in a language that they can understand is essential to their being able to protect their privilege against self-incrimination.

The development of warnings in all the languages that individuals speak is likely to be a challenge. California indicates why this is so: “Over 200 languages are spoken in California. Of the state’s 37 million residents, nearly 40 percent speak a language other than English at home. Of the 40 percent, an estimated 6.7 million residents speak or understand English ‘less than very well.’” Judicial Council of California Fact Sheet (July 2014), http://www.courts.ca.gov/documents/Fact_Sheet-_Court_Interpreters.pdf

The reality is that all law enforcement agencies will have to find ways to communicate with LEP individuals. The Vera Institute of Justice explains:

The number of immigrants living within the United States is growing. Unlike in the past, however, many are settling in suburbs, small towns, and rural areas, bringing new cultures and languages to places previously unaccustomed to such cultural diversity. As a result, many law enforcement agencies around the nation are dealing with unfamiliar languages as they work to ensure public safety. Overcoming these challenges is essential. When language barriers prevent immigrants from, say, reporting a crime or describing a suspect, it becomes harder for officers to provide protection or gather evidence. And police often work in high pressure situations where communication needs to happen quickly.
Although the focus of the Resolution is assuring that *Miranda* warnings are adequately communicated to all arrestees who are interrogated, the reality is that police departments that recognize the importance of being able to communicate in languages other than English will increase the likelihood that their policing is more effective at the same time that constitutional rights are protected:

As first responders for public safety, law enforcement personnel face a special burden. Police officers cannot perform their duties well when they cannot communicate with the people they serve. When language barriers prevent individuals from reporting a crime or describing a suspect, for example, it becomes that much harder for police to gather evidence or provide protection. As one officer said, “Language discordance is our biggest challenge when serving the Hispanic community. The language barrier makes it very, very frustrating to get our work done.” Language barriers can even threaten the safety of officers: being unable to communicate with an armed suspect can dangerously exacerbate a life-or-death situation.

Id. at 4.

It makes good sense for police departments to develop at the outset warnings in language other than English that correspond to the larger populations of LEP individuals in a particular community. There is good reason for jurisdictions to share translations with each other in an effort to reduce the costs of translations.

Respectfully submitted,

Matthew Redle
Chair, Criminal Justice Section
February 2017
GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: Matthew Redle, Chair

1. Summary of Resolution(s). This resolution calls for the translation of *Miranda* warnings into in as many languages and dialects as necessary to accurately and fully inform individuals of their *Miranda* rights.

2. Approval by Submitting Entity. This resolution was passed by the Criminal Justice Council at the ABA annual meeting in San Francisco, August 6, 2016.

3. Has this or a similar resolution been submitted to the House or Board previously? No, however, a related resolution was adopted by the House of Delegates, in relation to Spanish translations only, at the annual meeting in August 2016.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? As mentioned in 3, above, this resolution goes beyond the resolution adopted in 2016 and requires translation of *Miranda* warnings into all languages, not only Spanish.

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

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

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. If adopted, this policy will be used in local, tribal, territorial, state, and federal jurisdictions to promote translation of *Miranda* warnings.

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


10. Referrals.
    Center for Professional Responsibility
    Civil Rights and Social Justice Section
    Commission on Veteran’s Legal Services
Disability Rights Commission
Hispanic Legal Rights & Responsibilities Commission
Commission on Homelessness and Poverty
Center for Human Rights
Commission on Immigration
Racial & Ethnic Justice
Civil Rights and Social Justice
Government and Public Sector Lawyers
International Law Section
Federal Trial Judges
GP Solo
Judicial Division
Law Practice Division
Litigation Section
National Association of Attorney Generals
National Legal Aid and Defender Association
Racial & Ethnic Diversity in the Profession Commission
Standing Committee on the Federal Judiciary
Standing Committee on Legal Aid & Indigent Defense
State and Local Government Section
Young Lawyer’s Division
Youth at Risk Commission

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution calls for the translation of Miranda warnings into as many languages and dialects as necessary to accurately and fully inform individuals of their *Miranda* rights.

2. Summary of the Issue that the Resolution Addresses

This resolution addresses the need for Miranda warnings to be translated into the language the person speaks and understands best, in order to ensure that the individual understands the rights and knowingly invokes or waives them.

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

If adopted, this policy will be used in local, state, and federal jurisdictions to promote translation of *Miranda* warnings.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

None.
RESOLVED, That the American Bar Association urges the Food and Drug Administration ("FDA") to update its current policy requiring deferment of blood donations from men who have sex with men for one year after the donor’s most recent sexual encounter with a man to a deferral policy based on an individual risk assessment or other similar policy that does not result in disparate treatment of men who have sex with men;

FURTHER RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal governments to enact and adopt legally sound and medically safe blood donation policies that do not result in disparate treatment of men who have sex with men.
REPORT

I. Overview and Recommendation

On June 12, 2016, the United States experienced one of the largest mass shootings in history—49 people were killed and 53 wounded at Pulse, a gay nightclub in Orlando, Florida, when Omar Mateen, a 29-year-old U.S. citizen launched an attack in the name of Islamic State terrorist group. After the shooting, blood banks in the region advertised a need for donors, according to the New York Times. In Orlando, a very large portion of those willing donors, even those with rare blood types, could not donate any blood. This is due to the Food and Drug Administration’s (“FDA”) policy that requires the deferment of blood donations from men who have sex with men (“MSM”) for one year after the donor’s most recent sexual encounter with a man (“MSM One-Year Policy”). In the aftermath of the shooting, any man who had had sexual relations with another man in the last year— i.e. essentially, any gay or bisexual man—was prohibited from helping his own community during this crisis. The American Bar Association recognizes the importance of assistance to victims in the aftermath of terrorist attacks, mass shootings, or other disasters, including the availability of blood and non-discriminatory policies to encourage the broadest possible source of blood donors, the saving of the highest number of lives, and providing a means for the victims and community to cope with their grief.

Donating blood is one of the extremely rare and valuable positive actions that one can take to help address meaningless carnage like the Pulse nightclub massacre. The gay blood ban is a lingering negative stigma that exacerbates the pain of such public tragedies.

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4 Hudack, Id., “‘We have to be here for our community. I made sure that I came down her so our friends and family can make it okay,’ said [a member of the public] who worked at the nightclub for five years. She fought off tears thinking of the victims.”
5 Sam Levin, Activists urge US to end ban on gay men donating blood after Orlando massacre Gay men can’t donate blood to support those suffering from terror attack, Experts and advocates hope instance will push the government to end ban, (June 2016), THE GUARDIAN, https://www.theguardian.com/us-news/2016/jun/14/orlando-pulse-shooting-gay-blood-ban-lgbt-rights.
Victims are one of the primary reasons we have a criminal justice system. We protect their identities and contact information. We provide them with special services (counseling, housing, medical treatment). Many laws require restitution be paid to victims. Programs have been set up for restorative justice between victims and offenders. Following crimes and tragedies, victims require special services to cope, manage grief, and begin to heal and move on. This is even more important in the wake of terrorist attacks or mass shootings. The victims in these scenarios are not just those who lost their lives or are injured, it is the entire community. The friends, families, and neighbors of those who lost their lives are still victims.

In the aftermath of September 11, people all over the nation lined up to donate blood. It was a way for people to do something to help. To find a way to heal, to assist in the grieving process. Many articles specifically cite to donating blood as a means for victims and communities to deal with grief following such incidents, and in fact, recommend it. The criminal justice system is frequently involved in care for victims, and rightfully so. However, this interest must extend to all victims, of all races, ethnic background, religions, and sexual orientations. A victim is a victim, and requires care. The ABA responded to this by passing policies on survivor rights for same sex partners of victims and matters involving the ability of first responders to respond to mass killings.

Louie, of GMHC, (an AIDS and HIV group in New York – www.gmhc.org) noted the gay community’s “long history of banding together, especially in the face of tragedy.” Following the most lethal mass shooting in U.S. history, he said, “some people will want to donate blood, and won’t be able to.” Based on current estimates of the number of MSM in the United States, there would be about 4.2 million more eligible blood donors in the U.S if the FDA were to lift the ban entirely. Thus complete removal of the FDA restrictions on MSM has the potential to help save the lives of 1.8 million people annually.

Dr. Paul Volberding, director of the AIDS Research Institute at the University of California, San Francisco, said the policy requiring gay men to stay celibate for 12 months before donating blood was “not really supported by the facts.”

The FDA policy is “overly conservative,” agreed Dr. Susan Buchbinder, director of the HIV research program for San Francisco General Hospital. “I don’t think it’s appropriate given current testing technology.” She added: “I can’t imagine that additional pain that people feel when they go in trying to help care for the survivors of this massacre and are unable able to donate blood because of a regulation that I don’t believe is supported by the science.” “The testing methods [for blood-borne diseases such as HIV] are just amazingly accurate. We don’t miss infected

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7 [117 (S&LGL)] Approved (142; 103) (“RESOLVED, That the American Bar Association supports increased federal funding to state, local and territorial governments, including public authorities, to enable these “first responders” to prevent terrorist attacks and increase their readiness to respond to any attacks that do occur.”)
people,” Volberding told STAT. “The window from the exposure to testing positive is as short as a few days.”

On June 14, Illinois Rep. Mike Quigley put out a press release that included comment from Rep. Barbara Lee and other House Democrats on the FDA’s blood donation policy for MSM. Like Lee, New York Rep. Sean Patrick Maloney called the FDA’s policy a “bigoted, backward and unscientific regulation.”9 California Rep. Xavier Becerra also implied science wasn’t the basis for the FDA’s policy when he said, “Science should be the basis for our policy, not sexual orientation.” Quigley, the vice chair of the Congressional LGBT Equality Caucus, also called on FDA Commissioner Robert Califf “to change the policy to be based on the risk of transfusion-transmissible infections, and not on sexual orientation.” In other words, an individual risk-based assessment.

In addition, Florida Rep. Alcee L. Hastings said, “We have the technological capabilities to screen blood donations to ensure they are safe for use, regardless of one’s sexual orientation.” According to the FDA’s own revised blood donation policy document, “The prevalence of HIV infection in male blood donors who reported that they were MSM was determined to be 0.25%, which is much lower than the estimated 11-12% HIV prevalence in the population of individuals reporting regular MSM behavior … This indicates that considerable self-selection likely took place in individuals who presented to donate.”

The ABA has adopted numerous policies over the years addressing LGBTI rights and discrimination, first responder and medical services following a terrorist attack, victim rights and protections, as well as policies regarding needle exchange programs. The ABA even adopted policy on care and services for the victims of hurricane Katrina. Some of these policies are set forth below, others are attached. There is a long history of the ABA House of Delegates adopting resolutions pertaining to the protection of victim rights. In 2014, the House of Delegates adopted a policy that states,

“RESOLVED, That the American Bar Association “[r]ecognizes that lesbian, gay, bisexual and transgender (LGBT) people have a human right to be free from discrimination, threats and violence based on their LGBT status and condemns all laws, regulations and rules or practices that discriminate on the basis that an individual is a LGBT person.”

