MEETING OF OFFICERS, COUNCIL AND COMMITTEE CHAIRS

Telephonic Council Meeting
July 25, 2017 3:00 PM ET
866-646-6488 passcode 7282890493

COUNCIL MEETING AGENDA

<table>
<thead>
<tr>
<th>Item</th>
<th>Presenter</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Call to order; Introductions</td>
<td>Bill Johnston</td>
</tr>
<tr>
<td>2. Chair Report</td>
<td>Bill Johnston</td>
</tr>
<tr>
<td>2.1 Highlights from the Section Scorecard</td>
<td></td>
</tr>
<tr>
<td>2.2 Update on the Section Annual Meeting</td>
<td></td>
</tr>
<tr>
<td>2.3 Nominating Committee Update</td>
<td></td>
</tr>
<tr>
<td><strong>Action Items</strong></td>
<td></td>
</tr>
<tr>
<td>3. Consideration of Proposed 2017-2018 Budget</td>
<td>Linda Rusch/Chris Rockers</td>
</tr>
<tr>
<td>4. Approval of Section Positions on Reports and Recommendations, ABA House of Delegates</td>
<td>Lynne Barr/Barbara Mayden/Alvin Thompson/Steve Weise</td>
</tr>
</tbody>
</table>
### Spring Meeting CLE Programs

**Top Attended**

<table>
<thead>
<tr>
<th>Program</th>
<th>Registration Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Too Much or Too Little? Is the CFPB Exercising its Enforcement Power Appropriately?</td>
<td>149</td>
</tr>
<tr>
<td>The State of Consumer Protection Initiatives and the Bank Examination Privilege</td>
<td>130</td>
</tr>
<tr>
<td>The CFPB at Six Years: Reflections on Jurisdiction, “Abusive”, and the Election’s Impact</td>
<td>127</td>
</tr>
<tr>
<td>Blockchain Technology and Privacy</td>
<td>109</td>
</tr>
<tr>
<td>Charters, Partnerships, and Beyond: The Changing Landscape of FinTech Bank…</td>
<td>106</td>
</tr>
</tbody>
</table>

### Success by Numbers

- **9.81%** increase in LinkedIn followers
- **122** first time attendees at Spring Meeting
- **1,490** lawyer member adds
- **2.92** average number of committees per member
- **$270,250** Spring Meeting sponsorship revenue
- **32%** year over year publications net profit increase

### Business Law Section Scorecard

**FY2017 Q3, March - May 2017**
### Membership - May 2017

<table>
<thead>
<tr>
<th>Section Counts</th>
<th>Current FY</th>
<th>Prior FY</th>
<th>Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lawyer</td>
<td>29,863</td>
<td>32,587</td>
<td>-8.36%</td>
</tr>
<tr>
<td>Associate</td>
<td>1,793</td>
<td>1,894</td>
<td>-5.33%</td>
</tr>
<tr>
<td>Student</td>
<td>14,020</td>
<td>13,300</td>
<td>5.41%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>45,676</td>
<td>47,781</td>
<td>-4.41%</td>
</tr>
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</table>

<table>
<thead>
<tr>
<th>ABA Counts</th>
<th>Current FY</th>
<th>Prior FY</th>
<th>Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lawyer</td>
<td>251,627</td>
<td>261,397</td>
<td>-3.74%</td>
</tr>
<tr>
<td>Associate</td>
<td>15,132</td>
<td>15,024</td>
<td>0.72%</td>
</tr>
<tr>
<td>Student</td>
<td>98,248</td>
<td>71,899</td>
<td>36.65%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>365,007</td>
<td>348,320</td>
<td>4.79%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Section Activity</th>
<th>Current FY</th>
<th>Prior FY</th>
<th>Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lawyer Member Adds</td>
<td>4,110</td>
<td>5,234</td>
<td>-21.47%</td>
</tr>
<tr>
<td>Lawyer Member Drops</td>
<td>-7,406</td>
<td>-11,756</td>
<td>-37.00%</td>
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</table>

<table>
<thead>
<tr>
<th>Committees - Substantive</th>
<th>Current FY</th>
<th>Prior FY</th>
<th>Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>Members in a Substantive Cmt.</td>
<td>16,016</td>
<td>17,043</td>
<td>-6.03%</td>
</tr>
<tr>
<td>Average Committees</td>
<td>2.92</td>
<td>2.83</td>
<td>3.18%</td>
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<table>
<thead>
<tr>
<th>Content - FY2017</th>
<th>Produced FYTD</th>
<th>Registrants FYTD</th>
<th>Total Number Accessible</th>
</tr>
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<tbody>
<tr>
<td>CLE</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>In The Know</td>
<td>9</td>
<td>6,312</td>
<td>50</td>
</tr>
<tr>
<td>CLE Webinars</td>
<td>4</td>
<td>224</td>
<td></td>
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<tr>
<td>National Institutes</td>
<td>2</td>
<td>202</td>
<td></td>
</tr>
<tr>
<td>Business Law Basics</td>
<td>9</td>
<td>6,598</td>
<td>23</td>
</tr>
<tr>
<td>Business Law Breaking News</td>
<td>5</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td><strong>Activities</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Non-CLE Webinars</td>
<td>17</td>
<td>1,746</td>
<td>143</td>
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<tr>
<td>Podcasts</td>
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<td>Publications</td>
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<tr>
<td>Books (Print Editions)</td>
<td>6</td>
<td></td>
<td>130</td>
</tr>
<tr>
<td>e-Newsletters</td>
<td>25</td>
<td></td>
<td>647</td>
</tr>
<tr>
<td>The Business Lawyer (i.e. 39,229)</td>
<td>2</td>
<td></td>
<td>118</td>
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<tr>
<td>Business Law Today</td>
<td>7</td>
<td></td>
<td>118</td>
</tr>
<tr>
<td>Technical Comments</td>
<td>0</td>
<td></td>
<td>0</td>
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<tr>
<td>Program Materials</td>
<td>242</td>
<td></td>
<td>749</td>
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<table>
<thead>
<tr>
<th>Meetings - FY2017</th>
<th>Held</th>
<th>Number of Registrants</th>
<th>Number of Sponsorships</th>
<th>Sponsorship Revenue</th>
<th>Number of CLE Programs Offered</th>
<th>Number of CLE Cmt. &amp; Sub Cmt. Meetings</th>
<th>Total Net Revenue</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section Annual Meeting</td>
<td>1</td>
<td>1,676</td>
<td>45</td>
<td>$169,100</td>
<td>87</td>
<td>300</td>
<td>TBD</td>
</tr>
<tr>
<td>Section Fall Meeting</td>
<td>1</td>
<td>348</td>
<td>6</td>
<td>$10,500</td>
<td>16</td>
<td>41</td>
<td>TBD</td>
</tr>
<tr>
<td>Section Spring Meeting</td>
<td>1</td>
<td>1,603</td>
<td>48</td>
<td>$270,250</td>
<td>88</td>
<td>261</td>
<td>TBD</td>
</tr>
<tr>
<td>Committee Stand-alone</td>
<td>10</td>
<td>1,709</td>
<td>20</td>
<td>$90,100</td>
<td>40</td>
<td>79</td>
<td>TBD</td>
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### Marketing & Communication - May 2017

<table>
<thead>
<tr>
<th>Total Number of Recipients</th>
<th>Open Rate</th>
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<tbody>
<tr>
<td>Business Law Today</td>
<td>34,178</td>
</tr>
<tr>
<td>In The Know</td>
<td>71,185</td>
</tr>
<tr>
<td>Business Law Basics</td>
<td>70,806</td>
</tr>
<tr>
<td>CLE Connection</td>
<td>NA</td>
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<table>
<thead>
<tr>
<th>Website - May 2017</th>
<th>Current Month</th>
<th>Prior Month</th>
<th>Change</th>
<th>FYTD</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unique Visitors</td>
<td>76,663</td>
<td>78,145</td>
<td>-1.90%</td>
<td>650,548</td>
</tr>
<tr>
<td>Page Views</td>
<td>123,938</td>
<td>133,491</td>
<td>-7.16%</td>
<td>1,106,367</td>
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<table>
<thead>
<tr>
<th>Social Media - FY2017 Q3</th>
<th>Current Quarter</th>
<th>Prior Quarter</th>
<th>Change</th>
<th>Posts</th>
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</thead>
<tbody>
<tr>
<td>Facebook</td>
<td>1,856</td>
<td>1,803</td>
<td>2.94%</td>
<td>9</td>
</tr>
<tr>
<td>Instagram</td>
<td>448</td>
<td>394</td>
<td>13.71%</td>
<td>0</td>
</tr>
<tr>
<td>Linkedln</td>
<td>913</td>
<td>806</td>
<td>13.28%</td>
<td>1</td>
</tr>
<tr>
<td>Twitter</td>
<td>3,237</td>
<td>3,135</td>
<td>3.25%</td>
<td>8</td>
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<table>
<thead>
<tr>
<th>Committees - FY2017</th>
<th>Current FY</th>
<th>Prior FY</th>
<th>Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mergers and Acquisitions</td>
<td>4,965</td>
<td>5,043</td>
<td>-1.55%</td>
</tr>
<tr>
<td>Corporate Governance</td>
<td>2,639</td>
<td>2,735</td>
<td>-3.51%</td>
</tr>
<tr>
<td>Federal Regulation of Securities</td>
<td>2,284</td>
<td>2,401</td>
<td>-4.87%</td>
</tr>
<tr>
<td>Banking Law</td>
<td>2,178</td>
<td>2,558</td>
<td>-3.44%</td>
</tr>
<tr>
<td>Private Equity and Venture Capital</td>
<td>2,063</td>
<td>2,154</td>
<td>-3.30%</td>
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</table>

<table>
<thead>
<tr>
<th>Top Five Growth</th>
<th>Current FY</th>
<th>Prior FY</th>
<th>Change</th>
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</thead>
<tbody>
<tr>
<td>Antitrust Law</td>
<td>460</td>
<td>225</td>
<td>104.44%</td>
</tr>
<tr>
<td>Corporate Social Responsibility Law</td>
<td>226</td>
<td>118</td>
<td>91.53%</td>
</tr>
<tr>
<td>Credit Unions</td>
<td>249</td>
<td>207</td>
<td>20.29%</td>
</tr>
<tr>
<td>Business Law Education</td>
<td>431</td>
<td>255</td>
<td>69.02%</td>
</tr>
<tr>
<td>Consumer Bankruptcy</td>
<td>233</td>
<td>183</td>
<td>27.32%</td>
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Proprietary ABA Information: Confidential
## Business Law Section
### 2017-2018 Budget Roll Up

<table>
<thead>
<tr>
<th>Account</th>
<th>Budget 2016-2017</th>
<th>Actuals Period Ending May 2017</th>
<th>Budget 2017-2018</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Revenue</td>
<td>Expense</td>
<td>Net</td>
</tr>
<tr>
<td>Dues</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Section Dues</td>
<td>1,450,000</td>
<td>0</td>
<td>1,450,000</td>
</tr>
<tr>
<td>Total Dues</td>
<td>1,450,000</td>
<td>0</td>
<td>1,450,000</td>
</tr>
<tr>
<td>Staff</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Personnel</td>
<td>0</td>
<td>(1,216,684)</td>
<td>(1,216,684)</td>
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<tr>
<td>Development</td>
<td>0</td>
<td>(13,000)</td>
<td>(13,000)</td>
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<tr>
<td>Overhead</td>
<td>0</td>
<td>(287,100)</td>
<td>(287,100)</td>
</tr>
<tr>
<td>Total Staff</td>
<td>0</td>
<td>(1,516,784)</td>
<td>(1,516,784)</td>
</tr>
<tr>
<td>Account</td>
<td>Budget 2016-2017</td>
<td>Actuals Period Ending May 2017</td>
<td>Budget 2017-2018</td>
</tr>
<tr>
<td>---------------------------------</td>
<td>------------------</td>
<td>-------------------------------</td>
<td>------------------</td>
</tr>
<tr>
<td></td>
<td>Revenue</td>
<td>Expense</td>
<td>Net</td>
</tr>
<tr>
<td>Office Overhead</td>
<td>0</td>
<td>(3,500)</td>
<td>(3,500)</td>
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<tr>
<td>Travel Reimbursement</td>
<td>0</td>
<td>(50,000)</td>
<td>(50,000)</td>
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<tr>
<td>Council Support</td>
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<td>(21,000)</td>
<td>(21,000)</td>
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<tr>
<td>Midwinter Council Meeting</td>
<td>6,500</td>
<td>(268,700)</td>
<td>(262,200)</td>
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<tr>
<td>Directory</td>
<td>0</td>
<td>(7,500)</td>
<td>(7,500)</td>
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<tr>
<td><strong>Total Leadership</strong></td>
<td><strong>6,500</strong></td>
<td><strong>(350,700)</strong></td>
<td><strong>(344,200)</strong></td>
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<tr>
<td>Account</td>
<td>Budget 2016-2017</td>
<td>Actuals Period Ending May 2017</td>
<td>Budget 2017-2018</td>
</tr>
<tr>
<td>---------------</td>
<td>------------------</td>
<td>--------------------------------</td>
<td>------------------</td>
</tr>
<tr>
<td></td>
<td>Revenue</td>
<td>Expense</td>
<td>Net</td>
</tr>
<tr>
<td>Section Annual</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>924,800</td>
<td>(1,121,450)</td>
<td>(196,650)</td>
</tr>
<tr>
<td>Spring</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>1,319,860</td>
<td>(1,284,800)</td>
<td>35,060</td>
</tr>
<tr>
<td>Fall Meeting</td>
<td></td>
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<tr>
<td></td>
<td>144,450</td>
<td>(144,450)</td>
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</tr>
<tr>
<td>Total Meetings</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>2,389,110</td>
<td>(2,550,700)</td>
<td>(161,590)</td>
</tr>
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<td>Budget 2016-2017</td>
<td>Actuals Period Ending May 2017</td>
<td>Budget 2017-2018</td>
</tr>
<tr>
<td>-------------------------------</td>
<td>------------------</td>
<td>--------------------------------</td>
<td>------------------</td>
</tr>
<tr>
<td></td>
<td>Revenue</td>
<td>Expense</td>
<td>Net</td>
</tr>
<tr>
<td>Educational Programming</td>
<td>90,000</td>
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<td>90,000</td>
</tr>
<tr>
<td>Membership</td>
<td>0</td>
<td>(232,350)</td>
<td>(232,350)</td>
</tr>
<tr>
<td>The Business Lawyer</td>
<td>85,400</td>
<td>(530,725)</td>
<td>(445,325)</td>
</tr>
<tr>
<td>Business Law Today</td>
<td>6,000</td>
<td>(30,000)</td>
<td>(24,000)</td>
</tr>
<tr>
<td>In the Know/Business Law Basics</td>
<td>20,000</td>
<td>(42,624)</td>
<td>(22,624)</td>
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<tr>
<td>ABA Support Service Fee</td>
<td>(39,109)</td>
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<tr>
<td>General Marketing</td>
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</tr>
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<td>Account</td>
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<td>Budget 2017-2018</td>
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<tr>
<td>------------------</td>
<td>------------------</td>
<td>------------------------------</td>
<td>------------------</td>
</tr>
<tr>
<td></td>
<td>Revenue</td>
<td>Expense</td>
<td>Net</td>
</tr>
<tr>
<td>Committees-General</td>
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<td>(58,700)</td>
<td>(58,700)</td>
</tr>
<tr>
<td>Travel Reimbursement</td>
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<tr>
<td>Meetings</td>
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<td>(743,672)</td>
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<td>Total Committees</td>
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<td>(1,054,372)</td>
<td>(260,700)</td>
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<tr>
<td>---------------------------------</td>
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<td>--------------------------------</td>
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</tr>
<tr>
<td></td>
<td>Revenue</td>
<td>Expense</td>
<td>Net</td>
</tr>
<tr>
<td>Pro Bono Project</td>
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<tr>
<td>International Legal Projects</td>
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<td>(10,000)</td>
<td>(10,000)</td>
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<tr>
<td>Governance Special Projects</td>
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<td>(10,000)</td>
<td>(10,000)</td>
</tr>
<tr>
<td>Business Bar Leader Conference</td>
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<td>(51,050)</td>
<td>(51,050)</td>
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<tr>
<td>Business Law Advisors</td>
<td>0</td>
<td>(28,400)</td>
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<tr>
<td>Judges/Business Court Reps</td>
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<td>(25,000)</td>
</tr>
<tr>
<td>Delaware Law Forum</td>
<td>23,000</td>
<td>(23,000)</td>
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<td>Actuals Period Ending May 2017</td>
</tr>
<tr>
<td>--------------------------------</td>
<td>------------------</td>
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</tr>
<tr>
<td></td>
<td>Revenue</td>
<td>Expense</td>
<td>Net</td>
</tr>
<tr>
<td>ULC Contribution</td>
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<td>(5,000)</td>
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<tr>
<td>Consumer Fellows</td>
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<tr>
<td>Fellows</td>
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<td>(135,000)</td>
</tr>
<tr>
<td>Ambassadors</td>
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</tr>
<tr>
<td>Envoys</td>
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<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Diplomat</td>
<td>0</td>
<td>0</td>
<td>0</td>
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<tr>
<td>Miscellaneous Diversity Outreach</td>
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<td>(8,350)</td>
</tr>
<tr>
<td>ABA Legal Opportunity Scholarship Fund</td>
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<td>(30,000)</td>
</tr>
<tr>
<td>Diversity Clerkship Program</td>
<td>0</td>
<td>(72,300)</td>
<td>(72,300)</td>
</tr>
<tr>
<td>Content Distribution/Tech Dev</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Member Benefit Projects (New)</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Advance S</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td><strong>Total Special Projects</strong></td>
<td>23,000</td>
<td>(440,100)</td>
<td>(417,100)</td>
</tr>
<tr>
<td>Account</td>
<td>Budget 2016-2017</td>
<td>Actuals Period Ending May 2017</td>
<td>Budget 2017-2018</td>
</tr>
<tr>
<td>-------------------------------</td>
<td>------------------</td>
<td>-------------------------------</td>
<td>------------------</td>
</tr>
<tr>
<td></td>
<td>Revenue</td>
<td>Expense</td>
<td>Net</td>
</tr>
<tr>
<td>Subtotal</td>
<td>4,824,573</td>
<td>(6,803,355)</td>
<td>(1,978,782)</td>
</tr>
<tr>
<td>Publications</td>
<td>1,181,500</td>
<td>(546,244)</td>
<td>635,256</td>
</tr>
<tr>
<td>Commissions, Royalties, List Sales</td>
<td>90,000</td>
<td>0</td>
<td>90,000</td>
</tr>
<tr>
<td>Total Other Operations</td>
<td>1,271,500</td>
<td>(546,244)</td>
<td>725,256</td>
</tr>
<tr>
<td>Total Operations</td>
<td>6,096,073</td>
<td>(7,349,599)</td>
<td>(1,253,526)</td>
</tr>
<tr>
<td>Investment Income from Money Market</td>
<td>1,000</td>
<td>0</td>
<td>1,000</td>
</tr>
<tr>
<td>Transfer from Permanent Reserve</td>
<td>756,417</td>
<td>0</td>
<td>756,417</td>
</tr>
<tr>
<td>Transfer from Contingency Reserve</td>
<td>496,109</td>
<td>0</td>
<td>496,109</td>
</tr>
<tr>
<td>Transfer from Permanent Reserve--Member Benefit Projects (New)</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Total Revenue/Expense</td>
<td>7,349,599</td>
<td>(7,349,599)</td>
<td>0</td>
</tr>
<tr>
<td>Report</td>
<td>Sponsor and Subject</td>
<td>Reviewing Entity</td>
<td>Recommended Position</td>
</tr>
<tr>
<td>--------</td>
<td>---------------------</td>
<td>------------------</td>
<td>----------------------</td>
</tr>
<tr>
<td>101</td>
<td>TIMOTHY STANLEY, ABA MEMBER&lt;br&gt;EDWARD J. WALTERS, ABA MEMBER</td>
<td>Intellectual Property</td>
<td>No position</td>
</tr>
<tr>
<td></td>
<td>Urges Congress to require that any works of the U.S. government that are published privately also be deposited with the Government Printing Office and subsequently distributed on the Internet, to the member libraries of the Federal Depository Library System, to the Library of Congress, and to the National Archives.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>102A</td>
<td>TORT TRIAL AND INSURANCE PRACTICE SECTION</td>
<td>Consumer Financial Services&lt;br&gt;Dispute Resolution</td>
<td>Oppose&lt;br&gt;No position</td>
</tr>
<tr>
<td></td>
<td>Opposes the use of mandatory, binding, pre-dispute arbitration agreements in private student loan contracts and supports enactment of legislation and regulations that would prohibit or invalidate such arbitration agreements and opposes legislation and regulations that would authorize, encourage or enforce such agreements.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>102C</td>
<td>TORT TRIAL AND INSURANCE PRACTICE SECTION</td>
<td>Professional Responsibility&lt;br&gt;Business and Corporate Litigation</td>
<td>Support&lt;br&gt;Does not support</td>
</tr>
<tr>
<td></td>
<td>Supports common-interest doctrine, under which sharing of privileged communications with persons of common interest who have agreed to maintain confidentiality does not waive privilege.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>103</td>
<td>SECTION OF DISPUTE RESOLUTION</td>
<td>Business and Corporate Litigation&lt;br&gt;Banking Law&lt;br&gt;Consumer Financial Services&lt;br&gt;Judges Initiative</td>
<td>Support&lt;br&gt;No position&lt;br&gt;Support</td>
</tr>
<tr>
<td>N.</td>
<td>Committee/Section</td>
<td>Professional Responsibility</td>
<td>Position</td>
</tr>
<tr>
<td>----</td>
<td>------------------</td>
<td>-----------------------------</td>
<td>---------</td>
</tr>
<tr>
<td>104</td>
<td>STANDING COMMITTEE ON THE AMERICAN JUDICIAL SYSTEM</td>
<td>Business and Corporate Litigation</td>
<td>No position</td>
</tr>
<tr>
<td>106</td>
<td>STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS</td>
<td>White Collar Crime</td>
<td>Support</td>
</tr>
<tr>
<td>109A</td>
<td>SECTION OF INTERNATIONAL LAW</td>
<td>International Business Law</td>
<td>TBD</td>
</tr>
<tr>
<td>110</td>
<td>STANDING COMMITTEE ON CLIENT PROTECTION</td>
<td>Professional Responsibility</td>
<td>Support</td>
</tr>
<tr>
<td>111</td>
<td>STANDING COMMITTEE ON SPECIALIZATION</td>
<td>Banking Law</td>
<td>Oppose</td>
</tr>
</tbody>
</table>

Reaffirms its opposition to restructuring the United States Court of Appeals for the Ninth Circuit and supports ongoing efforts by the Ninth Circuit and other federal courts to utilize technological and procedural innovations to handle caseloads efficiently while maintaining coherent, consistent law in their respective jurisdictions.

Urges Congress to enable the United States Department of Justice to ensure compliance with the Sixth Amendment right to effective assistance of counsel to: 1) pursue civil actions to obtain equitable relief where violations of that right occur and 2) recognize a cause of action for equitable relief in federal court from systemic violations of the right to counsel.

Adopts the ABA Model Provisions on Electronic Commerce for International Trade Agreements, dated August 2017, and recommends them as a standard template for use in international trade agreements and other relevant international agreements and guidelines.

Amends the black letter of Rule 7 (Roster of Lawyers) of the ABA Model Rules for Lawyer Disciplinary Enforcement (MRLDE) to minimize instances of lawyer misappropriation of monies held in trust accounts and hold lawyers accountable when appropriate.

Oppose Banking Law
Oppose Consumer Financial Services
Oppose Credit Unions
Oppose Cyberspace Law
Oppose Intellectual Property
<table>
<thead>
<tr>
<th>114A</th>
<th>SECTION OF INTELLECTUAL PROPERTY LAW</th>
<th>Intellectual Property</th>
<th>Support</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adopts policy supporting the view that proof of willfulness is not a requirement for an accounting of a defendant’s profits in trademark infringement, unfair competition, or cyber-piracy cases under Sections 32, 43(a), and 43(d) of the federal Lanham Act, 15 U.S.C. §§ 1114, 1125(a) and 1125(d).</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>114B</th>
<th>SECTION OF INTELLECTUAL PROPERTY LAW</th>
<th>Intellectual Property</th>
<th>Support</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adopts policy in support of a clarification of the patent laws and supports an interpretation of those laws such that a sale or an offer to sell a product or service embodying an invention must have been “available to the public” and made the invention known to the public to invalidate claims directed to that invention.</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>114C</th>
<th>SECTION OF INTELLECTUAL PROPERTY LAW</th>
<th>Intellectual Property</th>
<th>Support</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adopts policy in support of a clarification of the patent laws and supports an interpretation of those laws such that in a post-issuance proceeding at the U.S. Patent and Trademark Office (PTO) in which a previously issued patent is challenged by a third party, the PTO may not, as a condition of accepting new claims, require the patent owner to first demonstrate the patentability of the new claims.</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>119A</th>
<th>SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE SECTION OF STATE AND LOCAL GOVERNMENT LAW COMMISSION ON HOMELESSNESS AND POVERTY COMMISSION ON VETERANS LEGAL SERVICES</th>
<th>Consumer Financial Services Community Economic Development</th>
<th>Support</th>
</tr>
</thead>
<tbody>
<tr>
<td>Urges governments to enact legislation prohibiting discrimination in housing on the basis of lawful source of income.</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>120</th>
<th>COMMISSION ON VETERANS LEGAL SERVICES STANDING COMMITTEE ON LEGAL ASSISTANCE FOR MILITARY PERSONNEL</th>
<th>Health and Life Sciences Pro Bono</th>
<th>Support</th>
</tr>
</thead>
<tbody>
<tr>
<td>Recommends review and improvement of the processes by which military records are corrected, discharge status petitions are considered, and the character of one’s discharge is reviewed.</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
RESOLUTION

RESOLVED, That the American Bar Association urges Congress to require that any works of the U.S. government that are published privately—that is, by parties other than the government—also be deposited with the Government Publishing Office and subsequently distributed on the Internet, to the member libraries of the Federal Depository Library System, to the Library of Congress, and to the National Archives.

FURTHER RESOLVED, That the American Bar Association urges the Office of Government Ethics to develop a legal advisory for employees and officers of the executive branch to determine when a privately published work is a work of the U.S. government.

FURTHER RESOLVED, That the American Bar Association encourages publishers to inquire of authors who are employed by the U.S. government if their work is a work of the U.S. government and, if so, to clearly label such work upon publication and make it freely and broadly available to the public.
REPORT

Introduction

The U.S. Constitution gives Congress the power “to promote the progress of science and the useful arts,” a power that Congress quickly exercised with passage of the Copyright Act of 1790. Our system of copyright is one of limited rights, both in the terms under which copyright is granted but also in excluding from copyright a number of key areas. In Wheaton v. Peters, the Supreme Court’s first major copyright case, the Court defined an exclusion for edicts of government, in that case the opinions issued by the federal courts.

General principles, such as the doctrine of edicts of government, evolve over time. The Wheaton v. Peters case arose out of advances in printing technology, which led Richard Peters, the new court reporter, to come out with cheaper editions of Supreme Court reports, making them more accessible to rural lawyers in the new republic. Similarly, as the growth of the Internet has made it possible to provide people everywhere with ready access to the law, the ABA House of Delegates at the 2016 Annual Meeting passed Resolution 112, which urged greater public availability of public safety standards incorporated by reference into the Code of Federal Regulations and other statutes and rules.

A related exception to copyright is the works of government doctrine, which excludes from copyright works authored by federal employees and officers in the course of their official duties. Over the last 100 years, a large number of scholarly articles have been authored by federal employees and officers and published in privately run publications. In many cases, these scholarly articles bear copyright assertions by the publishers, and are not available to the public without paying a fee and agreeing to stringent terms of use as a condition of access.

This resolution and report examines the availability of works of government in the scholarly literature, including the legal background of the doctrine, an empirical study of the extent of the practice, and proposes a series of concrete steps to increase availability. This inquiry is part of a

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1 U.S. Const. art 1, § 8, cl. 8.
2 1 Stat. 124 (1790).
5 American Bar Association, Resolution 112, Annual Meeting 2016, August 8-9, 2016. See also Lorelei Laird, After debate, ABA House calls for publication of privately drafted standards used in legislation, ABA Journal, August 9, 2016.
larger concern, the preservation of and access to works created by our governments, including
government databases, edicts of governments, and public information generally.