The ABA has also addressed the issue of HIV infections, adopting a policy that states: “RESOLVED, That in order to further scientifically based public health objectives to reduce HIV infection and other blood-borne diseases, and in support of its long-standing opposition to substance abuse, the American Bar Association supports the removal of legal barriers

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11 2014 AM 114B
to the establishment and operation of approved needle exchange programs that include a component of drug counseling and drug treatment referrals."12

After the massacre and public outcry over the gay blood ban, on July 26, 2016, the FDA requested public comments to address the MSM One-Year Policy. Specifically, the statement read:

The agency wants comments supported by scientific evidence such as data from research, regarding potential blood donor deferral policy options to reduce the risk of HIV transmission, including the feasibility of moving from the existing time-based deferrals related to risk behaviors to alternate deferral options, such as the use of individual risk assessments. 13

Responding to the FDA request for public comment, this resolution recognizes three demonstrable facts:

1. The percentage of gay men who transmit HIV is extremely low, and the percentage of gay men who are living with HIV is approximately 2,466,700 out of almost 22.5 million so that the MSM Policy impacts and discriminates against a potential donor pool of 19,939,660 people who are deferred but not living with HIV.
2. All blood is tested for HIV so that anyone’s donation that tests positive will not be a threat to blood recipients.
3. Other nations use individual risk assessments, and the United States can do likewise.

II. History

Academics and advocates have written extensively on the history of the MSM blood donation ban.14 This policy against blood donations from MSM has its roots in the AIDS crisis of the early 1980s when HIV/AIDS was spreading rampantly among gay men. During that time, there was a great amount of uncertainty and lack of scientific research surrounding AIDS, and health workers discovered that the underlying virus—HIV—was transmissible through blood and blood products. Thus, the transfusion of blood carrying HIV would infect the recipient of that blood. Accordingly, the FDA imposed various deferment policies throughout the 1980s and early 1990s until it settled on a lifetime deferment in 1992 (“MSM Lifetime Policy”).15

Since 1992, there have been extensive advancements in HIV awareness, testing, and prevention among MSM, as well as the mandatory testing of blood donations for HIV prior to transfusions. Nonetheless, the FDA maintained the 1992 MSM Lifetime Deferment Policy until December 2015. In its recent policy announcement, the FDA changed the deferment period from a lifetime ban to a deferment of one year since the MSM had his most recent sexual encounter with a man. Nonetheless, the immense progress we have witnessed in prevention, testing, and awareness has rendered even the one-year deferment period unnecessary.

In December 2015, the FDA published the “Revised Recommendations for Reducing the Risk of Human Immunodeficiency Virus Transmission by Blood and Blood Products” (“Revised Recommendations”). This announced a change from what amounted to a lifetime ban on blood donations by MSM to a one-year deferral period (“MSM One-Year Policy”) from a donor’s most recent sexual encounter with another man.

III. All Donated Blood Is Tested

All blood donated in the United States is subject to mandatory tests to detect various transmittable diseases—including HIV. One such form is nucleic acid testing (“NAT”), a molecular testing technique introduced in the late 1990s and early 2000s to reduce the risk of infections transmitted through blood transfusions. NAT can identify HIV in a blood sample within two weeks of the date of infection. Blood donations in the United States are tested by pooling together samples of blood from 6-16 donors for the same NAT. Then, if HIV is present in one of the samples, none of the samples may be used in a future transfusion and all are discarded.

The FDA asserts that including donations from MSM’s in these pools for testing increases the likelihood of contamination and poses a grave risk to the blood supply. However, the FDA also reports in its Revised Recommendations that the rate of HIV infection in MSM blood donors is only 0.25%. Blood collection organizations could mitigate the minute risk posed by these donations by continuing to screen potential donors and separating donations made by MSM donors from those made by individuals determined to be at a lower risk. If donations from MSM donors

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17 Rekha Hans & Neelam Marwaha, Nucleic acid testing-benefits and constraints, 8. 1, 2 (Jan-Jun 2014). ASIAN J. TRANSFUSION SCI
18 “RNA detection by NAT, using TMA in minipools of 16 (as described for HBV and HCV testing), closes the window period between infection and the detection of antibody by about 4-7 days.” American Red Cross, Blood Testing, AMERICANREDCROSS.COM, http://www.redcrossblood.org/learn-about-blood/what-happens-donated-blood/blood-testing.
19 Revised Recommendations at 9.
20 Id.
were tested together, this would not increase the risk of contamination to donations from non-MSM donors. Because MSM’s already make up approximately 2.6% of blood donors in the United States due to non-compliance with the deferment period, and because blood collection organizations already screen potential donors using questions about sexual history, this method would not be very costly or logistically difficult to implement.

According to the Food and Drug Administration Website:

The FDA reviews and approves all test kits used to detect infectious diseases in donated blood. After donation, each unit of donated blood is required to undergo a series of tests for infectious diseases, including: Hepatitis B and C viruses; Human Immunodeficiency Virus, Types 1 and 2; Human T-Lymphotropic Virus, Types I and II; Treponema pallidum (Syphilis). Additionally, FDA recommends testing for the following infectious diseases: West Nile Virus and Trypanosoma cruzi (Chagas disease). Donated blood must be quarantined until it is tested and shown to be free of infectious agents.

The FDA has revisited its donor deferral recommendations to reduce the risk of transmitting human immunodeficiency virus (HIV) several times over the past 10 years. In 2010, the ACBSA found that the deferral policy for men who have had sex with other men (MSM) was suboptimal and it recommended that studies be conducted to better inform a potential policy change. Once the studies were completed in 2014, the FDA along with other Public Health Service agencies, including the Centers for Disease Control and Prevention, Health Resources and Services Administration, National Institutes of Health, and the Office of the Assistant Secretary for Health, assessed the results of the studies. In November 2014, these results were presented to the HHS Advisory Committee for Blood and Tissue Safety and Availability (the committee that succeeded the ACBSA), which, after considering the results, recommended that a shorter deferral period was appropriate.

Prior to the current guidance, FDA’s recommendations were outlined in the April 1992 memorandum, “Revised Recommendations for the Prevention of Human Immunodeficiency Virus (HIV) Transmission by Blood and Blood Products.” Based on the evidence now available, FDA has changed its recommendation from the indefinite deferral for MSM to a 12 month blood donor deferral since last MSM contact. For other behavioral deferrals such as commercial sex workers and injection drug use, insufficient data are available to support a change to the existing deferral recommendations at

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22 Id.
IV. Too Many are Unnecessarily Deferred

In the Revised Recommendations, the FDA briefly explained the current risk of HIV infection associated with male-to-male sexual contact, as well as commercial sex work (“CSW”) and injection drug use (“IDU”). These risks are the basis for the one-year deferral. As relevant to MSM, the FDA explained:

> Among persons living with HIV in 2012, CDC estimates that 56% were MSM (including MSM who were also IDU). MSM remain at increased risk of HIV infection. In 2010, the majority of new HIV infections were attributed to male-to-male sexual contact: 63% among all adults and 78% among men, indicating that male-to-male sexual contact remains associated with high rate of HIV exposure.

While these numbers appear very high, the FDA fails to contextualize the numbers against the overall population of the United States. A review of the proportions of the total MSM population and those living with HIV is informative.

The FDA states that MSM who had male-to-male sexual contact within the last five years constitute approximately 4% of the overall population of the United States. According to the CDC, “Gay and bisexual men accounted for an estimated 83% (29,418) of HIV diagnoses among males and 67% of all diagnoses” in 2014. The U.S. Census Bureau estimates that the total population of the United States was 320,090,857 people on January 1, 2015. Accordingly, the 2014 population of MSM who had had male-to-male sexual contact within the last five years was approximately 12,803,634 (rounded to the nearest one). Thus, the 29,418 HIV transmissions in the MSM community in 2014 constituted only 0.2% of the MSM population.

Additionally, the Revised Recommendations state that an estimated 10-11% of MSM are living with HIV. The total number of MSM (beyond those who have had male-to-male sexual contact within the last 5 years) is estimated to be 7% of the total population. Using the 320,090,857 figure above, this amounts to 22,406,360 members of the MSM community in total, so the total number of MSM who are living with HIV is estimated at 2,466,700. Accordingly, the MSM Policy impacts a potential donor pool of 19,939,660 people who are deferred but not living with HIV.

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25 Id. at 3-4.
26 Id. at 4.
27 Id.
30 Revised Recommendations at 6.
31 Id. at 4.
These simplified calculations show that the figures relied upon by the FDA appear to inflate the risk of MSM HIV transmission by failing to contextualize it. The FDA imposes a one-year deferral for MSM based on the 0.2% transmission total within the total MSM population, which directly impacts the 19,939,660 potential MSM donors who do not live with HIV.

V. Other Nations Use Individual Risk Assessments

“Argentina ended its ban on gay and bisexual men donating blood last year, and Italy has also transitioned away from a total ban on gay men, instead assessing individuals based on risk.”\(^32\) In the case of Argentina, its Health Minister explained the change: “Health Minister Daniel Gollán said the decision was ‘scientifically and technically accurate.’”\(^33\)

Italy has been using individual assessments since 2001, as the following excerpt explains:

In 2001, a new decree of the Ministry of Health changed the previous provisions. A new policy was introduced based on an individual risk assessment (IRA) of candidate donors with regards to at-risk sexual behaviour. … The policy introduced a distinction between "risk" and "high risk" sexual behaviour to be individually assessed in each blood donor, both male and female, regardless of sexual orientation. "Risk" sexual behaviour includes: having a new sexual partner whose sexual behaviour is unknown, having ever had one occasional sexual relationship with a person whose sexual behaviour is unknown, having had casual sex with an HIV- and/or HBV- and/or HCV-infected partner. A blood donor, whether MSM or heterosexual, having engaged in any of these behaviours is deferred for 4 months from the exposing event. "High risk" behaviour is intended as a behaviour exposing the donor to a high risk of acquiring transfusion-transmissible infections and includes: usual/recurrent (occurring repeatedly) sex with more than one heterosexual or MSM partner whose sexual behaviour is unknown, receiving or exchanging sex for money, use of injecting drugs, usual/recurrent sex with a partner positive for syphilis and/or HIV and/or HBV and/or HCV. A blood donor, whether MSM or heterosexual, having engaged in any of these behaviours is permanently deferred. The physician in charge of blood donor selection is responsible for adjudicating either "risk" or "high risk" behaviour.\(^34\)

A study of the effects of the change demonstrated “that the implementation of the IRA policy in 2001 did not significantly affect either the incidence or prevalence of HIV infection among blood donors or the distribution of MSM and heterosexuals among HIV antibody-positive blood donors.”\(^35\)

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\(^32\) Sam Levin, \textit{id.}\(^33\) \url{http://time.com/4038742/argentina-gay-blood-donation/}, quoting \textit{Slate}.\(^34\) Barbara Suligoi, Simonetta Pupella, Vincenza Regine, Mariangela Raimando, Claudio Valati & Giuliano Grazzini \textit{Blood Transfusion}, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3729137/\(^35\) \textit{Id.}.
VI. Conclusion

HIV is spread as a result of risky behaviors. The FDA should move away from categorizing all MSM as at-risk. After all, MSM blood from a man in a multi-year monogamous homosexual marriage is less risky than a sexually active heterosexual female who engages in at-risk behaviors. Other nations—not the U.S.—are leading by example to put into place risk assessments for donors. These assessments focus on risky behaviors NOT the identity of the potential donor.36 Ergo, the FDA should move to an “Assess and Test” screening system.37 This new proposed system would provide that:

After assessing the donor’s personal sexual practices, a deferral may be given only for those in whom a risk of infection has been identified, such as individuals who have engaged in frequent, unprotected sex with multiple partners since their prior HIV test. For this risky group, a short period of abstinence may be appropriate to allow for reliable test results. For donors who are not high risk, the deferral should be eliminated altogether.38

The FDA’s MSM One-Year Policy on blood donation has disparate and damaging effects on MSM. The Pulse Nightclub massacre evidences this harm, not only because MSM were unable to donate needed blood, but also because the MSM One-Year Policy created secondary harm to those affected by the tragedy who found themselves in a position in which they were specifically excluded from helping fellow members of their community. The MSM One-Year Policy fails to consider all pertinent alternatives that would meet the same goals.