In recent times, government employees and those who use government data have raised alarms
over the deliberate destruction of government databases, especially data that runs counter to par-
tisan beliefs. Even when data is not deliberately removed, concerns have been raised about the
government’s ability to properly archive and preserve important information over the long term
because it was stored and deleted on government or private servers, or because of the inade-
quacy of government electronic archiving systems.

History of the Works of Government Doctrine

The idea that works by federal employees are not eligible for copyright stems in early cases from
an application of the work-for-hire doctrine: a work created in the course of employment gener-
ally belongs to the employer and not the employee. For example, from 1852-1854, the artist
William Heine accompanied Commodore Matthew C. Perry on his expedition to Japan, creating
drawings that were subsequently published by the government. Heine registered copyright in
those drawings, then sued William H. Appleton when he published the same report. The court
ruled that Heine’s copyright registration was invalid because Heine was not the author for pur-
poses of copyright and the work had already been given to the public by the Navy.

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8 See, e.g., Brady Dennis, Scientists are frantically copying U.S. climate data, fearing it might vanish un-
9 Editorial, White House E-Mail Gone Missing, New York Times, March 1, 2008; Editorial, History De-
10 Michael S. Schmidt, State Department Is Asked to Explain Handling of Hillary Clinton’s Emails, New
11 Carl Malamud, Testimony on Electronics Records Archives, Subcommittee on Information Policy, Cen-
sus, and National Archives, Committee on Oversight and Government Reform, U.S. House of Represent-
atives, December 16, 2009.
Before the 20th century, most of the judicial focus on the issue of copyright in government publications was devoted to the question of whether edicts of government could be registered for copyright. The courts started with judicial opinions, then considered statutes, and finally the copyrightability of compilations and their components, such as page numbers or headnotes.

Congressional attention to the question of copyright in government works dates back to the Printing Law of 1895, which provides for the sale by the Public Printer of “duplicate stereotype or electrotype plates from which any government publication is printed” and included an additional clause that “no publication reprinted from such stereotype or electrotype plates and no other Government publication shall be copyrighted.”

The clause was inserted as a convenience for Representative James D. Richardson, the chairman of the Joint Committee on Printing who had, on his own volition, compiled the Messages and Papers of the Presidents of the United States, and wished to come out with his own private edition. During a heated floor debate opposing the measure, the proviso that no copyright would vest in any publication was added to satisfy opponents who were worried that private claims of copyright over government publications would be exercised.

After Representative Richardson secured passage of the Printing Act of 1895, his actions received continued attention. Richardson was forced to defend on the House floor his belief that he could properly assert copyright with respect to private individuals but not with respect to the government. After Richardson issued several volumes of the Presidential Messages, accompanied by assertions of copyright, a Senate committee was appointed to review the affair. It concluded that:

“If the services of any author or compiler employed by the Government require to be compensated, payment should be made in money frankly and properly appropriated for that purpose and the resulting book or other publication in whole and as to any part

14 Banks v. Manchester, 128 U.S. 244 (1888) (Copyright in state court opinions).
15 See Davidson v. Wheelock, 27 F. 61 (Cir. Ct., D. Minn., 1866) (no copyright in Minnesota’s Constitution or statutes); Howell v. Miller, 91 F. 129 (6th Cir. 1898) (no copyright in statutes of Michigan).
16 Gould v. Banks, 53 Conn. 415, 2 A. 886 (1885) (“a copyright of a volume does not necessarily include a copyright of the opinions”).
17 Banks Law Pub. Co. v. Lawyers’ Cooperative Pub. Co., 169 F. 386 (2d Cir. 1909) (“paging and distribution into volumes, are not features of such importance as to entitle the reporter to copyright protection of such details”).
18 Callaghan v. Myers, 128 U.S. 617 (1888) (Synopsis created by the reporter may be copyrighted). But see Chase v. Sanborn, 4 Cliff. 306, 6 O.G. 932, 5 Fed. Cas. 521 (Cir. Ct. D. N.H. 1874) (Headnotes created by the judge are not copyrightable because authored in the course of official duties).
19 28 Stat. 601 (1895), § 52.
should be always at the free use of the people, and this, without doubt, was what Congress intended.”

Congress further extended this legislative prohibition against copyright in government publications in the Copyright Act of 1909, stating no “publication of the United States Government, or any reprint, in whole or in part” is eligible for copyright. That provision was maintained into the Copyright Act of 1976, and the term “work” was substituted for “publication” to clarify that all creative work, whether published or unpublished, in whatever form, were covered.

Since the 1909 Act, there have been only a few interpretations by the courts of the works of government clause. One of the first cases was Sherrill v. Gieves, in which Sherrill, an Army officer, prepared a textbook on military topography in his spare time, the text of which was then printed by the Government and used in an army school. Sherrill subsequently published the book on his own and was able to successfully defend his copyright. The case underscores the principle that the government may use copyrighted works in government publications, but such use does not invalidate an underlying copyright.

In Sawyer v. Crowell Publishing Co., the plaintiff accompanied the Secretary of the Interior on a mission to Alaska and on the trip gathered data for a map. Although Sawyer gathered the data on his own time, he had a subordinate prepare the map on government time and directed the U.S. Geological Survey to engrave the map. Sawyer subsequently filed for copyright and asserted his right and the court ruled that because the map was closely related to the plaintiff’s official duties, and that government resources were used to create the work, his copyright was thus invalid.

Finally, in Public Affairs Associates, Inc. v. Rickover, Vice Admiral Hyman G. Rickover asserted copyright over two speeches he had delivered to a university and an education group in his spare time. He had written the speeches at home, where they were typed by his wife. Despite the fact that the speech’s final form was typed by his office secretary and printed by the Navy as a news release, the court ruled Rickover retained copyright over its contents.

Works of Government and the Private Publication of Works

Since the 1930s, “the practice grew of having scientific and technical works produced by and for the Government published in private journals.”28 This practice is important not only for the dissemination of information, but as the Rickover court held, “it is in the public interest for the Government to encourage intellectual development of its officers and employees, and to look with favor upon their making literary and scientific contributions.”29 In fact, this practice was advocated by the Bureau of the Budget in 1943 as a cost-saving measure to save the government the cost of printing these works.30

The first requirement for the works clause is that the author be an employee or officer of the federal government. There has been considerable discussion in the literature about when a task performed by a contractor becomes a work of the government.31 Whether copyright (or lack of copyright) vests in the government is a different issue from the question of works of government and is analyzed as a question of whether this was a work for hire.32 The current report focuses only on works of government, not on works for hire.33

The key issue if whether a work was produced in the course of the employee or officer’s official duties. The House Report accompanying the 1976 Copyright Act clearly stated that even if the subject matter of a writing overlapped those duties, it was not necessarily a work of government:

“Under this definition, a Government official or employee would not be prevented from securing copyright in a work written at that person’s own volition and outside his or her duties, even though the subject matter involves the Government work or professional field of the official or employee.”34

Courts and executive branch agencies have looked with disfavor on any claim of copyright over government works, since copyright in those instances would frustrate the primary purpose of this clause, which was promoting the “free dissemination of valuable government information.”35 This has been particularly true in the case of misrepresentation. For example, the Federal Trade Commission successfully forced two private parties to cease and desist from selling How to Win Success in the Mail-Order Business as a new work when it was in fact a Department of Com-

28 Berger, op. cit. note 20 at 34.
merce publication, and held that they must “clearly disclos[e] the title under which it was previously sold.”

Likewise, when William B. Schulte sold a booklet entitled *Establishing and Operating a Real Estate and Insurance Brokerage Business* and falsely claimed that the information was from previously confidential sources and could not be obtained for less than the sale price of $2, the FTC forced him to cease and desist as well.

Under the Copyright Act, if a work of government is included in a private publication, then the copyright notice must clearly identify “either affirmatively or negatively, those portions of the copies or phonorecords embodying any work or works protected.”

The House Report accompanying the Act stated that this clause was the result of a “publishing practice that, while technically justified under the present law, has been the object of considerable criticism” and requires that the notice should be “meaningful rather than misleading.”

Assertion of copyright over works of government is a widespread practice in private publishing. In 1963, a sitting president published a book called *To Turn the Tide* with the subtitle “A selection from President Kennedy’s public statements from his election through the 1961 adjournment of Congress.” Two pages after the title page the book contained the notice “Copyright © by John F. Kennedy” and the admonition “No part of this book may be used or reproduced in any manner whatsoever without written permission except in the case of brief quotations embodied in critical articles and reviews.”

It is difficult to argue that any speeches given by the President of the United States are not given in the course of his or her official duties. As a result, the text of these speeches should not be given copyright protection.

Additional guidance on the external publication of works of government is provided in departmental-issued guidance and regulations. For example, the U.S. Army policy on intellectual property explains that official duties may be “expressed or implied” and involve work “necessary for the proper performance and accomplishment of an employee’s duties” or works “requested, directed, instructed, or otherwise ordered by an appropriate official.”

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39 H. Rep. 94-1476 op. cit. note 34 at 145.
41 Drew Harwell and Amy Brittain, *Secret Service asked for $60 million extra for Trump-era travel and protection, documents show*, Washington Post, March 22, 2017 (Quoting White House press secretary Sean Spicer: “The president is very clear that he works seven days a week. … This is part of being president”).
Nevertheless, the Army recognizes that “even though the subject matter of [a] work may be directly related to the author-employee’s official duties,” it may in fact be a private work, but that if government facilities were used, the government is entitled to a royalty-free license to use the work “and to have others do so for its benefit.” Finally, important to the subject of this report, the law requires “affirmative or negative identification of the sections which are actually copyrighted, thereby indicating which portions are works of the United States Government.”

Another example of such guidance is the Federal Judicial Center’s Outside Publications Policy. The Center asserts that for any work produced on official duty time or using government resources, the Center has the first right to publish, but if the work was prepared on the employee’s own time and “with no or very minimal use of government resources,” it may be published externally. An important caveat, one which applies to other branches of government, is that if any “honoraria or outside income” is received, the matter should be cleared with appropriate ethics officials.

The Federal Judicial Center is clear that when materials are a work of government “they should be made widely available and at no cost to the public,” but the Center recognizes that such outside publication may reach “interested audiences more directly” as well as call attention to the Center. As with many government agencies, the Center is also subject to the Government Printing and Binding Regulations, which governs works created using appropriated funds and states that no work shall “be made available to a private publisher for initial publication without the prior approval of the Joint Committee on Printing.” When the Center was found in breach of that requirement, it reached an agreement with the Joint Committee to make reprints of any such privately published articles available to the Federal Depository Library System.

One final issue to consider is what the nature of a “work” is when it is published as part of a larger compilation, such as when an article by a federal employee is part of a journal that contains non-governational works. This was the nature of the 19th-century controversies over edicts of government, where some parties maintained that while court opinions were in the public domain, page numbers were a creative enterprise deserving of protection.

When a journal publishes an article authored by an employee or officer acting in his or her official capacity, in some cases the publisher will simply mark that article with an explicit disclaimer.

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43 AR 27-60, § 4-3(c).
44 id., § 4-3(d).
45 id., § 4-3(f).
49 Letter from John C. Godbold, Director, Federal Judicial Center to Hon. Frank Annunzio, Chairman, Joint Committee on Printing, October 5, 1988.
of copyright. However, in many cases no such disclaimer is provided and in some, the issue becomes even murkier. An example is the recent publication by President Obama in the Harvard Law Review. The article contains a disclaimer at that reads:

“This journal’s copyright notice applies to the distinctive display of this Harvard Law Review Commentary, in both print and online forms, and not the President’s work or words.”

Perhaps the Harvard Law Review is attempting to distinguish the work the President originally submitted from the “final” work as published, but it is clear that the writing of the President, in the final fixed form as published by the Harvard Law Review Association, is also a work of government. The article as published has been “fixed in any tangible medium of expression, now known or later developed, from which [it] can be perceived, reproduced, or otherwise communicated, either directly or indirectly with the aid of a machine or device” and was done so “by or under the authority of the author.” It is a work and it is a work by an officer of the U.S. government, hence it is a work of government and no copyright may vest in its final form.

Audits of Publication Practices

In order to quantify the extent of the practice of employees or officers of the United States publishing their work in private publications, a series of audits have been conducted. We examine first the results from American Bar Association publications, then law reviews, and finally more generally the full scholarly literature.

Most ABA publications are not freely available on the Internet, and must be accessed through commercial services such as electronic databases from companies such as William S. Hein & Co.’s HeinOnline service. Because author affiliation is not part of the searchable metadata, examining the literature for potential works requires examining the title page and reading the author-provided information, which typically includes information such as the author’s education

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51 See, e.g., Stephen W. Preston, CIA and the Rule of Law, 6 J. of Natl. Security Law & Policy 1, (2012) (“No copyright is claimed in the content of this article, which was prepared by a federal officer in his official capacity.”); Mullins et. al., Description of Bartonella ancashensis sp. nov., isolated from the blood of two patients with verruga peruana, Intl. J. of Systematic and Evolutionary Microbiology, 65, 3339-3343 (2015), (Authors are affiliated with the U.S. Naval Medical Research Center, the Walter Reed Army Institute of Research, and the U.S. Naval Medical Research and a Disclaimer indicates that 4 of the 5 authors “are military service members or employees of the US Government and this work was prepared as part of their official duties (17 U.S.C. § 105 provides that ‘Copyright protection under this title is not available for any work of the United States Government’”).
and professional affiliations. In the case of government employees, the footnote often includes a disclaimer that the work does not represent the official views of the government.