Respectfully submitted,

Matthew Redle
Chair, Criminal Justice Section
February 2017

36 Sam Levin, id.
38 Id.
GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section
Submitted By: Matthew Redle, Chair

1. **Summary of Resolution(s).** This resolution calls for the repeal and/or modification of the discriminatory prohibitions on blood donations by gay men and for the FDA to develop non-discriminatory but medically safe means of accepting blood donations and testing for infectious diseases.

2. **Approval by Submitting Entity.** This resolution was adopted by the Criminal Justice Council shortly after the fall meeting in Washington, D.C., November 11, 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 is consistent with the 2014 resolution calling for the repeal of all regulations and legislation that discriminate on the basis of sexual orientation.

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

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

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** If adopted, this policy will be used in local, state, and federal jurisdictions to promote the development of non-discriminatory but medically safe blood donation policies.

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

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

10. **Referrals.**
    - Public Service and Diversity
    - Commission on Veteran’s Legal Services
    - Legal Aid & Indigent Defense
    - Commission on Disability Rights
    - Special Committee on Hispanic Legal Rights & Responsibilities
    - Commission on Homelessness and Poverty
    - Center for Human Rights
    - Commission on Immigration
    - Racial & Ethnic Diversity
    - Racial & Ethnic Justice
    - Youth at Risk
Young Lawyer’s Division
Civil Rights and Social Justice
Government and Public Sector Lawyers
Health Law
International Law
Federal Trial Judges
State Trial Judges
Law Practice Division
Litigation
Science & Technology
Commission on Sexual Orientation and Gender Identity
GP Solo
National Association of Attorney Generals
State and Local Government Section
Center for Professional Responsibility
National Association of Legal Aid and Defender Association
AIDS Coordinating Council

(NEED TO VERIFY NAMES OF COMMITTEES; ALSO INCLUDE THE FOLLOWING ENTITIES: GP SOLO; NATIONAL ASSOCIATION OF ATTORNEY GENERALS; STATE AND LOCAL GOVERNMENT SECTION; CENTER FOR PROFESSIONAL RESPONSIBILITY; NATIONAL ASSOCIATION OF LEGAL AID AND DEFENDER ASSOCIATION; AIDS COORDINATING COUNCIL)

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution calls for the repeal and/or modification of the discriminatory prohibitions on blood donations by gay men and for the FDA to develop non-discriminatory but medically safe means of accepting blood donations and testing for infectious diseases.

2. Summary of the Issue that the Resolution Addresses

This resolution addresses the discriminatory impact of the current FDA blood donation regulations, and the disparate and damaging impact these policies have on victims and the victim community.

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

If adopted, this policy will be used in local, state, and federal jurisdictions to promote reformation of FDA policies to ensure that blood donation regulations are both medically safe/sound, but also implemented in a non-discriminatory fashion.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

None.
RESOLVED, That the American Bar Association urges Congress to amend Section 1862(a)(1) of the Social Security Act (42 U.S.C. 1395y) to broaden the scope of Medicare coverage by allowing for coverage for items and services that are reasonable and necessary: (a) for the diagnosis, prognosis or treatment of current or future conditions, illnesses, or injuries; or (b) to improve the functioning of a malformed or impaired body member or function; or (c) to mitigate against the future onset or severity of any prognosticated illness, injury or condition.

FURTHER RESOLVED, That the American Bar Association urges Congress to define “prognosis” as the forecasting of the likelihood of or probable course of any current or future illness, injury or condition.
Background

Historically, most medical treatments have been designed for the average (already sick) patient and, as a result of this approach, the success of a single treatment can vary. Precision medicine is an innovative approach to medical treatment that takes into account individual differences in people’s genes, environments, and lifestyles. The promise of precision medicine is delivering the right treatments, at the right time, to the right person. It provides medical professionals the resources they need to target the specific treatments of the illnesses that patients may encounter. Most importantly, it can and will be able to reasonably predict an individual’s propensity for developing future conditions that may be prevented or mitigated with current or future treatments.

This approach to healthcare will likely lead to increased efficiency for providers and improved results for patients. Many diagnostic tests and targeted therapies are already available for patient use, and in fact, some of these tests and therapies have already been approved for payment by the federal Medicare program which requires medical necessity and reasonableness. By amending Section 1862(a)(1) of the Social Security Act (42 U.S.C. § 1395y), more predictive and precise medical interventions will be reimbursable, and thus accessible. A healthier population benefits everyone, including payers.

I. Current State of Precision Medicine and its Benefits

The National Institutes of Health (NIH) defines precision medicine as "an emerging approach for disease treatment and prevention that takes into account individual variability in genes, environment, and lifestyle for each person."\(^1\) Precision medicine enables providers and researchers to predict more accurately which illnesses will occur and what treatment and prevention strategies will work in different groups of people. It is in contrast to a "one-size-fits-all" approach, in which disease treatment and prevention strategies are developed for the average person, with little, if any, consideration for the genetic differences between individuals.

Although the term “precision medicine” is relatively new, the concept has been a part of healthcare for many years. For example, a person who needs a blood transfusion is not given blood from a randomly selected donor; instead, the donor’s blood type is matched to the recipient to reduce the risk of complications. Although examples can be found in several areas of medicine, the role of precision medicine in day-to-day healthcare is relatively limited – in part because today’s reimbursement models, generally, restrict its potential.

Precision medicine depends on an intimate understanding of how human genes and the proteins they encode function. For example, certain genes normally produce proteins that contribute to an individual’s well-being. But an abnormal gene can result in a protein that causes a specific disease. Certain therapeutics—often called “actionable therapies”—are available for use against abnormal gene and protein development, a type of “variant,” in genomics terms. While

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\(^1\) National Institutes of Health, “About the Precision Medicine Initiative Cohort Program,” found at: https://www.nih.gov/precision-medicine-initiative-cohort-program.
more and more is being learned with respect to identifying problematic genes, currently there are a limited number of proven actionable therapies. So a gap exists between the available knowledge and actionable therapies. This gap highlights the importance of changing reimbursement methodologies to encourage innovation and invention in both genetic testing and, importantly, the corresponding actionable therapies.

While precision medicine offers the potential for life-saving advances in the diagnosis and treatment of a wide variety of medical conditions, such as Alzheimer’s, diabetes, and congestive heart failure, one of the areas of greatest potential is in the prevention and treatment of cancer. For some cancer patients, precision medicine will lead to less, but more effective, treatment. An example is the recent report on the medical test, OncotypeDx. The report found that this test provides molecular information that enables 16% of early-stage breast cancer patients to skip chemotherapy. This and other kinds of precision testing of tumors, which enhance understanding of the genetic profile of a patient’s cancer, hold the promise of enhancing effective treatment strategies.

A recent article on the status of, and challenges to, the development of precision medicine illustrates the difference that new genomic diagnostic techniques can make. The article cites a man diagnosed with leukemia who had not responded well to standard chemotherapy. But after a routine genomic profile test, his physicians were able to predict that his leukemia might be sensitive to a specific pill. This prediction proved to be accurate, allowing the patient to undergo successful chemotherapy and a bone marrow transplant. Unfortunately, lack of reimbursement continues to impede access to promising treatments.

The potential of precision medicine is recognized at the highest levels of government. In his 2015 State of the Union address, President Obama launched the Precision Medicine Initiative (PMI), a bold new research effort to revolutionize health care and the treatment of disease. The President stated, “I want the country that eliminated polio and mapped the human genome to lead a new era of medicine – one that delivers the right treatment at the right time.” This initiative would help to “give all of us access to personalized information we need to keep ourselves and our families healthier.”

Subsequently, on February 26, 2015, Sylvia M. Burwell, Secretary, U.S. Department of Health and Human Services (Department), made the following statement on the President’s FY 2016 Budget before the Committee on Energy and Commerce, Subcommittee on Health:

**Advancing Precision Medicine.** The FY 2016 Budget includes $215 million for the Precision Medicine Initiative, a new cross-Department effort focused on developing treatments, diagnostics, and prevention strategies tailored to the genetic characteristics of individual patients. This effort includes $200 million for the NIH to launch a national research cohort of a million or more Americans who volunteer

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to share their information, including genetic, clinical and other data to improve research, as well as to invest in expanding current cancer genomics research, and initiating new studies on how a tumor’s DNA can inform prognosis and treatment choices [emphasis added].

The Department will also modernize the regulatory framework to aid the development and use of molecular diagnostics, and develop technology and define standards to enable the exchange of data, while ensuring that appropriate privacy protections are in place.

With the support of Congress, this funding would allow the Department to scale up the initial successes we have seen to date and bring us closer to curing the chronic and terminal diseases that impact millions of Americans across the county.6

The PMI Cohort Program intends to extend precision medicine to all diseases by building a national research cohort of one million or more U.S. participants. Many factors have converged to make now the right time to begin a program of this scale and scope — Americans are extremely engaged in improving their health and participating in health research, electronic health records have been widely adopted, genomic analysis costs have dropped significantly, data science has become increasingly sophisticated, and health technologies have become mobile.7 These goals are being realized. Most recently, the NIH and ONC announced the program “Sync for Science,” which enables patients to donate their medical data to the PMI and improve the sharing of data between researchers.

Further, the use of precision medicine in the prevention and treatment of cancer, for example, is high on the list of priorities of the federal government. During this 2016 State of the Union Address, the President called on Vice President Biden to lead a new, national “moonshot” initiative to eliminate cancer. This was shortly followed by an announcement of a $1 billion initiative to jumpstart this program.8 The “moonshot” will work to accelerate research efforts and break down barriers to progress by enhancing data access, and facilitating collaborations with researchers, doctors, philanthropies, patients and patient advocates, and biotechnology and pharmaceutical companies. A particular goal of the “moonshot” is to attain a greater understanding of the genetic changes that occur within the cancer cell, and in surrounding and immune cells responding to the cancer, which will advance both immunotherapy and targeted drug therapy and help lead to an increased ability to enhance patient response to therapy.9

A change in the potential reimbursement available for precision medicine furthers this laudable goal. Specifically, invention and innovation follow what Medicare reimburses. Consequently, to the extent that prognostic tests and their resulting interventions become reimbursable, the likelihood of achieving the “moonshot” increases.

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9 Id.
II. Proposal

As discussed, our proposal would change the definition of Medicare’s “medical necessity” to include reasonable and necessary prognostic tests and actionable interventions before illness manifests. It is our hope that this change would also spill over to the commercial market. Whether a commercial insurance plan covers genetic testing and resulting interventions depends on several factors - but the most important is the strength of evidence supporting a test’s analytical and clinical validity, and clinical utility. A major limiting factor, however, is the lack of industry standardization. Specifically, while a particular commercial insurer may be willing to invest in genetic testing and mitigating actionable therapies across its insured population to reduce the likelihood of future diseases, it may be reluctant to do so unless other insurers in the industry also act. A move by CMS to amend the definition of medical necessity to include such interventions would be instructive to commercial insurers. This is why a change in Medicare’s definition of medical necessity is critical. As the government’s role in healthcare continues to grow, the lines between public payors and private payors have blurred. More and more private payors base their coverage and reimbursement rates for services on what CMS defines as reimbursable under Medicare. Consequently, if Medicare adopts reimbursement methodologies that pay for prognostic tests and actionable therapies, we anticipate that commercial insurers will follow. At this time, however, we are not proposing a direct change or mandate on commercial insurers.

The general definition of medical necessity can be found in 42 U.S.C. § 1395y(a)(1) of the Social Security Act. This language is 50 years old and states: “no payment may be made under part A or part B for any expenses incurred for items or services which … are not reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member.” Our proposal would revise this definition to incorporate key components of precision medicine – specifically the concept of testing for future illnesses (using genomic medicine) and interventions to “prevent or mitigate” against those prognosticated illnesses or injuries. Importantly, the revised definition would retain the “reasonable and necessary” concepts that CMS would be able to expand upon during rule making. The proposed new definition follows:

PROPOSED AMENDMENT TO SECTION 1862(a)(1)

EXCLUSIONS FROM COVERAGE AND MEDICARE AS SECONDARY PAYER

Sec. 1862. [42 U.S.C. 1395y] (a) Notwithstanding any other provision of this title, no payment may be made under part A or part B for any expenses incurred for items or services—

(I)(A) which, except for items and services described in a succeeding subparagraph or additional preventive services (as

described in section 1395x(ddd)(1) of this title), are not reasonable and necessary for the diagnosis, prognosis or treatment of current or future conditions, illnesses or injuries or to improve the functioning of a malformed or impaired body member or function or to prevent or mitigate against the future onset or severity of any prognosticated illness, injury or condition. For purposes of this Section, “prognosis” means the forecasting of the likelihood of or probable course of any current or future illness, injury or condition.

(B) ... 

The potential benefits of precision medicine are just beginning. It is our hope that this change will spur further progress in this exciting new medical technology.

Respectfully submitted,

C. Joyce Hall, Chair
ABA Health Law Section
February 2017
1. Summary of Resolution.
   The purpose of this Resolution is to expand Medicare’s definition of medically necessary services to include aspects of precision medicine – specifically interventions that could mitigate medical issues which are genetically indicated, but not yet expressed.

2. Approval by Submitting Entity. The ABA Health Law Section approved submission of this Resolution on November 16, 2016.

3. Has this or a similar resolution been submitted to the House or Board previously? Not to our knowledge.

4. What existing American Bar Association policies are relevant to this Resolution and how would they be affected by its adoption? None that we are aware of.

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). None that we are aware of.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. Submission to various members of the United States Congress involved in health care policy matters.

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


10. Referrals. None.
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
At a time of unprecedented scientific and medical breakthroughs, precision medicine has the capability to accurately diagnose human diseases, predict individual susceptibility to disease based on genetic, environmental, and lifestyle factors, detect the onset of disease at early stages, pre-empt its progression, target treatments, and increase the overall efficiency and effectiveness of the health care system. This progress has brought us major treatment advances that will improve patient outcomes, with the greatest impact being felt by those facing serious and life-threatening conditions and unmet medical needs.

The emergence of precision medicine is eliciting growing excitement and optimism among patients, providers, and policymakers as a new wave of targeted therapies emerges that demonstrate the potential to improve patient outcomes and health care delivery. Current federal regulations restrict reimbursement to only those treatments and procedures that are “medically necessary.” Because the existing definition of “medical necessity” focuses solely on those who are already sick, it excludes treatments (both existing and those in development) that could mitigate medical issues which are genetically indicated, but not yet expressed. In short, precision medicine allows, for the first time, the potential to accurately predict illnesses before they occur. And when cost effective interventions are possible, these treatments should be covered and reimbursable for Medicare payment purposes in order to ensure patient access.

With this Resolution, the American Bar Association will urge Congress to adopt a new definition Medicare coverage to specifically include procedures reasonable and necessary for the prognosis or treatment of future conditions, illnesses, or injuries. The American Bar Association will further urge Congress to define “prognosis” as the forecasting of the likelihood of or probable course of any current or future illness, injury or condition.

2. Summary of the Issue that the Resolution Addresses
Because Medicare’s current definition of what is medically necessary (and thus, reimbursable) excludes interventions that could mitigate medical issues which are genetically indicated, but not yet expressed, this Resolution will urge Congress to adopt a broader statutory definition.

3. Please Explain How the Proposed Policy Position will address the issue
In this Resolution the American Bar Association will support a change in the Social Security Act’s definition of what is medically necessary and thus reimbursable to include aspects of precision medicine - specifically interventions that could mitigate medical issues which are genetically indicated, but not yet expressed.
4. **Summary of Minority Views**
While we have not performed an exhaustive search of possible minority views, we suspect that such views would focus on the potential increases in costs for covering the discussed precision medicine interventions, etc. For this reason the proposed text also includes the caveat “reasonable and necessary” as to what will be considered medically necessary.
RESOLVED, That the American Bar Association approves the Uniform Employee and Student Online Privacy Protection Act, promulgated by the National Conference of Commissioners on Uniform State Laws, as an appropriate Act for those states desiring to adopt the specific substantive law contained in the act.
REPORT

UNIFORM EMPLOYEE AND STUDENT ONLINE PRIVACY PROTECTION ACT

Summary

Today, most individuals have online accounts of some type. These include social media accounts, bank accounts, and email accounts, among others. Generally, when someone asks for access to the login information for, or non-public content of, a personal online account, an individual is free to say “no.” But that is less true in the employment and educational contexts. Employers may have the power to coerce access to personal online accounts of individuals who are, or seek to become, their employees. Similarly, educational institutions may have coercive power over those who are, or seek to become, their students. When an employer or educational institution asks for the login information for, or non-public content of, an employee’s or student’s online account, that person may find it difficult to refuse. In recent years, there have been a number of reports of incidents where employers and educational institutions have demanded, and received, such access.

The Uniform Employee and Student Online Privacy Protection Act (UESOPPA) provides a uniform model for states to adopt. Its principal goal is to enable employees and students to make choices about whether, and when, to provide employers and educational institutions with access to their personal online accounts. To this end, the act prohibits employers and public and private post-secondary educational institutions from requiring, coercing, or requesting that employees or students provide them with access to the login information for, or non-public content of, these accounts. It further prohibits employers and educational institutions from requiring or coercing an employee or student to add them to the list of those given access to the account (to “friend” them, in common parlance), though it does not prohibit them from requesting to be added.

UESOPPA is divided into 10 sections. Section 1 is the short title. Section 2 defines important terms used in the act. Section 3 delineates protections for employee protected personal online accounts and creates exceptions to these protections. Section 4 delineates protections for student protected personal online accounts and creates exceptions to these protections.

Section 3 and Section 4 are both divided into four subsections: subsection (a), which prohibits an employer (or educational institution) from taking certain actions that would compromise the privacy of an employee’s (or student’s) protected personal online account; subsection (b), which creates exceptions to these prohibitions; subsection (c), which provides additional protections for employee (or student) content if an employer (or educational institution) accesses employee (or student) content for a purpose specified in subsection (b)(3); and subsection (d), which provides additional protections when an employer (or educational institution), by virtue of lawful system monitoring technology, gains access to login information for an employee’s (or student’s) protected personal online account. Section 5 provides remedies for violations of the act, including a private right of action. The remainder of the act contains standard provisions generally included by the Uniform Law Commission.
The work of the Drafting Committee is available at www.uniformlaws.org, the website of the Conference. A direct link to the Uniform Employee and Student Online Privacy Protection Act is available here. [http://www.uniformlaws.org/shared/docs/social media privacy/ESOPPA_Final_Act_2016.pdf]

Respectfully submitted,

Richard T. Cassidy
President
National Conference of Commissioners on Uniform State Laws
February 2017
GENERAL INFORMATION FORM

Submitting Entity: National Conference of Commissioners on Uniform State Laws

Submitted By: Liza Karsai, Executive Director

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

   The National Conference of Commissioners on Uniform State Laws (NCCUSL) requests approval of the Uniform Employee and Student Online Privacy Protection Act by the American Bar Association (ABA) House of Delegates.

2. **Approval by Submitting Entity.** The National Conference of Commissioners on Uniform State Laws granted final approval to the Act at its July 2016 Annual Meeting.

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

   No.

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

   No known existing Association policies relevant to this Resolution that would be affected.

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

   Not applicable.

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

   The Uniform Employee and Student Online Privacy Protection Act has not yet been enacted in any jurisdiction.

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

   The National Conference of Commissioners on Uniform State Laws will present the Act to state legislatures for consideration and enactment.

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

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

None.

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

The ABA Advisor for the Uniform Employee and Student Online Privacy Protection Act was Frank H. Langrock.

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

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

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(802) 864-8144 (office)
rcassidy@uniformlaws.org
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

That the American Bar Association approves the Uniform Employee and Student Online Privacy Protection Act, promulgated by the National Conference of Commissioners on Uniform State Laws, as an appropriate Act for those states desiring to adopt the specific substantive law contained in the act.

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

The growing use of social media has implications in both employment and educational contexts. Indeed, employers and educational institutions now sometimes ask current and/or prospective employees and students to grant the employer or school access to social media or other name and password protected accounts. The Uniform Employee and Student Online Privacy Protection Act addresses both employers’ access to employees or prospective employees’ social media and other online accounts accessed via username and password or other credentials of authentication as well as post-secondary educational institutions’ access to students’ or prospective students’ similar online accounts.

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

Approval of the Uniform Employee and Student Online Privacy Protection Act by the American Bar Association House of Delegates would demonstrate to states that the Act is an appropriate approach for addressing the issues described above.