The audit of ABA publications is a partial one in that not all publications and issues were examined. Included are articles in which the author self-describes as an employee or officer of the U.S. government. Not included were articles in which the author included a disclaimer indicating the work was done on personal time.\textsuperscript{55}

The results are presented in Table 1.\textsuperscript{56}

<table>
<thead>
<tr>
<th>Publication Name</th>
<th>Period Examined</th>
<th>Works Found</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABA Journal of Labor and Employment Law</td>
<td>2011-2016</td>
<td>8</td>
</tr>
<tr>
<td>Administrative Law Review</td>
<td>1949-2015</td>
<td>255</td>
</tr>
<tr>
<td>Air and Space Lawyer</td>
<td>2014-2015</td>
<td>4</td>
</tr>
<tr>
<td>Antitrust Law Journal</td>
<td>2000-2015</td>
<td>75</td>
</tr>
<tr>
<td>ABA Institutes</td>
<td>2012-2015</td>
<td>27</td>
</tr>
<tr>
<td>Criminal Justice</td>
<td>2012-2016</td>
<td>10</td>
</tr>
<tr>
<td>Insights on Law and Society</td>
<td>2010-2015</td>
<td>4</td>
</tr>
<tr>
<td>International Lawyer</td>
<td>2015-2016</td>
<td>2</td>
</tr>
<tr>
<td>Journal of Affordable Housing and Community Development Law</td>
<td>1993-2016</td>
<td>19</td>
</tr>
<tr>
<td>Judges’ Journal</td>
<td>2006-2016</td>
<td>25</td>
</tr>
<tr>
<td>Jurimetrics</td>
<td>2014-2015</td>
<td>3</td>
</tr>
</tbody>
</table>

\textsuperscript{55} See, e.g., Allan Jonathan Stein, \textit{FOIA and FACA: Freedom of Information in the Fifth Branch?}, 27 Admin. L. Rev. 31 (1975) (“Presently with the office Hearings and Appeals, United States Department of the Interior. This article was originally written for Professor Roy A. Schotland at the Georgetown University Law Center.”); Nathan I. Finkelstein and Collister Johnson, Jr., \textit{Public Counsel Revised: The Evolution of a Concept for Promoting Public Participation in Regulatory Decision-Making}, 29 Admin. L. Rev. 167 (1977) (Both authors self-identify as former federal employees and note “This article was written in consultation of the entire staff of the office of Public Counsel of the Rail Services Planning Office, Interstate Commerce Commission. Mr. A. Grey Staples, Jr., Director of the Office of Public Counsel, is particularly responsible for assisting the authors in developing the concepts and ideas discussed herein.”); Lawrence M. Frankel, \textit{Rethinking the Tunney Act: A Model for Judicial Review of Antitrust Consent Decrees}, 75 Antitrust L.J. 549 (2008-2009) (“Attorney, U.S. Department of Justice … The article was written while the author was visiting the University of Chicago Law School as the ’06-’07 Victor Kramer Fellow”).

\textsuperscript{56} ABA members are encouraged to notify the author of any audited articles that they feel are not properly works of government because they were not conducted in the course of an author’s official duties. The full listing may be viewed at https://law.resource.org/pub/us/works/aba/aba.audit.listing.pdf
In no case were articles accompanied by a disclaimer that no copyright applied to works of government or by any indication that the article was in fact such a work, although in a large number of articles a disclaimer was inserted that indicated that the views presented in the article did not necessarily reflect the official views of the employing agency.

In many cases, the articles are clearly explanations of an official about the workings of their department. Another set of audits were conducted by volunteer law students across the country of law reviews based in law schools. Those results are presented in Table 2. Without clear indications if an article is in fact written in the course of official duties, the reader is forced to examine the runes of the footnote describing the author to try and make that determination.

<table>
<thead>
<tr>
<th>Journal Name</th>
<th>Period Examined</th>
<th>Works Found</th>
</tr>
</thead>
<tbody>
<tr>
<td>Berkeley Technology Law Journal</td>
<td>1986-2016</td>
<td>22</td>
</tr>
</tbody>
</table>

Table 2: Partial Audit of Selected Law Reviews

Table 2: Partial Audit of Selected Law Reviews

<table>
<thead>
<tr>
<th>Journal Name</th>
<th>Period Examined</th>
<th>Works Found</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stanford Law Review</td>
<td>1948-2004</td>
<td>58</td>
</tr>
<tr>
<td>Yale Law Journal</td>
<td>1923-2017</td>
<td>274</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td><strong>772</strong></td>
</tr>
</tbody>
</table>

In one article, the results seem not to be a work when an ensign serving on active duty in the U.S. Naval Reserve published a piece on tax policy.\(^58\) In another, the author was a Professor at Harvard Law School who served as the official reporter to the Advisory Committee on Civil Rules and his article described that work.\(^59\) In a third, the author is Counsel to the President of the United States, but states that the article “was drafted before he became associated with the federal government.”\(^60\) In a fourth article, a sitting justice of the Supreme Court clearly marks the article “© 1989 Antonin Scalia” which certainly serves as an indicator that this is perhaps not a work of government.\(^61\) In a fifth, a Federal Trade Commissioner describes how the agency is structured and selects cases.\(^62\) If the extent of the practice was only a few thousand law review articles, this issue would not necessarily deserve attention. However, legal publishing is one of many fields in which government officials publish prolifically. In fields such as medicine, agencies such as the Centers for Disease Control, the Veterans’ Administration hospital system, and the National Institutes of Health all play a dominant role. In economics, organizations such as the Bureau of Labor Statistics, the U.S. Census, the Board of Governors of the Federal Reserve, and the Federal Trade Commission all play an active role. In the field of agriculture, the U.S. Department of Agriculture is one of the premier research institutions. In the field of transportation engineering, organizations such as the Federal Aviation Administration and the Federal Highway Administration make key contributions.

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To help determine the extent of works of government, a series of searches have been conducted in major bibliographic database systems such as ProQuest and EBSCO. The process consists of working through the U.S. Government Manual\textsuperscript{63} and other sources on the structure of government and entering resulting agency names into the search services.

Table 3 shows preliminary results for select agencies listing the number of potential works of government found through bibliographic searchers. Note that these lists are based on raw results and post-processing steps such as elimination of duplicates and quality assurance to make sure each entry is in fact authored by a federal employee will reduce the totals. Because databases such as ProQuest have a limited scope, additional results are being retrieved using specialized search services. For example, ProQuest has cataloging information for 1 million articles from the IEEE, but the IEEE has over 4 million articles published, so a supplementary search of computer science is needed to complement the initial results.

<table>
<thead>
<tr>
<th>Agency</th>
<th>Works Found</th>
</tr>
</thead>
<tbody>
<tr>
<td>Army Corps of Engineers</td>
<td>20,027</td>
</tr>
<tr>
<td>Board of Governors of the Federal Reserve</td>
<td>17,483</td>
</tr>
<tr>
<td>Centers for Disease Control</td>
<td>11,904</td>
</tr>
<tr>
<td>Central Intelligence Agency</td>
<td>5,185</td>
</tr>
<tr>
<td>Dept. of Agriculture</td>
<td>40,298</td>
</tr>
<tr>
<td>Dept. of Commerce</td>
<td>38,352</td>
</tr>
<tr>
<td>Dept. of Defense Graduate Schools</td>
<td>5,569</td>
</tr>
<tr>
<td>Dept. of Defense Intelligence Agencies</td>
<td>11,594</td>
</tr>
<tr>
<td>Dept. of Education</td>
<td>4,713</td>
</tr>
<tr>
<td>Dept. of Energy (excluding National Labs)</td>
<td>6,943</td>
</tr>
<tr>
<td>Dept. of Health and Human Services (excluding CDC and NIH)</td>
<td>24,720</td>
</tr>
<tr>
<td>Dept. of Homeland Security (excluding Coast Guard and ICE)</td>
<td>44,070</td>
</tr>
<tr>
<td>Dept. of Interior</td>
<td>13,520</td>
</tr>
<tr>
<td>Dept. of Labor</td>
<td>7,243</td>
</tr>
<tr>
<td>Dept. of State</td>
<td>7,848</td>
</tr>
<tr>
<td>Environmental Protection Agency</td>
<td>23,297</td>
</tr>
<tr>
<td>Legislative Branch and Associated Agencies</td>
<td>53,931</td>
</tr>
<tr>
<td>National Aeronautics and Space Administration</td>
<td>41,745</td>
</tr>
<tr>
<td>National Institutes of Health</td>
<td>45,301</td>
</tr>
<tr>
<td>Nuclear Regulatory Commission</td>
<td>9,156</td>
</tr>
<tr>
<td>Smithsonian Institution</td>
<td>14,651</td>
</tr>
<tr>
<td>U.S. Army (Generally)</td>
<td>14,899</td>
</tr>
<tr>
<td>U.S. Courts</td>
<td>4,792</td>
</tr>
<tr>
<td>U.S. Navy</td>
<td>6,667</td>
</tr>
<tr>
<td>Veteran's Administration</td>
<td>6,981</td>
</tr>
<tr>
<td>White House and Executive Office of the President</td>
<td>3,092</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>483,981</strong></td>
</tr>
</tbody>
</table>
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Opportunities for Broader Availability

There are several steps that can be taken to promote broader availability of works of government. First and foremost is better adherence to the terms of existing laws for articles that will be published in the future. When an article is submitted to a publication, most require completion of a copyright release form. Some publications that deal with government employees provide an option that indicates there is no copyright to be transferred because the employee works for the federal government. In other cases, conscientious federal employees simply scratch out the release and pen some form of the phrase “I will not sign this statement.”

It would be a straightforward best current practice for publishers to provide a simple indicator on the form that allows a federal employee to make clear when a submission is a work of government. Likewise, it would be equally straightforward for all publishers to clearly indicate, as the law requires, when a published article is a work of government.

One mechanism that would help provide broader availability of works of government in the future would be legislation mandating that a copy of any externally published works of government be submitted to the Government Printing Office, which would make those works available on the Federal Digital System web site it operates and also provide copies to the members of the Federal Depository Library System.

A second area where guidance would be useful would be formal policies from the Office of Government Ethics and the Judicial Conference of the United States to provide guidelines across government for external publication, in particular guidance on when such a publication is a work of government and when it is the personal publication. Such guidelines could spell out any departmental approvals or other ethics safeguards that agencies should put in place.

While government can make such articles more broadly available on government web sites, private publishers can also take steps to make these materials much more broadly available. In the case of articles published in the future, publishers could provide free access to these articles in addition to clearly marking them as works of government. Conclusion: Keeping America Informed

The works of government doctrine developed in the late 19th century as part of a broader focus on making government information more broadly available. In 1861, on the same day that Abraham Lincoln was inaugurated, the Government Printing Office opened its doors with a mission of “keeping America informed.”64 On the other side of Capitol Hill, the newly formed Smithsonian Institution was working to promote the “increase and diffusion of knowledge.”65 This was a period when all three branches grappled with who owns edicts of government and other works of government, a period that culminated in the Printing Act and then the Copyright Act and a clear policy that works of the U.S. Government are owned by the people and have no copyright. That

65 9 Stat. 102 (1846).
policy emerged from dramatic changes in printing technology, changes that made possible private works such as the National Reporter System of John B. West.66

A subsequent dramatic change in technology in the 1930s and 1940s accompanied an explosion of government activity,67 and instituted formal procedures such as the creation of Official Journals of Government such as the Federal Register and the establishment of a National Archives and Records Agency to preserve the materials of government. By the end of World War II, agencies such as the Government Printing Office had greatly expanded their activities, consuming 250,000 tons of paper per year at the world’s largest printing plant.68

External publication of works of government is a practice that has grown over time. We should continue to adapt our basic principles to meet the realities of our modern Internet era. We can encourage the continued publication in prestigious scholarly journals and still maintain our belief that government information has a special role because it is owned by the people.

An informed citizenry is at the core of our democracy and a federal government that informs and instructs plays a valuable role in our modern, information-rich society. John Adams said if our democracy is to work, we must arm our citizens with knowledge, letting “the public disputations become researches into the grounds and natures and ends of government” and encouraging us to “let every sluice of knowledge be open’d and set a flowing.”69 Works of government are just one small sluice, but one that we can readily open and set a flowing. With adoption of this resolution, the ABA can take a concrete and meaningful step to promote greater access to knowledge.

Respectfully submitted,

Timothy Stanley
Edward J. Walters

69 John Adams, A Dissertation on the Canon and Feudal Law, No. 4., Boston Gazette, October 21, 1765.
GENERAL INFORMATION FORM

Submitting Entity: Individual submission by Timothy Stanley and Edward J. Walters (ABA Members)

Submitted By: Timothy Stanley and Edward J. Walters joined by Nathan Cardozo, David Greene, Vincent Polley, Nina Mendelson

1) Summary of Resolution(s).

The resolution proposes legislation that would require works authored by federal employees or officers in the course of their official duties and subsequently published privately in journals or other publications to furnish those works to the Government Printing Office for subsequent distribution. The resolution encourages publishers to properly identify works of the U.S. government and to make them more broadly available to the public. The resolution identifies actions that may be taken by the Judicial Conference, the Office of Government Ethics, and the Federal Trade Commission to promote better labeling and availability of works of the U.S. government.

2) Approval by Submitting Entity.

This is a submission by individual members comprising the Ad Hoc Committee on Promulgation.

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?

Copyright release forms used for acceptance of articles.

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

N/A

6) Status of Legislation. (If applicable)

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

Policy could be implemented by legislative action and agency action and through voluntary steps by publishers.

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

None (excepting a minor change in procedures for receiving submissions from authors).

9) Disclosure of Interest. (If applicable)

N/A

10) Referrals.

The Resolution and report have been referred to all ABA Section Chairs, Section Delegates, and their staff directors.

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

Carl Malamud
1005 Gravenstein Highway North
Sebastopol, CA 95472
(707) 827-7290
carl@media.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.)

Carl Malamud
1005 Gravenstein Highway North
Sebastopol, CA 95472
(707) 217-2934
carl@media.org
EXECUTIVE SUMMARY

Works of the U.S. government are writings and other publications authored by an employee or officer of the federal government in the course of his or her official duties. These works of government are not eligible for copyright based on long-standing public policy and legislative enactments going back to the Printing Act of 1895 and the Copyright Act of 1909.

1. Summary of the Resolution

This report and resolution outlines a number of steps that governmental authorities and private publishers (including the ABA) could take to encourage broader availability of Works of the U.S. Government. This resolution recommends that Congress mandates a deposit of all externally published works of government with the Government Printing Office for subsequent distribution on government web sites and through the Federal Depository Library System. In addition, this resolution recommends that the Office of Government Ethics develop guidelines instructing federal employees and officers on the proper contours of the works of government clause.

This resolution also recommends that publishers more determine on submission which articles are works of government and more clearly mark them upon publication.

2. Summary of the Issue that the Resolution Addresses

In the 20th century, a large number of scholarly and technical articles began to be published in journals run by professional associations or by private publishers. This report documents 552 articles in publications of the ABA which are potentially works of government and thus not eligible for copyright. This report also demonstrates that the problem is not confined to the legal literature, and includes several hundred thousand journal articles authored by federal employees or officers and privately published. The fields of endeavor include law, economics, medicine, engineering, agriculture, and many other disciplines.