4. **Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified**

The Uniform Employee and Student Online Privacy Protection Act is based on sound public policy that in many instances will provide stronger privacy protections than what is currently provided in existing state laws. However, some privacy advocates would have preferred different policy choices and may be dissatisfied with the final result. There is no known opposition within the American Bar Association.
RESOLVED, That the American Bar Association approves the Revised Uniform Unclaimed Property Act, promulgated by the National Conference of Commissioners on Uniform State Laws, as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.
REPORT

REVISED UNIFORM UNCLAIMED PROPERTY ACT

Summary

The Uniform Law Commission first approved a uniform act on unclaimed property in 1954 – the Uniform Disposition of Unclaimed Property Act. Since then, the act has been revised in 1966, 1981 (then renamed the Uniform Unclaimed Property Act), and 1995. The unclaimed property laws of most states are based in whole or in part on one of the multiple versions of the Uniform Act.

After nearly 20 years, the ULC has once again revised the act, approving the Revised Uniform Unclaimed Property Act (RUUPA) in 2016. The Revised Act provides necessary updates that keep up with technological innovation and recognizes new forms of property not included in prior versions of the Act.

Like its predecessors, the Revised Act provides rules for determining when property is actually abandoned, and when it is, for determining which state gets it.

The most common types of unclaimed property are bank accounts and bank deposits, life insurance proceeds, trust and fiduciary accounts, securities, wages, amounts owed in business to business and consumer transactions, class action proceeds, money orders and travelers checks.

The key parties involved in the distribution and processing of unclaimed property are the apparent owner, holder, and administrator. The apparent owner is the person whose name appears on the records of a holder as the owner of property held, issued, or owing by the holder. The holder is the person obligated to hold for the account of, or to deliver or pay to, the owner property that is subject to the RUUPA. If the property is “abandoned” under the Act, then the holder must report the property to the administrator, the state official responsible for administering the RUUPA.

Article 2 of RUUPA establishes rules to determine if property is abandoned. Under the Act, property is presumed abandoned if it is unclaimed by its apparent owner after a specified period of time (the dormancy period). The length of the dormancy period depends on the type of property. RUUPA establishes dormancy periods for some types of property that were not covered in previous versions of the Act, including health savings accounts, custodial accounts for minors, stored-value cards, and more. RUUPA also clarifies that property is not presumed abandoned if the apparent owner shows an interest in the property during the dormancy period designated in the Act.

Article 3 establishes three priority rules to determine which state may take custody of property that is presumed abandoned. The first-priority rule grants custody to the state of the last-known address of the apparent owner, according to the holder’s records. The second-priority rule grants custody to the state of corporate domicile of the holder, if there is no record of the address of the apparent owner, or the address is in a state that does not permit the custodial taking of the
property. The third-priority rule permits a state administrator to take custody of the property if (1) the transaction involving the property occurred in the state; (2) the holder is domiciled in a state that does not permit the custodial taking of the property; and (3) the last-known address of the apparent owner or other person entitled to the property is unknown or in a state that does not permit the custodial taking of the property.

Under Articles 4 and 5, the holder of property presumed abandoned must send a notice to the apparent owner about the property and must file a report with the administrator about the property.

Articles 6 and 7 describe how the administrator may take custody of unclaimed property and how it may sell it. Except for securities, the RUUPA allows the administrator to sell the property three years after receipt, but it is not required to do so. Securities may be sold three or more years after the administrator receives the security and gives the apparent owner notice. The administrator is prohibited from selling military medals or decorations awarded for military service. Instead, the administrator may deliver them to military veterans’ organizations or governmental entities.

Article 8 directs the administrator to deposit all funds received under the Act into the general fund of the state. Article 8 also requires the administrator to maintain records of the property.

Article 9 addresses various scenarios in which the administrator of one state would need to pay or deliver unclaimed property to another state, either because there is a superior claim to the property by the other state or the property is subject to the right of another state to take custody.

Article 10 explains how an administrator may request property reports and how an administrator may examine records to determine if a person has complied with the Act. Article 11 gives holders the right to seek review of determinations made by the administrator about their liability to deliver property or payment to the state. Article 12 imposes a penalty on a holder that fails to report, pay, or deliver property within the time required by the Act. Civil penalties may also apply if the holder enters into a contract to evade an obligation under the Act.

Article 13 of the RUUPA governs the enforceability of an agreement between an apparent owner and a “finder” to locate and recover property. The Act requires a signed record between the parties to designate the finder as an agent of the owner. Article 14 explains what information is considered confidential under the Act. The Article describes when confidential information may be disclosed under the Act, and the steps that an administrator must take in the event of a security breach.

The Revised Uniform Unclaimed Property Act makes a number of improvements to earlier versions of the uniform act in order to keep up with technological changes and new forms of property.

The work of the Drafting Committee is available at www.uniformlaws.org, the website of the Conference. A direct link to the Revised Uniform Unclaimed Property Act is available [here](http://www.uniformlaws.org/shared/docs/unclaimed%20property/RUUPA_Final%20Act%202016.pdf)
Respectfully submitted,

Richard T. Cassidy, President
National Conference of Commissioners
On Uniform State Laws
February 2017
GENERAL INFORMATION FORM

Submitting Entity: National Conference of Commissioners on Uniform State Laws

Submitted By: Liza Karsai, Executive Director

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

   The National Conference of Commissioners on Uniform State Laws (NCCUSL) requests approval of the Revised Uniform Unclaimed Property Act by the American Bar Association (ABA) House of Delegates.

2. **Approval by Submitting Entity.**

   The National Conference of Commissioners on Uniform State Laws granted final approval to the Act at its July 2016 Annual Meeting.

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

   No.

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

   The ABA previously approved a resolution to support the 1995 version of the Uniform Unclaimed Property Act.

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

   Not applicable.

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

   The Revised Uniform Unclaimed Property Act has not yet been enacted in any state legislature.

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

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

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

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

None.

10. **Referrals.**

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

    The ABA Advisor for the Revised Uniform Unclaimed Property Act was Ethan D. Millar.

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.)

    Richard T. Cassidy, NCCUSL President
    Rich Cassidy Law
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    Burlington, VT 05401-1124
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    rcassidy@uniformlaws.org
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

That the American Bar Association approves the Revised Uniform Unclaimed Property Act promulgated by the National Conference of Commissioners on Uniform State Laws in July 2016 as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

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

The National Conference of Commissioners on Uniform State Laws first drafted uniform state legislation on unclaimed property in 1954. Since then, revisions have been promulgated in 1981 and again in 1995. Many technological developments in recent years as well as new types of potential unclaimed property, such as gift cards, are not addressed in the most current uniform act. The Revised Uniform Unclaimed Property Act updates provisions on numerous issues, including escheat of gift cards and other stored-value cards, life insurance benefits, securities, dormancy periods, and use of contract auditors.

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

Approval of the Revised Uniform Unclaimed Property Act by the American Bar Association House of Delegates would demonstrate to states that the Act is an appropriate approach for addressing the issues described above.

4. **Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified**

A variety of views were expressed during the drafting process, and compromises were reached. Express opposition to the Revised Uniform Unclaimed Property Act is unknown at this time.
RESOLVED, That the American Bar Association approves the Uniform Unsworn Domestic Declarations Act, promulgated by the National Conference of Commissioners on Uniform State Laws, as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.
REPORT

UNIFORM UNSWORN DOMESTIC DECLARATIONS ACT

Summary

The Uniform Unsworn Domestic Declarations Act (UUDDA) allows the use of unsworn declarations made under penalty of perjury in state court proceedings. Under the Act, the declarant must be physically located within the boundaries of the United States while making the declaration.

If the state’s law either requires or allows use of a sworn declaration, an unsworn declaration made under the Act’s rules has the same effect as a sworn declaration.

The UUDDA does not apply to:

• A deposition;
• An oath of office;
• An oath required to be given before a specified official other than a notary public;
• A declaration to be recorded under the state’s real estate law; or
• An oath required by the state’s law relating to self-proved wills.

Under the UUDDA, an unsworn declaration must be in substantially the following form:

I declare under penalty of perjury under the law of [insert name of the enacting state] that the foregoing is true and correct.

Signed on the ___ day of _______, at ___________________________.
(month) (year) (city or other location, and state)

_______________________
(printed name)

________________________
(signature)

The UUDDA builds upon the Unsworn Foreign Declarations Act (UUFDA), which covers unsworn declarations made outside the boundaries of the United States. States that have enacted the UUFDA should enact the Uniform Unsworn Domestic Declarations Act; states that have not enacted the UUFDA should enact the Uniform Unsworn Declarations Act.

The work of the Drafting Committee is available at www.uniformlaws.org, the website of the Conference. A direct link to the Uniform Unsworn Domestic Declarations Act is available here. [http://www.uniformlaws.org/shared/docs/unsworn domestic declarations/UUDDA_Final Act_2016.pdf]
Respectfully submitted,

Richard T. Cassidy, President
National Conference of Commissioners
On Uniform State Laws
February 2017
1. **Summary of Resolution(s).**

The National Conference of Commissioners on Uniform State Laws (NCCUSL) requests approval of the Uniform Unsworn Domestic Declarations Act by the American Bar Association (ABA) House of Delegates.

2. **Approval by Submitting Entity.**

The National Conference of Commissioners on Uniform State Laws granted final approval to the Act at its July 2016 Annual Meeting.

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

No.

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

The ABA previously approved a resolution to support the related act, the Uniform Unsworn Foreign Declarations Act.

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

Not applicable.

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

The Uniform Unsworn Domestic Declarations Act has not yet been enacted in any state legislature.

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

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

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

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

None.

10. **Referrals.**

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

The ABA Advisor for the Uniform Unsworn Declarations Act was Richard W. Morefield.

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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rcassidy@uniformlaws.org
EXECUTIVE SUMMARY

1. Summary of the Resolution

That the American Bar Association approves the Uniform Unsworn Domestic Declarations Act promulgated by the National Conference of Commissioners on Uniform State Laws in July 2016 as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

2. Summary of the Issue that the Resolution Addresses

The purpose of the Uniform Unsworn Domestic Declarations Act is to permit the use of unsworn declarations made under penalty of perjury in state courts. Under the Act, unsworn declarations may be used in lieu of affidavits, verifications, or other sworn court filings if they were made under penalty of perjury and use substantially similar language to the model form provided. The Act builds upon the Uniform Unsworn Foreign Declarations Act (UUFDA), which covers unsworn declarations made outside the United States. States that have the UUFDA should enact the Uniform Unsworn Domestic Declarations Act; states that have not enacted UUFDA should enact the Uniform Unsworn Declarations Act.