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

The law requires that works of government be clearly identified. However, many such articles are not properly identified and in any case, many of them are not available except by subscribing to commercial services and adhering to stringent terms of use. By more clearly labelling Works of the U.S. Government and by requiring mandatory deposit of such works to the Government Printing Office, this literature will become more broadly available as is the intent of the Works of the U.S. Government clause of the Copyright Act. By urging formal guidance from the Office of Government Ethics, employees and officers of the government will be able to identify when a work is conducted in the course of their official duties.

4. Summary of Minority Views

None as of this writing.
RESOLVED, That the American Bar Association opposes the use of mandatory, binding, pre-dispute arbitration agreements in private student loan contracts; and

FURTHER RESOLVED, That the American Bar Association supports enactment of legislation and regulations that would prohibit or invalidate such arbitration agreements and opposes legislation and regulations that would authorize, encourage, or enforce such agreements.
Reasons for the Resolution

Lenders in the private student loan market have come under increasing scrutiny for predatory practices that include (1) charging high interest rates and penalties in violation of state consumer protection laws, (2) providing high-cost loans to borrowers who are likely unable to repay their debts, and (3) misrepresenting the quality of educational institutions that they finance.\(^1\) Borrowers harmed by these practices have sought relief through civil actions, often by way of class action lawsuits, but have been forced to arbitrate their claims due to a pre-dispute arbitration provision in the original loan documents.\(^2\)

While arbitration and other mechanisms for alternative dispute resolution provide substantial benefits in the civil justice system and should be encouraged, the widespread use of pre-dispute arbitration provisions in a variety of consumer contracts has been criticized.\(^3\) Consumers often unknowingly waive their right to a civil jury or non-jury trial. Moreover, because the cost of arbitration often exceeds the amount of an individual’s damages, consumers are unable to bring their claims and potentially illegal predatory practices cannot be challenged. These concerns are particularly acute in the private student loan market, where young individuals saddled with debt while in the infancy of their careers have no meaningful way to challenge potentially predatory lending practices.

On November 1, 2016, The U.S. Department of Education promulgated final rules that amend the William D. Ford Federal Direct Loan regulations to prohibit participating schools from using certain contractual provisions regarding dispute resolution processes, such as pre-dispute arbitration agreement or class action waivers. The regulations further require certain notifications and disclosures by schools regarding their use of arbitration.\(^4\) The position set forth in this resolution is consistent with the Department of Education regulations from the borrowers’ perspective. Moreover, unlike many private student loan agreements, loans made under the federal student loan program do not contain pre-dispute arbitration provisions on account of the Seventh Amendment’s prohibition on the government’s denial of trial by jury.\(^5\)

The Consumer Financial Protection Bureau (“CFPB”) has recently taken action demonstrating the increasing concern for binding pre-suit arbitration provisions in consumer contracts. The CFPB was created pursuant to the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act. The Act required the CFPB to study the use of mandatory arbitration clauses in consumer financial markets. Congress also gave the Bureau the power to issue regulations that are in the public interest, for the protection of consumers, and consistent with the study. The CFPB’s March 2015 study showed individuals rarely bring actions against financial service providers either in court or in arbitration. The study found that class actions provide a

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1 Between a Rock and a Hard Place; Courthouse Doors Shut for Aggrieved Private Student Loan Borrowers, Public Citizen, July 2012.
2 Id.
more effective means for consumers to challenge problematic practices by these companies. In May 2016, the CFPB proposed rules that would require mandatory arbitration clauses to state explicitly that they cannot prevent consumers from being part of a class action.

It should be emphasized that the concern here is the inability of students to meaningfully challenge potentially predatory lending practices. That is not to say that lenders are in fact engaging in predatory lending practices. Support for this resolution does not require a determination that a student borrower’s allegation of a predatory lending practice should or should not prevail on the merits. Rather, the concern presented here is that student borrowers bringing such claims are often denied meaningful access to the courts. Arbitration may in some instances be an appropriate means of resolving these disputes. But that determination is best made after the parameters of a dispute are understood and a student’s waiver of his or her constitutional right to a civil jury trial can be made knowingly and intelligently.

_Fensterstock v. Educ. Fin. Partners_, 2012 U.S. Dist. Lexis 124571 (S.D.N.Y. Aug. 30, 2012) illustrates the inability of private student loan borrowers to obtain their day in court. Joshua Fensterstock filed a claim on behalf of a class, alleging that the manner in which his student loan lender applied his payments toward principal amounted to a penalty. His individual damages were two hundred dollars and would increase over the life of the loan. The original loan documents he signed contained extensive arbitration provisions, including a requirement that any class claims be arbitrated on an individual basis. The lender filed a motion to stay the proceedings and compel arbitration. The court originally denied the lender’s motion based on California law declaring such provisions unconscionable. Following the United State Supreme Court’s decision in _AT&T Mobility LLC v. Concepcion_, 563 U.S. 333 (2011), which held that the Federal Arbitration Act preempts California’s law declaring such provisions unconscionable, the _Fensterstock_ Court granted the lender’s motion to compel arbitration.

In _Kilgore v. KeyBank, N.A._, 718 F.3d 1052 (9th Cir. 2016), former students of a failed flight training school filed a putative class action against the bank and loan servicer that provided loans to finance the students’ tuition. The students claimed that the defendants were identified as preferred lenders in marketing materials, encouraged students to borrow from the defendants, and loaned students tuition money knowing that the flight school was financially volatile. The students sought to enjoin the defendants from reporting loan defaults to credit agencies and from enforcing the notes for the loans. Because the notes signed by the students contained an arbitration clause that waived their right to litigate in court and prohibited arbitration on a class basis, the Court granted a defense motion to compel arbitration. In light of the students’ assertion that they could not afford arbitration fees, the Court’s ruling likely left the students saddled with debt and poor credit ratings yet without the education they were promised.

Current ABA Policy

The proposed resolution is consistent with existing Association policies, but expands upon them. Prior policies demonstrate a distinction between business contracts that essentially bind the parties to contracts and those involving individuals. For example, in August 2009 the ABA House of Delegates adopted Resolution 114, which opposed efforts to invalidate pre-dispute agreements to arbitrate international commercial disputes. When the ABA has opposed pre-dispute arbitration
agreements, as discussed below, the contracts have involved individuals. The proposed resolution is consistent with this distinction in that it opposes binding arbitration in contracts involving individuals.

In February 2009, the ABA House of Delegates adopted Resolution 111B, which opposes pre-dispute arbitration provisions in agreements between a long-term care facility and residents of such a facility. The Report accompanying Resolution 111B summarized existing ABA policy at that time as follows:

The ABA has consistently promoted the greater use of alternative dispute resolution, including arbitration, to resolve disputes short of litigation, “so long as every disputant’s constitutional and other legal rights and remedies are protected (Report No. 114, approved by the ABA House of Delegates in August 1989). The ABA also has adopted a series of resolutions that, in specified circumstances, endorses the use of voluntary, but not mandatory, arbitration. In the context of court-annexed ADR, the ABA has repeatedly stated that only voluntary arbitration should be used by the courts (See, e.g., Report 10F, approved in Aug. 1994; Report 305 approved in Aug. 1995; and Report 112, approved in Feb. 1997). Also, the ABA has supported the use of arbitration by federal agencies, but only when “all parties to the dispute . . . knowingly consent to use arbitration procedures . . .” (See Report 103A, approved in Aug. 1988).

In August 2011, The ABA House of Delegates adopted Resolution 120, which urged Congress to amend the Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA”) to make unenforceable any clause of any agreement between an employer and an employee that requires arbitration of a dispute under the Act.

In February 2016, the ABA House of Delegates adopted Resolution 100, which encouraged the informed and voluntary use of alternative dispute resolution (ADR) processes as an effective, efficient and appropriate means to resolve health care disputes, but opposed the use of binding forms of alternative dispute resolution involving patients in medical malpractice disputes, disputes with private managed health care organizations, or involving residents in disputes with long-term care facilities or similar health care institutions, unless the parties agree to do so voluntarily and knowingly after a dispute arises.

In August 2014, the ABA House of Delegates adopted Resolution 105A, which recognized that the right to a civil jury trial is a fundamental right.

Conclusion

The American Bar Association should establish policy opposing the use of mandatory, binding, pre-dispute arbitration agreements in private student loan contracts. Moreover, the
American Bar Association should support the enactment of legislation and regulations that would invalidate such arbitration agreements and oppose legislation and regulations that would authorize encourage or enforce such agreements.

Respectfully submitted,

Sam H. Poteet, Jr., Chair
Tort Trial and Insurance Practice Section
August 2017
1. **Summary of Resolution(s).**

The American Bar Association opposes the use of mandatory, binding, pre-dispute arbitration agreements in private student loan contracts. Further, the American Bar Association supports enactment of legislation and regulations that would prohibit or invalidate such arbitration agreements and opposes legislation and regulations that would authorize, encourage or enforce such agreements.

2. **Approval by Submitting Entity.**

Approved by the Council of the Tort Trial and Insurance Practice Section on Saturday, February 4, 2017.

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 proposed resolution is consistent with existing Association policies, but expands upon them. Prior policies demonstrate a distinction between business contracts that essentially bind the parties to contracts and those involving individuals. For example, in August 2009 the ABA House of Delegates adopted Resolution 114, which opposed efforts to invalidate pre-dispute agreements to arbitrate international commercial disputes. When the ABA has opposed pre-dispute arbitration agreements, as discussed below, the contracts have involved individuals. The proposed resolution is consistent with this distinction in that it opposes binding arbitration in contracts involving individuals.

In February 2009, the ABA House of Delegates adopted Resolution 111B, which opposes pre-dispute arbitration provisions in agreements between a long-term care facility and residents of such a facility. The Report accompanying Resolution 111B summarized existing ABA policy at that time as follows:

The ABA has consistently promoted the greater use of alternative dispute resolution, including arbitration, to resolve disputes short of litigation, “so long as every disputant’s constitutional and other legal rights and remedies are protected (Report No. 114, approved by the ABA House of Delegates in August 1989). The ABA also has adopted a series of resolutions that, in specified circumstances,
endorses the use of voluntary, but not mandatory, arbitration. In the context of court-annexed ADR, the ABA has repeatedly stated that only voluntary arbitration should be used by the courts (See, e.g., Report 10F, approved in Aug. 1994; Report 305 approved in Aug. 1995; and Report 112, approved in Feb. 1997). Also, the ABA has supported the use of arbitration by federal agencies, but only when “all parties to the dispute . . . knowingly consent to use arbitration procedures . . . .” (See Report 103A, approved in Aug. 1988).

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In August 2014, the ABA House of Delegates adopted Resolution 105A, which recognized that the right to a civil jury trial is a fundamental right.

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)

Not applicable

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

Appropriate notice to relevant policymakers and state and local bar associations would be made.

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

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

None

10. **Referrals.**

Section of Dispute Resolution  
Law Student Division  
Young Lawyers Division  
Section of Litigation  
Business Law Section

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

James A. Wells  
Meyerson & O'Neill  
1700 Market St. Suite 3025  
Philadelphia, PA 19103  
215/972-1376  
FAX: 215/972-0277  
jwells@meyersonlawfirm.com

Robert S. Peck  
Center for Constitutional Litigation, PC  
7916 Bressingham Drive  
Fairfax Station, VA 22039  
202/944-2874  
FAX: 202/965-0920  
E-mail: Robert.peck@cclfirm.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.)

Robert S. Peck  
Delegate, TIPS  
202/944-2874  
E-mail: Robert.peck@cclfirm.com

Timothy W. Bouch  
Delegate, TIPS  
843/513-1072  
E-Mail: tbouch@leathbouchlaw.com
Michael W. Drumke
Delegate, TIPS
312/222-8523
E-mail: mdrumke@smbtrials.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution places the American Bar Association on record opposing the use of mandatory, binding, pre-dispute arbitration agreements in private student loan contracts. The resolution also places the American Bar Association on record supporting the enactment of legislation and regulations that would prohibit or invalidate such arbitration agreements and opposes legislation and regulations that would authorize, encourage, or enforce such agreements.

2. Summary of the Issue that the Resolution Addresses

Lenders in the private student loan market have come under increasing scrutiny for predatory practices that include (1) charging high interest rates and penalties in violation of state consumer protection laws, (2) providing high-cost loans to borrowers who are likely unable to repay their debts, and (3) misrepresenting the quality of educational institutions that they finance. Borrowers harmed by these practices have sought relief through civil actions, often by way of class action lawsuits, but have been forced to arbitrate their claims due to a pre-dispute arbitration provision in the original loan documents. These borrowers often unknowingly waive their right to a civil jury or non-jury trial. Moreover, because the cost of arbitration often exceeds the amount of an individual’s damages, they are unable to bring their claims and potentially illegal predatory practices cannot be challenged.

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

The resolution reaffirms the ABA’s longstanding support for the concept that the right to a trial by jury is a fundamental right and that any waiver of this right should be knowing and voluntary. It reaffirms the ABA’s support for access to the courts and for alternative dispute resolution, such as arbitration, when it is voluntary. The resolution specifically extends existing policy to cases involving private student loans.

4. Summary of Minority Views or Opposition Which Have Been Identified:

Minority views were presented within the Section to the effect that the resolution is not consistent with the ABA’s support for alternative dispute resolution. The majority view was that opposition to pre-dispute arbitration provisions in private student loans is not inconsistent with the ABA’s longstanding support for voluntary alternative dispute resolution.
RESOLVED, That the American Bar Association urges all federal, state, local, territorial, and tribal legislative, judicial and other governmental bodies to support the principles that:

(1) the holder of the attorney-client privilege does not waive the privilege or protection by sharing communications or materials with another person (not jointly represented by the same counsel) who,

(a) having common legal interests with the holder in some litigated, potentially litigated, or nonlitigated matter or in related matters (such as parallel lawsuits),
(b) has agreed with the holder of the privilege or protection

(i) to cooperate with one another to develop and pursue a joint legal strategy with respect to some aspect of the matter or matters in which the parties have common interests, and
(ii) to maintain the confidentiality of any privileged or protected communications or materials shared in pursuit of such cooperation;

provided that the communications or materials shared relate to the parties' common interests;

(2) no party to such a common-interest arrangement can unilaterally waive privilege or protection with respect to communications or materials other than the waiving party's own communications or materials;

(3) in the event of later adverse proceedings between or among the parties to the common-interest, any party may use communications or materials shared against any other party;

(4) existence of a common-interest or agreement to a common-interest arrangement is not a basis to compel the holder of a privilege or protection
to disclose to others having that common interest any communications or
materials that the holder does not voluntarily share;

(5) while some authorities condition protection of common-interest
sharing on each party to the common-interest arrangement being
separately represented, no such requirement should be applied when the
parties to the common-interest arrangement have a preexisting relationship
(including, without limitation, indemnitor-indemnitee, insurer-insured,
patent holder-licensee, or lead lender and participants in the loan) that

(a) binds them to a common outcome on the issue(s) as to which
they have a common interest,

(b) creates duties to respect one another’s interests, and

(c) creates rights to participate in decision making regarding the
common interest.