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

Approval of the Uniform Unsworn Domestic Declarations Act by the American Bar Association House of Delegates would demonstrate to states that the Act is an appropriate approach for addressing the issues described above.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

None known.
RESOLVED, That the American Bar Association urges lawmakers at federal, state, and local levels to work with the legal profession to collaborate in the identification and removal of legal barriers to veterans’ access to due and necessary assistance, including housing, education, employment, treatment, benefits, and services, particularly those provided by the Department of Veterans Affairs; and

FURTHER RESOLVED, That efforts to increase access to justice for veterans contemplate and include, where appropriate, veterans’ caregivers, especially on those matters for which the caregiver acts on behalf of the veteran.
Since 1918, the American Bar Association has supported protecting the rights of those who answer the call of duty. Through World Wars I and II up through the present, the ABA has helped shape the legal landscape as it applies to veterans and the administration of their due benefits. Several recent ABA policy positions are cited in the General Information form accompanying this report and others are under study within the ABA. Despite this history and the ABA’s success in identifying visible legal threats, there remain policy gaps that prevent the ABA from speaking to unanticipated novel challenges or to support new progress, even when the basis for doing so may be identical to the basis for existing policy. This policy resolution seeks to remedy these gaps and to focus the attention of the legal profession, as well as law and policy makers, on those matters for which lawyers play a unique role and have the largest impact.

Supporting veterans in this way is not merely an effort to be patriotic. The rule of law, itself, and the integrity of the justice system depend on the success of those who sacrificed to defend our borders, our citizens, and U.S. allies and partners. The legal profession owes veterans more than our gratitude. The ABA Veterans Legal Services Initiative was founded, in large part, to address this obligation and to help ensure the best possible legal outcomes for veterans. Accordingly, this resolution seeks to address two significant obstacles for veteran access to justice.

As a preliminary note, for the purposes of this resolution, a “veteran” is any person who performed military service. This very broad inclusive definition does not match that of the federal and some state governments, e.g., 38 U.S.C. 101(2) defines veteran for federal programs as “a person who served in the active military, naval, or air service and who was discharged or released under conditions other than dishonorable.” The ABA holds a more inclusive view for two reasons. First, despite legislative intent and more than 30 years of practice in including persons with “Other Than Honorable” (OTH) discharges in homeless programs, the Department of Veterans Affairs has more recently interpreted OTH to be equivalent to “dishonorable” for the purposes of its definition, thereby excluding as many as 9,000 veterans from shelter programs. Legislative efforts are underway to dictate that veterans with an OTH discharge be eligible for such programs. Second, there are many legal services programs around the country serving different veteran populations. Some veterans who had received a dishonorable discharge may be able, through a legal services program, to have their discharge upgraded to OTH. There are also efforts underway within the VA to authorize a review of the character of one’s discharge, rather than simply accept a discharge determination as dispositive of what assistance the veteran may be eligible into the future. Accordingly, the ABA means to be inclusive of existing legal services programs supporting veterans, including these. Absent subsequent express policy to the contrary, however, the ABA does not take the view that government benefits and services for veterans be expanded to all who served in the military.

CLAUSE ONE: ELIMINATING LEGAL BARRIERS

RESOLVED, That the American Bar Association urges lawmakers at federal, state, and local levels to work with the legal profession to collaborate in the identification and removal of
systemic legal barriers to veterans’ access to due and necessary assistance, including housing, education, employment, treatment, benefits, and services, particularly those provided by the Department of Veterans Affairs

This intensified focus on veterans is needed as military service can ironically produce consequences that prevent military and veteran families from accessing state and federal rights or benefits that their service helps guarantee. This can be for a range of reasons, including laws written without the unique circumstances of military life and service in mind; a failure to recognize special protections that already exist to account for these circumstances; and the presence of obstacles or consequences that flow from service, including mental or physical injury, and even the character of a person’s discharge from the military. Any obstacle to veterans accessing their rights and benefits can quickly destabilize the health and security of that individual and his or her family.

The legal profession should work, therefore, to prevent these obstacles through education and advocacy; intervene on the service member’s or veteran’s behalf to prevent or mitigate harm; and to restore veterans suffering adverse circumstances due to these barriers, especially when denials concern critical and life-sustaining services. These efforts are most effective when working, where reasonably possible, with the state and federal Departments of Veterans Affairs, local service providers, and counsel who are both expert and experienced.

To further understand how legal issues impact returning service members and create issues for veterans, consider the following story:

Tim served three tours of duty -- one in Iraq and two in Afghanistan. He is a decorated veteran whose personal life first began to unravel while he was deployed. Facing a divorce, custody battle, and suffering from undiagnosed post-traumatic stress disorder, (PTSD) Tim was unable to keep a job and meet his financial obligations. When he finally sought legal help, Tim was bounced from one well-meaning information or referral system to another, each one having strict guidelines on whom they could help and for what kinds of matters. Tim made several appointments with different legal offices, leaving some issues, such as his out-of-state custody matter, unresolved until a lawyer in the other state could be found. Despite his best efforts, the complexity of his family law, financial and health issues left him stressed, overwhelmed and hopeless. Tim’s self-medication of his PTSD with alcohol eventually spiraled out of control until he was living on the streets where his PTSD-related temper soon landed him in jail. The impact of Tim’s crisis also affected his family, who struggled to live without a father, husband, and son.

This story is a composite example of how unresolved legal difficulties can escalate and destabilize a veteran’s life. As this story portrays, many legal issues for veterans can actually arise during active duty service. While service members and veterans fall under separate laws administered and enforced by separate agencies, treating the person means understanding and appreciating the continuum between the two. Unresolved legal matters for service members can detract from mission accomplishment or render the person non-deployable. During and after transition to civilian life, leaving these same matters unresolved can operate to separate the veteran from benefits and destabilize his or her home and job security. While hypothetical, Tim’s story represents fairly common challenges faced by veterans and service members every day.
Through a coordinated effort to strengthen and increase access to existing legal assistance opportunities, and by developing a national awareness and engagement, Tim and others like him can have better, happier outcomes.

The vital importance of the connection between access to timely legal services and improved outcomes and transitions to civilian life cannot be overstated. Untreated or unresolved problems tend to only worsen over time until a breaking point occurs -- often at rock bottom. Yet, lawyers and other service providers empowered with the right network can break these cycles, tackle the complex legal and logistical crises, and resolve problems holistically.

Since 9/11, there has been strong interest and growing support from community organizations engaged in assisting veterans. This national dynamic is noted in the recent white paper “After the Sea of Goodwill” issued by General Martin E. Dempsey, the former Chairman of the Joint Chiefs of Staff. The white paper highlights how our communities have responded to support the needs of returning service members, veterans and their families, and elevates the need for improved national strategy across the public and private sectors. A successful national strategy requires a holistic approach characterized by cooperation, collaboration and integration of services that meet veteran, service member and family needs. The paper also notes that the overall patchwork of community support is insufficient, unconnected and declining as needs continue.

“In fact, recent empirical evidence suggests the sea of goodwill has already begun to wane. The need remains, however for substantive long-term efforts to assist veterans and their family members as they transition out of uniform and reintegrate into their civilian communities.”

This waning popularity message can be heard on Capitol Hill, with lawmakers expressing that enough "surge funding" has been provided to lift veterans out of poverty and that funding levels for veteran support programs should return to maintenance levels despite the 40,000 veterans who are experiencing homelessness and new ones added each day including women, some with children. As we reintegrate more than 2 million service members from post-9/11 military operations, and bring U.S. ground forces to their lowest level since before World War II, we face significant gaps in our capacity to support reintegration from military to civilian life. Without some interconnected response -- monitored and coordinated on a national level -- these men and women will continue to struggle to have their legal needs resolved, leaving them vulnerable to escalating problems that put their families, income and health at risk, not to mention the ability for those in transition to successfully reintegrate back into civilian life.

So what kinds of legal issues are we talking about? One major challenge for the legal community has been that veterans who have a civil legal issue, may also have a criminal matter as well. Or if someone comes in for assistance with a disability claim, it may also represent her sole source of income and any delay in a response can jeopardize her health or home. Lawyers serving veterans should be sufficiently versed across criminal, civil and administrative practice areas to identify issues and/or have a network in place to make appropriate referrals for matters they do not personally handle. If the lawyer is not prepared in this way, the veteran may ultimately be no better off for the limited, specialized support received. Civil legal aid funding streams often prohibit the use of funds for criminal defense, but a plan should be in place for a Veteran to get help with such matters. Even in Congress, however, the separation of civil and criminal legal
matters is changing, with some new congressional programs authorizing funds to be available for both, in support of the veteran’s success, because some issues come hand-in-hand. (ADD KEY VETERANS’ ISSUES PARAGRAPH HERE) Let us look at the key issues service members and veterans face.

**Veteran Homelessness**

In its most recent survey of homeless veterans and their healthcare providers (The Community Homelessness Assessment Local Education Networking Groups (CHALENG) Survey), the VA revealed that veteran homelessness is often triggered by an unaddressed legal problem. The survey reported that five of the top ten needs of homeless male veterans and four of the top ten unmet needs of female veterans were specific to legal issues. For example, housing eviction and foreclosure, assistance with a child support matter, quashing outstanding warrants and fines, having stale offenses expunged from one’s record, and even helping to replace a veteran’s lost photo identification literally can make the difference between that person living under a bridge and living in a home with a job and supportive services. Other unmet needs of homeless veterans, including military discharge status upgrades, guardianships, and credit issues, can also benefit from the assistance of a lawyer. With each veteran able to return to home life and contributing to his or her community, society benefits from the wealth of skills and character common to the men and women who served. Through legal support working in tandem with housing, employment and other service providers, the number of homeless veterans has been cut in half since 2010, to just under 40,000 today. This is still a shamefully high number, but we are starting to understand what works. Accordingly, at the request of the VA General Counsel, the ABA Commission on Homelessness and Poverty launched the Homeless Veteran Justice Initiative, which has been a catalyst to capture and support best practices and programs around the country. Among other things, the Initiative supports Veteran Treatment Courts, Homeless Court at Stand Down (projects that bring the judges and their courts to the homeless veteran community), and projects like the one described under Child Support below.

**Incarceration and Criminal Misbehavior**

No one knows the precise number of veterans already in prison, but the most recent estimates by the Department of Justice Bureau of Justice Statistics (BJS) suggests that the number is just over 180,000, or 8% of the total prison population, most of whom are men from the Vietnam Era. This is a drop from prior years and eras, and while the reasons are not clear, veterans behind bars do not tend to fit stereotypes of those in confinement. For example, the BJS study also revealed that three quarters of veterans behind bars received an honorable or general discharge, and past studies by the Department showed veterans were better educated, and possess other factors that cut against stereotypes of who populates our jails and prisons. Incarcerated veterans are more likely than non-veterans to be first-time offenders, yet on average receive longer sentences than non-veterans (among property and public-order offenders, veterans’ sentences averaged nearly two years longer than non-veterans). Those running the court systems know there are more veterans coming into courts, and jails that are already at capacity. There are evidence-based efforts underway to reverse these trends.
Some of the offenses that land veterans in jail are violent crimes, with which there is a correlation to veterans who saw combat and may be suffering from PTSD. These veterans struggle against anger and emotional outbursts, which can also be hallmarks for traumatic brain injury. In fact, new research has confirmed that these veterans in particular are more than twice as likely as other veterans to be arrested for criminal misbehavior. The study, published in the *Journal of Consulting and Clinical Psychology*, for the first time draws a direct correlation between combat PTSD, the anger it can cause, and criminal misbehavior. Several studies conclude that between 30% to 40% of the approximately 1.6 million veterans of Iraq and Afghanistan will "face serious mental health injuries" like PTSD and problems from traumatic brain injuries. Experts in the field report both those conditions are linked to anti-social and criminal behavior. These conditions can be treated successfully, however, and violence prevented. Yet, criminal convictions due to this service-connected conduct can be the very thing that separates a veteran from needed treatment.