(Paragraph (5) has no application in criminal litigation.)
REPORT

I. The ABA should support strengthening the attorney-client privilege by advocating in favor of the common-interest doctrine, which prevents waiver resulting from sharing of privileged communications among parties of common interest (but not jointly represented).

Sharing of privileged communications with persons not part of the attorney-client relationship ordinarily waives the privilege. 1 Almost all American jurisdictions recognize an exception to that rule for sharing in connection with the joint defense or joint prosecution of litigation. 2 Most federal courts and many state courts have generalized this exception to apply to parties of common interest in matters not involving anticipation of any particular litigation. 3 But some courts, notably the New York Court of Appeals 4 and the Fifth Circuit, 5 have limited it to matters where litigation is pending or reasonably anticipated. Moreover, some commentators appear to advocate rejection of the doctrine entirely. 6 The ABA should advocate for continued recognition of the doctrine and against any limitation to specific anticipated litigation. (Paragraph (1))

In any form of common-interest arrangement, there must be an agreement among the parties, but that agreement need not be express. 7 The parties also must actually pursue some joint strategy, to which the communications related. 8 (Paragraph (1))

It is generally agreed that (a) no party to a common-interest arrangement can unilaterally waive privilege regarding communications other than the party's own communications 9 and (b) in the event of later adverse proceedings between or among the parties to the common-interest, any party may use shared communications against any other party. 10 These principles are

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2 No exception would be necessary were the parties seeking to cooperate jointly represented, as all communications within the joint representation would be privileged, though there would be no privilege in subsequent adverse proceedings between the co-clients. Restatement LGL, § 79. But joint representation cannot be used where the parties, though wishing to cooperate on some issues have conflicts of interest on other issues. Model Rules of Prof’l Conduct, R. 1.7.
3 Restatement LGL, § 79 & cmt. f; Schaeffler v. United States, 806 F.3d 34, 40-43 (2nd Cir. 2015) (because of preexisting transaction, borrower and banks had common interests in restructuring borrower's business organization and refinancing transaction in a way that would receive favorable tax treatment, so sharing of privileged legal advice on tax issues did not waive privilege); United States v. BDO Seidman, LLP, 492 F.3d 806, 816 (7th Cir. 2007) ("The weight of authority favors our conclusion that litigation need not be actual or imminent for communications to be within the common interest doctrine"; citing cases in five other circuits agreeing on that point).
5 In re Santa Fe Int'l Corp., 272 F.3d 705, 711 (5th Cir. 2001) (requiring "palpable threat of litigation at the time of the communication.").
7 United States v. Gonzalez, 669 F.3d 974, 979-80 (9th Cir. 2012); Hunton & Williams v. United States Dept. of Justice, 590 F.3d 272, 284-85 (4th Cir. 2010); United States v. BDO Seidman, LLP, 492 F.3d 806, 816 (7th Cir. 2007); In re Grand Jury Subpoenas, 89-3 & 89-4, 902 F.2d 244, 246-47 (4th Cir.1990).
8 Schaeffler v. United States, 806 F.3d 34, 40 (2nd Cir. 2015); Pac. Pictures Corp. v. United States District Court, 679 F.3d 1121, 1129 (9th Cir. 2012).
9 Restatement LGL, § 79, cmt. g.
10 Restatement LGL, § 79, cmt. f.
important to the doctrine, and the ABA should be in a position to advocate for them when addressing other issues. (Paragraphs (2) & (3))

Overwhelming authority holds that existence of a common-interest or agreement to a common-interest arrangement is not a basis to compel the holder of a privilege or protection to disclose any communications or materials not voluntarily shared. But the Illinois Supreme Court disagrees. The latter rule improperly impairs the efficacy of the privilege; the ABA should advocate against it. (Paragraph (4))

Some authorities require each party to the common-interest arrangement to be separately represented for sharing to be protected against waiver. There is little (and divided) authority on this. Most authorities deal with common-interest arrangements (e.g., for joint defense of litigation) constituting an ad hoc alliance against a common foe, with the potential that any party to the arrangement might defect and ally with the former foe. That potential supports a requirement that each party have its own lawyer.

Paragraph (5) addresses this emerging issue by pointing out a fact not yet considered in any of the common-interest cases: some common-interests (unlike ad hoc coalitions in typical joint litigation arrangements) arise from preexisting relationships that bind the parties together in a way that makes separate representation for every party unnecessary. (The sort of relationship binding parties to a common result cannot exist in criminal litigation, so the sort of common-interest arrangements addressed by Paragraph (5) could not exist in the criminal context.)

Relationships with such binding effects include indemnitor-indemnitee, insurer-insured, patent holder-licensee, and the relationship between a lead lender and participants in the loan. Parties to such a relationship normally have, either expressly or impliedly, duties to respect one another’s interests and rights to participate in decision making regarding the common interest (at least to the extent of being consulted, even if the right to make the decision is vested in one or more other parties to the arrangement). Where this is true, each party to the arrangement has a need for access to information bearing on the decisions to be made regarding the common interest.

Moreover, the alignment of interests created by the preexisting relationship can allow an unrepresented party to treat the advice of lawyers for other parties regarding the common interests as if those lawyers represented it, even though the lawyers owe the unrepresented party no special duties. The preexisting relationship removes the risk of defection to ally with the common adversary in litigating the common issue. Accordingly, there is no need to impose a requirement of separate representation in that context.

13 Defection is still possible. For example, a policyholder might decide to settle with the claimant and cooperate against the insurer. But the policyholder would be the holder of its own privilege and entitled to waive it, even though sharing information with the insurer did not constitute a waiver. Moreover, the settlement would terminate litigation of the claim against the policyholder, so the common-interest issue would disappear.
An example of this situation can be found in liability insurance, where the relevant rights and duties among the parties are most extensively developed in caselaw. If there is a conflict of interest between insurer and policyholder regarding defense of a suit, the policyholder has a right to independent counsel, not representing and not directed by the insurer. But the insurer still shares with the policyholder an interest in defeating or minimizing the claim, because the insurer may be obliged to pay some or all of any judgment. The insurer has a right to be consulted about defense decisions, even though the policyholder is entitled to make those decisions. The insurer needs and is entitled to information and advice about the claim in order to provide such input and to determine its own obligations regarding defense and settlement of the claim.

Under the rule in paragraph (5), if the insurer chooses to have an unrepresented adjuster participate in management of the defense, *sharing of defense information with the unrepresented insurer would not waive the privilege*. But the adjuster’s communications with counsel (and with the insured) would not be independently privileged (though likely be protected by work product immunity and possibly derivatively privileged to the extent that they would reveal the contents of the privileged communications shared with the adjuster). Nor would the insurer be a holder of the privilege for any communications between a represented party and its counsel, even if those communications have been shared with it.

This rule strengthens the privilege against the adversary of the parties with the preexisting relationship by preventing necessary sharing of information from waiving the privilege. A Texas statute has been construed to preclude common-interest sharing except among allied lawyers. But, where the issue is not controlled by statute or rule, the ABA should advocate against that rule and in favor of the one stated in the Resolution. The ABA should also advocate against statutes or rules that mandate the Texas result.

The Paragraph (5) issue has limited authority on either side. None of that authority considers the special needs of parties with the sort of preexisting relationship addressed by Paragraph (5). The ABA should take a leadership position in shaping the law on this issue, by advocating a rule that will properly strengthen the privilege.

II. Whether every party to a common-interest arrangement must be separately represented is unsettled.

The leading case supporting a requirement of separate representation is *In re: Teleglobe Communications Corp.*, construing the Delaware Rules of Evidence. *Teleglobe* was a dispute between subsidiaries (the “Debtors”) of a bankrupt corporation, Teleglobe, and its former parent, Bell Canada Enterprises (“BCE”) regarding BCE’s decision to cease funding projects of Teleglobe. That decision resulted from a review called “Project X.” BCE’s in-house counsel had represented Teleglobe on various matters where Teleglobe and BCE had common interests, but had advised BCE alone on Project X. Teleglobe now sought to discover communications about Project X.

*Teleglobe* explained that the common interest or community of interest rule "allows attorneys representing different clients with similar legal interests to share information without

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14 *In re: Teleglobe Communic’ns Corp.*, 493 F.3d 345, 363-64 (3rd Cir. 2007).
having to disclose it to others."\textsuperscript{15} As \textit{Teleglobe} construed the rule, "to be eligible for continued protection, the communication must be shared with the attorney of the member of the community of interest."\textsuperscript{16}

The court concluded its discussion of the "community of interest rule" with two "points of caution," one relevant to the discussion here: "the privilege only applies when clients are represented by separate counsel. Thus, it is largely inapplicable to disputes like this one that revolve around corporate family members use of common counsel (namely, centralized in-house counsel)."\textsuperscript{17} The court concluded that "BCE's invocation of the 'common interest' privilege … was out of place, as BCE has never asserted that the parties were represented by separate counsel who properly shared information."\textsuperscript{18}

Still, the privilege was properly asserted, because even a conflicted representation by a joint attorney would not have divested one client of its privilege against the other on matters where they had adverse interests.\textsuperscript{19} (Because BCE's privilege was preserved, the conclusion that the common interest doctrine was inapplicable was dictum; it did not support the no-waiver result.)

While the \textit{Teleglobe} discussion was dictum, it is the only appellate application (other than \textit{In re XL Specialty Insurance Co.},\textsuperscript{20}) of the putative separate representation requirement. A number of federal district and bankruptcy courts have stated that requirement based on \textit{Teleglobe} or other authority, but without relying on the putative separate representation requirement.\textsuperscript{21} Some state court cases have done likewise.\textsuperscript{22}

Prof. Rice states that "[t]his limitation … has been lost in contemporary jurisprudence where distinctions between joint client, joint defense, common interests and community of
interest appear to have been overlooked and forgotten.” A number of relevant cases have upheld the privilege without mentioning any requirement that each party have its own lawyer.

III. No requirement of separate representation requirement should apply when the common-interest parties are part of a network created by a preexisting relationship.

One can identify two different types of common-interest arrangements. One (exemplified by the typical joint-defense agreement) is a coalition among independent actors seeking to cooperate on one or more issues against one or more third parties. The other (exemplified by common insurance and indemnification relationships) is a network of parties whose preexisting relationship binds them together on one or more issues, creates duties to respect one another’s interests, and creates rights to participate in decision making. In a coalition, each party acts independently, but they seek to cooperate in areas where their interests align. In a network, the interests are aligned by the preexisting relationship that binds all parties to the results of decisions made on behalf of all, with decision makers obliged to consult with non-decisionmakers if the latter wish to provide input. At least as to the network type, the rule permitting information sharing without waiver, is strongly justified.

One situation in which common legal interests are widely recognized is that where one party is obligated under some preexisting arrangement to indemnify another against liability. If and when a claim subject to such an indemnification obligation is asserted, the indemnitor and indemnitee share a legal interest in defeating or minimizing the claim. The law regarding such interests is most extensively developed where the indemnitor is a liability insurer and the indemnitee is its insured, but commercial indemnity obligations and those arising as a matter of law can present analogous issues.

Even with insurance, there are many variations. The simplest is where one insurer insures one insured and, pursuant to contract, has a right and duty to defend the insured against covered claims. But the insured may be entitled to conduct its own defense or there may be multiple insurers, some of whom do not defend. To analyze any variation, one must understand the structure of typical insurance policies.

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24 Many cases have formulated the common interest doctrine in ways that do not identify separate representation of all parties as a requirement. E.g., In re Bevill, Bresler & Schulman Asset Management Corp., 805 F.2d 120, 126 (3rd Cir. 1986) (“The joint defense privilege protects communications between an individual and an attorney for another when the communications are "part of an on-going and joint effort to set up a common defense strategy." In order to establish the existence of a joint defense privilege, the party asserting the privilege must show that (1) the communications were made in the course of a joint defense effort, (2) the statements were designed to further the effort, and (3) the privilege has not been waived.” (citations omitted)).
A. The most common network is that created by liability insurance.

1. The privilege universally applies where an insurer defends pursuant to a liability insurance policy.

The insuring agreement in liability policy typically promises the insured to defend against any covered claim. The law has long recognized that such an insurance policy ordinarily grants the insurer a right to select and direct defense counsel.\(^{26}\) Usually, where an insurer provides a defense pursuant to such a policy, the insurer is recognized as a co-client with the insured.\(^{27}\) Sharing of information among co-clients does not waive privilege, regardless of any requirements applicable to a common-interest arrangement.\(^{28}\)

Sharing of information is necessarily the default rule in co-client representations. Every client has a right to full information about the representation.\(^{29}\) Where there are two clients represented jointly, this right is inconsistent with a duty to one client to refrain from disclosures to the other. Thus, the normal rule is that (unless the clients agree otherwise) all information may be shared with both clients.\(^{30}\)

Even in jurisdictions and circumstances where a defending insurer is not recognized as a co-client, sharing of information with the insurer should not be a waiver. Among the privileged persons with whom information may be shared without waiver are agents of the client.\(^{31}\) The Restatement (Third) of the Law Governing Lawyers recognizes a carrier as such an agent for privilege purposes.\(^{32}\)

These specific statements are reinforced by broad rules permitting sharing of information among co-clients and among other parties of common interest.\(^{33}\) The relevant interest is one in the “matter” that is the subject of the representation.\(^{34}\) But their interests in the matter “need not be entirely congruent.”\(^{35}\) Joint representation or common-interest sharing is permissible for joint

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\(^{27}\) WILLIAM T. BARKER & CHARLES SILVER, PROFESSIONAL RESPONSIBILITIES OF INSURANCE DEFENSE COUNSEL (hereinafter, "BARKER & SILVER") § 4.04.

\(^{28}\) RESTATEMENT LGL, § 79.

\(^{29}\) MODEL RULES OF PROF’L CONDUCT, R. 1.4 (2012). See MODEL RULES OF PROF’L CONDUCT, R. 1.7 cmt. [31] ("As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client’s interests and the right to expect that the lawyer will use that information to that client’s benefit.").

\(^{30}\) RESTATEMENT LGL, § 60 cmt. f.

\(^{31}\) RESTATEMENT LGL, §§ 70, cmts. e & f, and 134 cmt. f.

\(^{32}\) RESTATEMENT LGL, § 75 (2000).

\(^{33}\) RESTATEMENT LGL § 76(1).

\(^{34}\) RESTATEMENT LGL § 76 cmt. e.
defense or prosecution of a lawsuit, even if the parties may have divergent interests in allocating any resulting recovery or liability.\(^\text{36}\)

Thus, with or without the common-interest doctrine, a defending insurer may share the insured's privileged communications without waiver, even if not a co-client.

2. **Nondefending insurers should also be permitted to share privileged information without waiver.**

Primary insurers sometimes agree that the insured will be allowed to defend (typically using counsel approved by the insurer), with the insurer reimbursing defense costs and indemnifying any judgment or settlement, both subject to applicable limitations in the policy. The law generally deprives a primary insurer of the right to defend if there would be a conflict of interest between insurer and insured regarding the conduct of the defense; it sometimes does so whenever the insurer has reserved the right to refuse to indemnify.\(^\text{37}\) In those circumstances, the insured is said to have a right to independent counsel.\(^\text{38}\) In either situation, the contract typically requires the insurer's consent to any settlement to which it will be called upon to contribute.

An excess insurer is one that promises to indemnify against certain liabilities beyond the monetary limits of the primary insurance. The excess insurer typically has no right or duty to defend, because defense is the responsibility of the primary insurer. But the excess insurer generally must consent to any settlement that it will be asked to pay.

Nondefending insurers typically have, by contract or by operation of law, a right to "associate" in the defense.\(^\text{39}\) Under the Restatement of the Law of Liability Insurance that includes "[t]he right to receive from defense counsel and the insured, upon request, [non-coverage sensitive] information that is reasonably necessary to assess the insured’s potential liability and to determine whether the defense is being conducted in a manner that is commensurate with that potential liability” and “[a] reasonable opportunity to be consulted regarding major decisions in the defense of the action."\(^\text{40}\)

Because the insurer(s) will or may be liable for all or portions of any judgment, they are entitled at least to have input into defense decisions, even if those decisions will be made by someone else. In order to do that and to themselves make informed decisions about approval of settlements calling for a contribution from them, they need access to privileged information about the defense, a need recognized by the right to associate.

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\(^\text{36}\) **See** FDIC v. Ogden Corp, 202 F.3d 454 (1st Cir. 2000) (parties had joint attorney-client relationship for prosecution of insurance claim, despite potential disputes about allocation of proceeds among themselves; information shared was confidential against outsiders, but usable in dispute *inter se*).

\(^\text{37}\) **See** BARKER & SILVER, *supra* note 27, §§ 6.04–05.


\(^\text{39}\) Such a right is conferred by operation of law when an insured is given a right to independent counsel, depriving the insurer of contractually granted control of the defense. **RESTATEMENT OF THE LAW OF LIABILITY INSURANCE** (hereinafter, "RESTATEMENT LLI"), § 17(4) (Prop. Final Dr. Mar. 28, 2017).

\(^\text{40}\) **RESTATEMENT LLI** § 23(1).
Under the Restatement LLI, such sharing would not impair the privilege: “The provision of information to an insurer pursuant to the right to associate does not waive any confidentiality rights of the insured with respect to third parties.”

Comments to the Restatement LLI explain that:

An effective defense of an insured or potentially insured legal action requires the insurer, the insured, the defense lawyer, and their agents to share information on a confidential basis in a manner that is protected from disclosure to the claimant and other parties outside of the insurer-intermediary-insured relationship. All of these parties share a common interest in protecting the insured from the action. Moreover, insurance policies should properly be regarded as appointing insurers, including nondefending insurers, as the insured's agents for purposes of defending or considering whether to settle the legal action. With regard to parties outside of that liability insurance relationship, the confidentiality protection for information disclosed within that relationship should be as strong as if the parties to that relationship were a single entity.

The analysis here indicates that a nondefending insurer should come within the scope of the common-interest rule whether or not represented by counsel with respect to the matter. Defense counsel must withhold any confidential information that might be used to support limitation of coverage. So, information shared with insurers, defending or otherwise, should be information regarding their common interest in defeating or minimizing the claim and not regarding their divergent interests as to coverage.

As a result, the nondefending insurers typically can consider defense counsel's advice on defense in the same way as if defense counsel represented all of the insurers. Separate counsel might be useful but ought not to be essential.

Privileged sharing would be supported if a network were conceptualized as an organization, entitled, without waiver, to share privileged information with its constituents who

41 RESTATEMENT LLI § 23(2).
42 RESTATEMENT LLI § 11, cmt. a.
43 See BARKER & SILVER, supra note 27, §§ 10.01-04.
44 Indeed, in upholding privileged sharing by one defendant with a co-defendant's attorney, it has been said that an "attorney who thus undertakes to serve his client's co-defendant for a limited purpose becomes the co-defendant's attorney for that purpose." United States v. McPartlin, 595 F.2d 1321, 1337 (7th Cir. 1979)

However, the lawyer representing one party does not owe any duty of loyalty to other parties (because of conflicts on other issues) and, presumably, owes them no duty of care, lest loyalty to the actual client be undermined. United States v Stepney, 246 F. Supp. 2d 1069, 1082-83 (N.D. Cal. 2003); Howard M. Erichson, Informal Aggregation: Procedural and Ethical Implications of Coordination among Counsel in Related Lawsuits, 50 DUKE L.J. 381, 419-32 (2000) (lawyer engaged in coordination normally owes fiduciary duty of confidentiality to nonclient participants, but no duty of loyalty). Still, for reasons stated in the text, attorneys in a common-interest arrangement should be regarded, for purposes of privilege, in an insurance-defense context (and in other network-type common-interest arrangements) as effectively representing all participants.
need to know that information to participate in the network's deliberations regarding those aspects of the matter involving common interests.⁴⁵

Use of common-interest analysis is supported by the Restatement LLI’s provisions specifically regarding sharing with nondefending insurers. Thus, where an insurer’s right to defend has been displaced by an insured’s right to independent counsel,

[the grounds for protecting confidentiality in the independent-counsel context are at least as strong as those in the duty-to-defend context. The conflict of interest that lies behind the independent-counsel requirement does not eliminate the common interest of insurer and insured in defeating the third-party claim; it does not change the fact that the insurer serves as the insured's agent for purposes of settling; and it does not eliminate the need for the insurer and insured to share confidential information in a manner that is protected from disclosure to third parties. Moreover, because the insured may in the end be obligated to pay a settlement or judgment that is not covered, the risks to the insured from the potential loss of confidentiality are even greater.]⁴⁶

And, where an insurer otherwise associates in the defense, "information shared with a liability insurer pursuant to a right to associate should be subject to the same level of protection from third parties as information shared with a liability insurer exercising the right to defend."⁴⁷

**B. Common-interest sharing has been permitted, without separate representation, within a network created by a commercial loan participation.**

Loan participations are extensively used by lenders to share the risks and benefits of loans. Certain characteristics are customary. A participation is a sale of an interest in a loan by a lender (the lead lender) to another institution (the participant) but the participant [1] is not a party to the loan, [2] does not have a contractual relationship … with the borrower, and [3] cannot sue the borrower directly for breaches of the loan agreement.⁴⁸ The participant only has a direct contractual relationship with the lead lender. The lead lender usually [a] retains partial interest in the loan, [b] retains record title to the loan, [c] remains liable for all obligations under the loan agreement (such as funding future borrowings), [d] retains the right to deal with the borrower, and [e] retains the right to enforce remedies against the borrower.⁴⁹ Participants typically have limited ability to prevent the lead lender from waiving or modifying the borrower's obligations under the loan. They do have what are known as "RATS rights" to object to modifications to rate, amortization, term, and security.⁵⁰

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⁴⁵ See Restatement LGL, § 73(4)(b).
⁴⁶ Restatement LLI § 17, cmt. d.
⁴⁷ Restatement LLI § 23, cmt. e.
⁴⁸ Assignments and Participations of Loans, Practical Law Practice Note 8-381-8532.
⁴⁹ Id.
⁵⁰ Id.
The role of a participant is somewhat analogous to that of a nondefending insurer, because the participant's consent is required for loan "workouts" modifying key loan terms, just as a nondefending insurer's consent is required for settlements.

In *HSH Nordbank AG New York Branch v. Swerdlow*,\(^{51}\) Nordbank had originated loans guaranteed by Swerdlow. Nordbank acted on its own behalf and as Administrative Agent for five non-party lenders, all agreeing to enforce repayment solely through Nordbank. Nordbank received legal advice from its counsel, which counsel shared with the nonparty lenders. This was inadvertently produced to the guarantors; Nordbank sought to claw it back. The guarantors argued that the privilege was waived because the advice had been communicated to the nonparty banks, who were not represented by counsel at the time.\(^{52}\) The district court found this argument "meritless," reasoning that:

> it is immaterial that the confidential communications passed from Nordbank's counsel directly to the non-party lenders, rather than passing from Nordbank or its counsel to the non-party lenders' attorneys. Nordbank and the non-party lenders are co-lenders of the Loan and thus share a common interest in enforcing defendants' obligations under the Guaranties. Any doubt regarding this identity of legal interests is resolved by the terms of the Loan itself. Not only does the Loan identify Nordbank as the only party capable of "enforce[ing] or exercis[ing] any of the . . . rights or remedies of or under any of the Loan Documents," but it also contemplates that Nordbank's counsel will effectively represent the interests of the various lenders, which interests are presumed to be identical. When viewed in conjunction with the fact that the relevant communications involve development of the appropriate legal strategy for obtaining relief, and that the parties privy to the communication understood the communication to be confidential on account of attorney-client privilege, these facts bring the communications at issue squarely within the common interest doctrine.\(^{53}\)

**C. Texas has required separate representation, but pursuant to a Texas statute, and ought not to be followed in the absence of such a mandate.**

In *In re XL Specialty Insurance Co.*,\(^{54}\) the Texas Supreme Court found that lack of separate representation resulted in waiver. A worker had sued XL for workers' compensation benefits. Under Texas law, XL alone was liable and the employer (Cintas) was not a party to the suit.\(^{55}\) But the insurance policy that provided coverage for those benefits had a $1 million deductible, requiring Cintas to reimburse any payments up to that amount.\(^{56}\) Cintas (which was

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\(^{52}\) Id. at 71.

\(^{53}\) Id. at 72 (footnotes and citations omitted).

\(^{54}\) *In re XL Specialty Ins. Co.*, 373 S.W.3d 46 (Tex. 2012).

\(^{55}\) Id. at 54.

\(^{56}\) Id. at 48.
not separately represented) was consulted about the claim, and defense counsel shared reports
with Cintas. After the workers compensation claim was resolved, the worker sued XL for bad
faith in handling the claim. The worker sought defense counsel’s reports, and the court held
that sharing them with Cintas had waived the privilege.

Insofar as Texas Rule of Evidence permits sharing outside an attorney-client relationship,
it does so only for communications “by the client or a representative of the client, or the client's
lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing
another party in a pending action and concerning a matter of common interest therein.” While
Texas has not recognized a general insured-insured privilege, communications between insurer
and insured can be shielded by the attorney-client privilege if they concern a potential suit and
are predominantly intended to be transmitted to the attorney to be hired to defend the insured.

But the requirements of the rule were not met in XL:

Here, XL is the client, and the communications were
between XL's lawyer and a third party, Cintas, who was not
represented by XL's lawyer (or any other lawyer) and was not a
party to the litigation or any other related pending action. We
recognize that Cintas, having contracted for a substantial
deductible, may have shared a joint interest with XL during the
administrative proceedings in the outcome of the claim. But no
matter how common XL's and Cintas's interests might have been,
our rule requires that the communication be made to a lawyer or
her representative representing another party in a pending action.
Those requirements were not met here.

The situation presented in XL differed from the usual liability insurance case involving a
defending insurer (where the privilege generally applies) because the insured was not a party
and not represented by defense counsel. Here, there was neither argument nor evidence that XL
and Cintas were joint clients nor that Cintas was a client and XL its representative. Because
Cintas could not act on XL's behalf, the court thought it could not have been XL's
representative. "[T]he communications were not made to the insured's
lawyer, and the insured is not a party to a pending action, as required by the rule, the allied
litigant privilege does not apply." Even if proper construction of the Texas Rule required the result reached by the court, the
distinctions drawn by the court seem arbitrary in light of the analysis presented in this report.

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57 Id.
58 Id.
59 Id. at 54.
60 TEX. R. EVID. 503(b)(1)(C).
61 XL, 373 S.W.3d at 53.
62 Id. at 53-54.
63 See discussion at notes 28-36, supra.
64 XL, 373 S.W.3d at 54-55.
65 Id. at 55.
66 Id. at 54.
Thus, common-law courts ought not to follow \textit{XL}. Moreover, even under rules with language parallel in some ways to that of the Texas rule, there may be room for courts to uphold the privilege for network-type common-interest arrangements without regard to the separate representation or pending-action requirements. Certainly, legislatures and courts should refrain from codifying privilege law in a way that mandates the result reach in \textit{XL}.

Respectfully submitted,

Sam H. Poteet, Jr.
Chair, Tort Trial & Insurance Practice Section
August 2017
1. **Summary of Resolution(s).** ABA supports common-interest doctrine, under which sharing of privileged communications with persons of common interest who have agreed to maintain confidentiality does not waive privilege. Terms for application of doctrine and consequences of doing so are specified.

2. **Approval by Submitting Entity.** Approved by TIPS Council, February 4, 2017

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 existing on this subject.

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.** File amicus briefs or lobby rulemakers or legislatures when appropriate

8. **Cost to the Association.** (Both direct and indirect costs) Filing fees and printing costs for amicus briefs; staff time for lobbying

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

10. **Referrals.** This report and resolution is referred to the Chairs and Staff Directors of all ABA Sections and Divisions, Center for Professional Responsibility.
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

ABA supports common-interest doctrine, under which sharing of privileged communications with persons of common interest who have agreed to maintain confidentiality does not waive privilege. Terms for application of doctrine and consequences of doing so are specified.

2. Summary of the Issue that the Resolution Addresses

Questions have arisen in various cases regarding whether, and in what circumstances, sharing of privileged communications with persons of common interest will be protected from the waiver that normally results from disclosure of such communications outside of the attorney-client relationship where they occurred, and what consequences flow from such sharing.