**Consumer Fraud and Identify Theft**

Veterans are frequently targeted by predatory lenders and are more vulnerable to financial problems than the rest of the population. This is especially true for those returning from active duty.

Congress, the Department of Defense, Federal Trade Commission (FTC), and Consumer Financial Protection Bureau, among others, have documented and warned of abusive, usurious, and predatory financial schemes targeting veterans and service members for their guaranteed paychecks, benefits, and pensions. Examples include fraudulent or abusive loan products and terms resulting in interest and fees equaling 400-900% of the original loan; education “mills” designed only to drain veteran education benefits, and identity theft.

The FTC reports that identity theft complaints from active U.S. military and veterans are twice the number reported by the general U.S. population. In fact, 30 percent of active military and veterans place identity theft as their No. 1 complaint, compared with 14 percent of the general U.S. population. The non-profit Privacy Rights Clearinghouse reports that since 2005, nearly 700 government and military data breaches have occurred, with 45 million veterans and active-duty military personnel ID records compromised. Identity theft can result in severe amounts of illicit debt, ruined credit, and can make it virtually impossible to obtain personal loans, mortgages or even jobs. Lawyers can help restore a person’s identity and reputation, clear fraudulent debts and discharge others, enforce state and federal protections, and return a veteran’s life to normal.

**Child Support**

In examining the greatest legal challenges homeless veterans face, the Department of Veterans Affairs, joined by service providers on every level, identified child support at the top of the list. For homeless veterans, arrearages often result in a substantial portion of their benefits going to help satisfy the outstanding obligation rather than treatment for the veteran. Often, these arrearages are not sought by the other parent but were the silent and automatic consequence of the other parent seeking welfare support when the veteran may have gone “off the grid.” With so much of their benefits apportioned to satisfy these debts, however, the veteran most often
chooses to go back to a more familiar life on the streets at which point no one is receiving assistance and families are kept apart. At the request of the Department of Veterans Affairs and the Office of Child Support Enforcement at the Department of Health and Human Services, the ABA joined in a new partnership launched in nine cities to address the problem. The project connects all stakeholders to ensure the obligations are addressed, such as payments tied to actual income, thus preserving the veteran’s treatment and services. The successful partnership is cited as Strategic Initiative #1 in “Opening Doors,” the Administration’s plan to end homelessness, and it is expected to go national. Lawyers and judges working with homeless veterans and those at-risk of homelessness should be aware of these issues and contemplate how or by whom such matters might be addressed.

Veteran Benefits

Benefits for veterans include disability compensation, pension programs, free or low-cost medical care, education assistance, survivor benefits, and PTSD support. When access to these benefits is denied, legal assistance may be needed for a resolution. Over the past decade, the country also saw the gradual but alarming rise in the number of backlogged disability claims to over 800,000, even as the VA processed over 1 million claims each year. The backlog means that these veterans were waiting a minimum of 125 days for a response to their benefits claims, more than 40,000 of which were two years or older. The unavailability of this income, especially for a veteran with service-connected injury, can cause major complications to health and home stability. At the request of the White House Counsel, the ABA met with officials from the Veterans Benefits Administration and the Office of the General Counsel over several months to explore whether the legal profession could play a larger role in helping to clear the claims backlog and assist veterans who did not benefit from representation of a lawyer or a veteran service organization. The meetings led to the establishment of a unique pro bono initiative based on the ABA’s successful Military Pro Bono Project. This initiative, the Veterans Claims Assistance Network (VCAN), saw cooperation between the VA and the ABA in addressing claims filed in three U.S. cities to connect unrepresented veterans with free legal assistance. The pilot was a success, and the lessons learned have opened doors for other legal assistance providers to work more effectively with the VA. Both the ABA and the VA look forward to the continuation of VCAN in the near future, because as the backlog of original claims has fallen dramatically, the backlog of claims now waiting a determination on appeal has topped 400,000. Benefits claims are highly specialized matters and require a great familiarity with the VA process and regulations. Those seeking to represent a veteran must first become accredited by the VA. These considerations are sometimes an obstacle to a lawyer assisting a veteran in these matters, but they are frequently central to the best interests of the veteran client. Lawyers seeking to represent veterans should consider seeking VA accreditation, for which required CLE training is available, including at no cost by some providers. It also helps if the lawyer establishes a relationship with an attorney more experienced in claims and related matters, or even a veteran service organization that provides such services.

Reintegration

Legal issues can add complications and delay or prevent reintegration into civilian life.
Additional issues face veterans as they transition from their military careers into their communities. A substantial number of legal problems today’s veterans face initially arose during active duty. In addition to responding to legal crises, lawyers help prevent them. Today, lawyers work with service members to begin creating, compiling and correcting medical and personnel records that will help prevent legal crises in years to come.

**Employment**

With the drawdown of troops, many veterans are given 30 to 60 days’ notice to leave the military and start a new life. The emotional, physical, and behavioral challenges for veterans are unique and amidst any personal tumult, the veteran must now also navigate the job market. It can be difficult for veterans to translate their military background or technical training into civilian jobs that require comparable expertise, and for Guard and Reserve, they often return to find their previous jobs and businesses gone in violation of their rights. According to the Department of Labor Veterans’ Employment and Training Services program that enforces such rights, nearly two-thirds of claims to enforce those rights are erroneous or deficient in how they claim the violation. Lawyers can help veterans write valid claims to enforce their rights.

**Substance Use Disorders and Depression**

A Department of Veteran Affairs study on reintegration problems and treatment suggests that mental disorders and symptoms, including PTSD, substance use disorders, and depression, are high among service members within the first year of returning from deployment. These men and women are disproportionately vulnerable to arrest or convictions for offenses arising from their service or efforts to self-medicate. Justice involvement often separates them from the very benefits they will need to return to self-sufficiency. Lawyers understand this, and working with the VA’s Veteran Justice Outreach coordinators, often through Veteran Treatment Courts, help veterans connect to necessary treatment and services.

**Interstate Issues**

Often, even exceptional lawyers are limited in what they can do for veterans who have legal matters arising in other states. Foreclosures, child custody disputes or support, and other matters arising in a different state leave some lawyers without options, and lawyer referral networks in other states provide no assurances as to the expertise of services provided or experience in working with veterans. Without a reliable means for referral to another state, lawyers are left to cold calling, depending on their personal networks or the bar’s relationship to another jurisdiction for successful resolution. An additional barrier exists for veterans in need of representation through a legal aid program or pro bono program, most of which have residency requirements as one of their eligibility criteria. While referrals between legal aid programs in different states are technically possible, the veteran must meet eligibility and priority guidelines for both programs in order to be considered for representation. To address these challenges, the ABA is leading a national effort to improve connectivity among state networks of legal service providers to ensure that referrals to lawyers in other jurisdictions are seamless and to appropriately experienced providers. The ABA also provides national opportunities for pro bono that include motivated substance experts in every jurisdiction. Much more needs to be done to
expand the reach of these projects, and most importantly, to help strengthen and expand state and local networks.

The Legal Community Response

As one can see, the types of legal issues and initiatives are substantial, and they cut across civil, criminal and administrative practice. These matters can seem complex to a lawyer, but not nearly as overwhelming as they are to a veteran in need. Many lawyers, especially legal aid attorneys working with low-income persons, have been working in these trenches for decades, as have many law firms and state or national organizations focused on facilitating pro bono legal services for veterans on special matters. The demand, however, required more in the form of education, training and direct services.

Accordingly, to address the demand, and the cross-section of legal issues presented, the bench and bar have responded over the past decade with an inspirational array of new and innovative projects. These included pro bono programs and consultation clinics held by law firms, as well as state and local bar associations. Some of these programs are even being held at a VA Medical Center or a local Starbucks. Law school clinical programs have grown dramatically, raising awareness and competency in a new generation of practitioners. These programs, along with civil legal aid and corporate in-house counsel, forged impressive private-public collaboration with state or local government to provide the needed legal support.

We have also seen the rise of initiatives that introduce new and ground-breaking ways of delivering legal services to tackle especially the more entrenched legal problems and other historical obstacles. These approaches include the introduction of the medial legal partnership model, bringing doctors and lawyers together in direct support of client patients. Also, we have seen new and expanded incubator programs to bring legal services where they were not already available to veterans and others. Young lawyers have travelled their states and throughout the country to provide support for certain legal matters or benefits claims, and others travelled to the veterans in rural communities, connected to subject matter expert lawyers back in the city via Skype.

Over the last several years, the VA General Counsel created a new position, the Veteran Justice Outreach Coordinator (VJOs), which is a position dedicated to interface with the justice system from the VA in support of justice-involved veterans. These VJOs have proven invaluable, particularly with the rise of Veteran Treatment Courts, which are courts specifically designed to support veterans, holding them firmly accountable for their offenses while also keeping them connected to the services and treatment they need. These courts, now numbering in the hundreds, experience extremely low recidivism rates by veterans who participate, and they have helped the legal community better understand the importance of veteran mentors and cultural competency.

We have also seen the rise of unparalleled resources in support of military and veteran families, such as Stateside Legal, an impressive portal of resources run by Pine Tree Legal Assistance in Maine, and funded in large part by the Legal Services Corporation. The ABA, in an effort to facilitate education with legal services for military families, founded ABA Homefront, which
provides information about service members’ rights and how someone visiting who may be unable to afford a lawyer can contact one in their community at no cost to them.

There are many more examples of initiatives around the country supporting veterans. These programs are undertaken by the widest array of providers, including private lawyers, government lawyers, law schools, bar associations, judges, LSC-funded and non-LSC funded legal aid, public defenders, prosecutors, attorneys general, law students, veteran service organizations, and more. The challenge is that each sector of the legal community has either tended to work with providers like them, or only in their local communities, unaware of the work going on nationally, including programs that might serve as models and best practices for other jurisdictions.

The ABA has provided a forum for ABA entities committed to serving veterans in various ways, as well as bar associations and other projects, to share what they are doing to avoid duplication, promote collaboration, and to learn from one another. That forum is the Coordinating Committee on Veterans Benefits and Services (CCVBS). The CCVBS does not make policy or operate like other entities – its purpose is to facilitate coordination. Through the CCVBS and then at the request of an outside organization, the ABA has hosted stakeholder meetings to evaluate the legal landscape and to recommend what is needed most. Among other things, stakeholders have requested greater national leadership from an organization that is inclusive and representative of all, such as the ABA.

**The ABA Presidential Veterans Legal Services Initiative**

In August 2016, ABA President Linda Klein established the Veteran Legal Services Initiative (VLSI). The purpose of the VLSI is to serve as a national lead in the (1) creation of centralized legal resources, (2) development of needed policy, and (3) support for the delivery of legal services.

It is through these efforts, namely to ensure that the rights of military service members and veterans are protected, and not lessened, by their service; that barriers are lifted when veterans try to access housing, education, employment, benefits, and services; and that legal support programs contemplate and include, where appropriate, caregivers and survivors who carry perhaps the greatest burdens without easily identified legal help.

Let us now revisit Tim’s story from earlier, showing the difference lawyers engaged in removing legal barriers can make possible. In this version

*Tim calls the new National Military & Veterans Legal Network established by the ABA, and the person who answers the call verifies that Tim is a veteran, thanks him for his service, and assures him that the information he gives during the call will be kept in the strictest confidence. She explains that she will not be representing him, but will seek to identify the right program and attorney close to him who can help. She listens to his story, asks him questions to search for possible additional legal issues that he may not be aware of, and enters Tim’s information on a hotline intake form that conforms to standards consistent with providers nationwide. She politely asks questions designed to screen for latent issues like PTSD and makes a follow up note for the*
attorney file. She also offers guidance provided by the VA on where veterans who may have PTSD can go for help. Based on his information, she looks at law school clinics, legal aid programs, pro bono military programs, and private lawyers who are a part of the network. Working with legal services in and near Tim’s community, she identifies an experienced family attorney and an estate law attorney who can help. She also identifies a lawyer for the out-of-state custody order and provides Tim with a list of information he should pull together for his conversations with the lawyers. She explains to Tim that she will provide the information to the lawyers. Later, when the lawyers have both reviewed the file and agreed to represent Tim, she links them together and provides them with the names of lawyers willing to advise them on certain specialized legal matters Tim is facing. With the support and advice he’s given, Tim’s life stabilizes. He has a financial plan he can follow because he is also now receiving treatment for his PTSD and it seems to be working. He has reconnected with his children and is an actively involved father. Things are not perfect, but they are improving, and Tim feels empowered and supported -- and never pays a dime for legal services -- all because the legal profession acted to create an environment and a system to break the cycles that were undermining his treatment, recovery, and success.

CLAUSE TWO: VETERANS' CAREGIVERS

FURTHER RESOLVED, That efforts to increase access to justice for veterans contemplate and include, where appropriate, veterans’ caregivers, especially on those matters for which the caregiver acts on behalf of the veteran.

Many veterans over the past century have returned home disabled in some way by service-connected injuries. They do not qualify for full-time care by the VA, and so someone -- often but not always a spouse, parent or child -- becomes the veteran’s full-time caregiver. These caregivers often sacrifice their own freedom and well-being to care for those to whom our nation owes its debt. Their roles vary with the severity of the physical or psychological injuries the veteran has sustained, and many must not only become educated in working with the VA, Social Security, Department of Education, but must also handle all of the finances. Their vigil can be 24 hours a day, seven days a week. Spouse caregivers also have often left the workplace to be home full-time, living on very modest assistance. This means that even small aberrations in their financial affairs can cause substantial and cyclical credit problems for them both, very possibly threatening housing stability.

While these men and women have been silent for decades, a recent study by RAND Corporation revealed that there are 5.5 million veteran caregivers, with just one quarter supporting veterans from the post-9/11 era. This means that 80% of veteran caregivers are supporting a veteran who, in addition to service connected injury, is also going through the natural stages of aging, which the caregiver might be experiencing as well.

Caregivers explain that they need support largely with trust and estate matters, making sure that if they were to die, the veteran would still be cared for. There have thankfully been efforts including among the Military Officers Association of America, Public Counsel, and the ABA to
provide legal support for caregivers, but connecting with the caregivers in a time of need can be a challenge, especially if they are not aware of the service already.

Working on behalf of veteran caregivers through its “Hidden Heroes” campaign, the Elizabeth Dole Foundation has identified an agenda of legal matters requiring attention. Similarly, other organizations, including organizations like National Military Family Association and Tragedy Assistance Program for Survivors, which renders aid to those who learn their loved one has fallen in the line of duty, support caregivers and manage a national peer network, connecting caregivers to one another for moral and other support. Particularly with regard to survivors, there can be complex legal problems and decisions to be made in the midst of mourning. Left on their own, these caregivers may rely on one another for advice, rather than needed legal counsel. Accordingly, we have seen the Military Spouse JD Network, an association of lawyers who are military spouses, provide a pro bono legal network in support of these survivors that literally spans the country and many parts of the world. Lawyers seeking to support caregivers and survivors must be prepared to take extra measures to make their services available through existing support networks.

These men and women – caregivers and survivors – shoulder immense burdens that many presume are borne by the VA. In reality, caregivers are not eligible for many pro bono programs serving the veteran community, even when they are calling on behalf of an incapacitated veteran over whom they have 100% legal and financial responsibility. Some are surprised to learn that survivors, or “Gold Star” family members, are neither considered to be military families nor veterans’ families. There is a limited line of support immediately following the death of the service member, but legal problems, especially latent ones, can linger much longer. Like caregivers, these survivors are not eligible for many laudable programs the legal community provides due to funding and eligibility restrictions. Sometimes, for example, a caregiver calls for assistance because his or her spouse has become violent, and some projects consider the representation to be a conflict of interest to their veteran-centric mission (but they still make an appropriate referral to those who can represent the caregiver). The ABA supports the inclusion of caregivers and survivors in pro bono and other free legal assistance programs, where appropriate and feasible.

Respectfully submitted,

Dwight L. Smith and Nanette M. DeRenzi, Co-Chairs
ABA Veterans Legal Services Initiative Commission
GENERAL INFORMATION FORM

Submitting Entity: Veterans Legal Services Initiative Commission

Submitted By: Dwight L. Smith and Nanette M. DeRenzi, Commission Co-Chairs

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

   Urging the legal profession and lawmakers at each level to identify long-standing, entrenched legal barriers for veterans in accessing their housing, education, employment, treatment, other services, or benefits. The resolution also urges, where appropriate, that legal services programs supporting veterans include veterans’ caregivers as eligible clients, particularly when they are acting on behalf of the veteran.

   *(CONFORM SUMMARY LANGUAGE TO CHANGES SUGGESTED IN RESOLUTION)*

2. **Approval by Submitting Entity.** The ABA Veterans Legal Services Commission approved its resolution on November 16, 2016.

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

   No proposal has been submitted on this specific subject matter, but the ABA has considered, and adopted, a range of policies supporting Veterans’ legal rights, legal standing, and the administration of supportive services. ABA policies of a technical nature, ABA policy supporting updates and technical revisions to a law, are not listed below. Most of the policies below specifically address matters that arise after the transition to civilian life is complete. These include the following:

   - 93M106B, to urge for centralized judicial review of discharge decisions that materially affect a service member’s rights
   - 97A10A, to oppose legislation and other changes to military personnel discharge decisionmaking pending hearings and thorough review of the system for correction of military records
   - 00A116B, urging expansion of jurisdiction for the U.S. Court of Appeals for the Federal Circuit to include determinations on questions of law made by the U.S. Court of Appeals for Veterans Claims
   - 03M102, urging greater authority for the U.S. Court of Appeals for Veterans Claims receives and presides on certain matters and merit selection of independent judges for the Board of Veterans Appeals
   - 05M8A, urging repeal of statutory prohibition on veterans being able to pay and attorney to assist them with their initial federal benefits claims
08M108, to support legislation that increases the availability of, and access to, legal services for Veterans to assist them in seeking their due federal benefits
09M114, to support increased and improved enforcement mechanisms for the Servicemember Civil Relief Act, including powers for the U.S. Attorney General and the availability of attorneys’ fees for prevailing clients
10M105A, urging new approaches to the civil and criminal justice needs of veterans, and guidelines in the establishment of Veterans Treatment Courts
11AM120, proposing improvements to the coverage and enforcement of the Uniformed Services Employment and Re-employment Rights Act.
2003, 2006, and 2007 policies supporting the creation and operation of Homeless Courts, which have since been instrumental in establishing Homeless Courts at Stand Down events, nationally

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** This Resolution reinforces, and is fully consistent with the policies listed in answer to Number 3, above. This policy resolution would amplify, not change, those existing policies and promote continuity of core principles behind them all.

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)** While the subject matter of this resolution is of interest to Congress and state legislatures, the resolution also addresses matters that can be resolved by the legal profession and the judiciary absent new law. Several bills are introduced each year to strengthen veterans’ legal protections, or as in the case of H.R. 6046, the Homeless Veteran Legal Services Act, they propose to allow the Department of Veterans Affairs to formally engage in strategic partnerships to deliver legal services for homeless veterans. While the resolution would authorize the ABA to speak to a wide range of bills, both for and against, there is no legislation seeking to implement this resolution’s recommendations.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** Implementation is being undertaken by the Veterans Legal Services Initiative referenced in the Report, as well as other military- and veteran-focused ABA entities, most notably the Standing Committee on Legal Assistance for Military Personnel, Coordinating Committee on Veterans Benefits and Services, Commission on Homelessness and Poverty, and the Center for Pro Bono. This policy will also allow the ABA to advocate and to respond to requests for technical assistance from Congress and the Administration to promote improved outcomes for veterans who face long-standing and difficult to resolve legal obstacles. There is otherwise no intent to enact specific language into law.

8. **Cost to the Association. (Both direct and indirect costs)** Adoption of the Resolution implicates no cost to the Association
9. Disclosure of Interest. (If applicable) N/A

10. Referrals. Input and support is being sought from relevant ABA entities involved with military- and veteran-related legal issues and the direct support of the VLSI. The resolution will otherwise include the broadest possibly circulation, expected to include all ABA policy-making entities. (WHO; NEED TO LIST ENTITIES)

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

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   1636 S. Cincinnati Avenue  
   Tulsa, OK 74119-4418  
   Tel: (918) 585-1446  
   Email: dls@dlstulsalaw.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**

   Urging the legal profession and lawmakers at each level to identify long-standing, entrenched legal barriers for veterans in accessing their housing, education, employment, treatment, other services, or benefits. The resolution also urges, where appropriate, that legal services programs supporting veterans include veterans’ caregivers as eligible clients, particularly when they are acting on behalf of the veteran.

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

   Effective protection of the rights and access to benefits for Veterans and their caregivers through support from the legal community to address chronic barriers that Veterans regularly confront and that can be eliminated with the assistance of a lawyer.

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

   The proposed policy position raises awareness of the importance of addressing the issues described in the Report, and the Report describes the supportive resources and programs implemented by the ABA and other bar associations and providers that can assist jurisdictions in carrying out the proposed policy position. The policy resolution also identifies the key areas where lawyers make a unique, substantial difference, in serving Veterans.

4. **Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified**

   No minority views or opposition have been identified.