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

Paragraph (1) supports the common-interest doctrine generally and states the requirements supported by the great weight of authority. It disapproves the minority view that common-interest sharing is proper only in connection with pending or specifically anticipated litigation.

Paragraphs (2) and (3) specify consequences of common-interest sharing supported by the overwhelming weight of authority: no party to a common interest arrangement can unilaterally waive privilege as to another party’s communications and any party can use shared information against any other party in later adverse proceedings between them.

Paragraph (4) provides, in accordance with the overwhelming weight of authority, that existence of a common interest provides a basis for voluntary sharing privileged communications without waiver but does not provide a basis for compelling a party to share information if it prefers not to do so. Contrary authority in Illinois and scattered cases elsewhere is disapproved.

Paragraph (5) addresses an emerging issue on which there is disagreement and little authority: can an unrepresented party participate in a common-interest arrangement in which privileged communications are shared. Specifically, Paragraph (5) identifies a limited type of arrangement, among parties with preexisting relationships that bind them to a common result, in which it would be permissible for an unrepresented party to participate without such participation resulting in waiver of privilege as to communications shared.

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

No known opposition. Some contrary authority, as identified in Report.
RESOLVED that the American Bar Association encourages greater use and development of ombuds programs that comply with generally recognized standards of practice, as an effective means of preventing, managing, and resolving individual and systemic conflicts and disputes.
I. INTRODUCTION

The number of “ombuds” or “ombudsman” programs continues to grow in both the public sector and in our private organizations. In the public sector, many bills have already been introduced in the 115th Congress that would establish or reform ombuds programs in various federal agencies, and several bills were also introduced in the last Congress to establish ombuds programs in various federal agencies. In addition, a comprehensive study of the role of ombuds in federal agencies was completed at the end of 2016 which documents the virtual explosion of ombuds programs of various types in the federal sector since the early 1990s. At the state and local level, ombuds roles have been widely used in many state and local governments and even at the level of local school districts. In non-governmental and other contexts, the ever-increasing need for mechanisms to help resolve individual and systemic conflicts has been recognized in such diverse sectors as the media, universities, leading non-profit agencies, companies, and multinational corporations.

While one of the most valuable aspects of the ombuds concept is the ability to adapt it to a wide variety of contexts, experience has shown that with this growth in usage, many ombuds programs have been proposed or created without incorporating the key principles generally viewed as essential to all types of ombuds programs. Moreover, programs have been created that are not compliant with any of the generally recognized professional standards of practice for the principal types of ombuds programs. Even more troubling is the fact that some programs labeled as “ombuds” incorporate functions that are completely incompatible with what would generally be expected of an ombuds.

1 During the 115th Congress, for example, bills have been introduced to: establish an Independence of Commission Ombudsman and an Enforcement Ombudsman within the Securities and Exchange Commission (H.R. 10); establish an Office of the Ombudsman for the public health insurance option within the Department of Health and Human Services (H.R. 635 and H.R. 1307); establish an Office of the Municipal Ombudsman within the Environmental Protection Agency (H.R. 1971, H.R. 2355, and S. 692); establish an Ombudsman Office within the Transportation Security Administration (H.R. 1986); require the Department of Health and Human Services to award grants to states enabling them to establish, expand, or provide support for behavioral health ombudsman programs that are independent of other state agencies (H.R. 2047); ensure that the Women Veteran Program Manager program in the Department of Veterans Affairs is supported at each medical center of the Department with a Women Veteran Program Ombudsman (H.R. 2452 and S. 681); establish an Immigration and Customs Enforcement Ombudsman within the Department of Homeland Security (S. 748); establish a Private Landowner Ombudsman within U.S. Customs and Border Protection (S. 757); require the Secretary of Health and Human Services to appoint a Medicare Reviews and Appeals Ombudsman within the Centers for Medicare & Medicaid Services (S. 794); and enhance the ability of the Small Business Administration Regulatory Enforcement Ombudsman to assist small businesses in meeting regulatory requirements (S. 1146). Additional ombuds bills are likely to be introduced later in the 115th Congress.

The proliferation of ombuds programs, both domestically and internationally, since 2004, the date of the last resolution on ombuds programs adopted by the American Bar Association (ABA), has prompted the Ombuds Committee of the ABA Dispute Resolution Section to develop the proposed resolution and this report. The proposed resolution—in keeping with previous ABA resolutions—encourages the expanded use of ombuds programs as an effective means of preventing, managing, and resolving individual and systemic conflicts and disputes. However, it also urges that ombuds programs comply with generally accepted principles and standards of practices.

Ombuds, also known as ombudspersons or ombudsmen, provide significant value to organizations and constituencies at all levels. The word “Ombudsman” is Scandinavian and means “representative” or “proxy.” As the term is generally used, an ombuds is a person who may make an inquiry into a complaint and who tries to help the inquirer have the problem addressed fairly by the organization. The term is used to describe roles in many different contexts, and the role varies widely from program to program. Ombuds can be found in a wide variety of organizations worldwide, including universities and colleges, governments at all levels, healthcare institutions, corporations, financial institutions, for-profit and not-for-profit organizations, prison systems, the media, and even the United Nations system itself.

In previous resolutions, the ABA recognized that there are different types of ombuds and identified their essential characteristics. Two resolutions adopted by the ABA in 2001 and 2004 recommended standards for creating and operating ombuds programs, and described three main categories of ombuds: Classical (Executive and Legislative), Organizational, and Advocate. As the use of ombuds has increased in multiple sectors since the time of those resolutions, the categories articulated in those

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3 In keeping with usage in earlier ABA reports, the term ombuds in this report is intended to encompass all other forms of the word such as ombudsperson, ombuds officers, and ombudsman, a Swedish word meaning agent or representative. The use of ombuds here is not intended to discourage the use of other terms.

4 In August 2001, the House of Delegates of the ABA adopted a Report and Recommendation to the House of Delegates that supported “...the greater use of ‘ombuds’ to receive, review, and resolve complaints involving public and private entities and endorsed the accompanying Standards for the Establishment and Operation of Ombuds Offices. See Resolution 01A 107D (2001 Resolution). The 2001 Resolution used the categorization of “Classical,” “Organizational,” and “Advocate” to describe the principal types of ombuds programs. On February 9, 2004, the House of Delegates adopted a policy revising the Standards for the Establishment and Operation of Ombuds Offices. See Resolution 04M 115 (2004 Resolution) which replaced the category of “Classical” ombuds with “Legislative” and “Executive,” but both of these types are generally understood to be variations of the classical ombuds model. See e.g., Charles L. Howard, The Organizational Ombudsman: Origins, Roles, and Operations - A Legal Guide, 1 (2010), Appendices 6 and 7, for the full text of 2001 and 2004 Resolutions and Reports.

resolutions have become unduly limiting and do not accurately reflect the current reality of ombuds practice, although they were an important step in working to articulate the principles of independence, impartiality, and confidentiality that are fundamental to successful ombuds programs.

Ombuds functions today vary widely with respect to the nature of their creation, their mandate and function, who they serve, and the standards that are followed. For example, there are many ombuds offices that practice what has typically been defined as the classical model of practice where an office is charged with impartially investigating complaints, formally or informally. These offices are in both the private sectors and in the government sector at the federal, state, and local levels of government. Such government offices are established by legislative enactment or a charter which sets forth the jurisdiction of the office and the span of its authority. Therefore, there is no single functional definition for an executive or federal ombudsman, just as there is no single definition for the role in other contexts.

While specific, limited definitions may no longer be beneficial, it is clear that generally recognized standards have emerged for various modalities of ombuds, including: The “ABA Standards,” as articulated in previous ABA resolutions; The United States Ombudsman Association (USOA) Governmental Ombudsman Standards (“USOA Standards”), available at: [http://www.usombudsman.org/site-usoa/wp-content/uploads/USOA-STANDARDS1.pdf](http://www.usombudsman.org/site-usoa/wp-content/uploads/USOA-STANDARDS1.pdf); the International Ombudsman Association (IOA) Standards of Practice (“IOA Standards”), available at: [http://www.ombudsassociation.org/IOA_Main/media/SiteFiles/IOA_Standards_of_Practice_Oct09.pdf](http://www.ombudsassociation.org/IOA_Main/media/SiteFiles/IOA_Standards_of_Practice_Oct09.pdf); and a supplement to the ABA Standards created by the Coalition of Federal Ombudsmen (COFO) (“COFO Guide”), available at: [http://federalombuds.ed.gov/federalombuds/pdfs/Final_Ombuds_Standards.pdf](http://federalombuds.ed.gov/federalombuds/pdfs/Final_Ombuds_Standards.pdf). While these standards are not the only canons that have achieved wide acceptance, they reflect adherence to the key principles of independence, confidentiality, and impartiality and thus underscore one of the primary purposes of the proposed resolution: that urging the creation of ombuds programs which are compliant with generally recognized standards will best serve both the programs themselves and the institutions and constituencies they serve. For this reason, the proposed resolution does not recommend one set of standards over another. Rather, it reiterates the ABA’s support of ombuds functions in multiple arenas and further encourages their use in a manner consistent with recognized ombuds standards that have been developed over many years for the different types of ombuds programs.

The goal of the proposed resolution is, therefore, to address the limitations created in the previous resolutions and to encourage the use of ombuds programs, thereby reinforcing administrative and organizational integrity, accountability, fairness, and equity, and upholding the greater societal interest of empowering people to surface good

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6 This practice is consistent with the 2004 ABA Resolution.
faith concerns to the government or an organization without fear of retaliation or other adverse consequences. Further, this proposed resolution recognizes the growing variation in models, policies and procedures governing the differing roles played by ombuds in different sectors and, especially in view of this growth, urges adherence to best practices and recognized standards followed by the most effective ombuds and ombuds offices.

II. BACKGROUND

The ombuds concept was first introduced into the United States in the early 1960s as a means of improving public administration and serving as a check and balance on administrative processes. During the 1960s, ombuds programs were established in numerous governmental organizations, including states and municipalities.

The American Bar Association adopted a resolution in 1969, which was revised in another resolution adopted in 1971, recommending that “state and local governments should give consideration to the establishment of an Ombudsman authorized to inquire into administrative action and to make public criticism.” The 1969 Resolution also identified the twelve essential characteristics of a statute creating an ombuds program.

During the 1970s and 1980s, ombuds programs continued to develop beyond state and local governments to include programs at colleges and universities, corporations, the federal government and other organizations.

During this same time, ombuds practices also evolved based on the contexts in which they operated, including programs that were independent but advocated on behalf of a constituency (for example, prison ombuds and nursing home ombuds), those that followed the traditional public model of ombuds with an investigative function, and those within private organizations that often operated according to an organizational charter and standards of practice, rather than a legislative or government mandate.

III. OMBUDS AND ALTERNATIVE DISPUTE RESOLUTION (ADR)

The ombuds function has also emerged as a valuable form of alternative dispute resolution (ADR) given that ombuds act as third parties and address disputes outside of formal channels, such as litigation, grievances, equal employment opportunity (EEO) complaints and so forth.

In the United States, most ombuds are in fact third-party neutrals, with the exception of Advocate Ombudsmen who are often authorized to advocate on behalf of vulnerable populations. Generally, ombuds utilize ADR skills and processes, as well as other creative avenues, as a means to address disputes and concerns. Ombuds essentially stand for procedural justice, fundamental fairness, accountability and equity, thereby allowing inquirers, visitors, complainants, or customers to voice concerns that might not

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otherwise be heard by an organization or entity. The USOA has referred to this as providing a means for “credible review.” The ability of ombuds to help people informally – on a wide range of issues that might not otherwise be addressed due to the limitations of litigation or fear of retaliation – makes them an important component of a comprehensive conflict management system.

IV. THE PROPOSED RESOLUTION AND EXISTING ABA POLICIES

The proposed resolution is consistent with and builds upon existing ABA policies. It seeks to highlight the growth and evolution of ombuds functions and encourages greater use of ombuds programs. In the early stages of the evolution of the ombuds concept, ombuds were limited to governmental and administrative functions, but the use of the ombuds continues to grow.⁸ This proposed resolution is intended to keep the ABA abreast of these changes to facilitate good decision-making as new ombuds programs are created.

The ABA has adopted four prior resolutions related to the ombuds function.

Resolution Adopted by the ABA in January 1969

As noted above, the ABA adopted a resolution in 1969 encouraging state and local governments to “give consideration to the establishment of an ombudsman authorized to inquire into all administrative actions and to make public criticism.”⁹ The resolution further sets out 12 suggested characteristics or parameters for a statute or ordinance establishing such an ombudsman, including independence, freedom “to investigate any act or failure to act by any agency, official, or public employee,” authority, discretion, and immunity from civil liability.¹⁰

Resolution Adopted by the ABA in July 1971

In 1971, the ABA adopted a resolution which amended the 1969 resolution and recommended the creation of a pilot ombudsman program “for limited geographical area or areas, for a specific agency or agencies or for a limited phase or limited phases of Federal activity.”¹¹ It was suggested that such experimentation take place before the establishment of a government-wide program.¹²

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⁸ References to ombuds can be found in the Administrative Dispute Resolution Act of 1999 and the Uniform Mediation Act of 2003, which further demonstrate a broad acceptance of the ombuds function.
⁹ See Howard, supra n. 4.
¹⁰ Id. at Appendix 1 (full text of 1969 ABA Resolution and Report).
¹¹ Id. at Appendix 2 (full text of 1971 ABA Resolution and Report).
¹² Id.
Resolution Adopted by the ABA in August 2001

In 2001, the ABA adopted a resolution supporting the greater use of ombuds to “receive, review, and resolve complaints involving public and private entities.” The ABA also endorsed the Standards for the Establishment and Operation of Ombuds Offices dated August 2001. The report accompanying the 2001 Resolution set out the ABA’s support of Classical, Organizational, and Advocate Ombuds models.

Resolution Adopted by the ABA in February 2004

The ABA adopted its fourth ombuds resolution in 2004, revising the Standards from 2001. The 2004 ABA Standards mention the ombuds categories of Legislative, Executive, Organizational, or Advocate.

Related ABA Policy: Resolution 100 (2016)

In a similar context involving disputes in the healthcare arena, the ABA just recently adopted a resolution encouraging the greater use of ADR mechanisms to help resolve healthcare disputes. The report accompanying the Resolution specifically references ombuds as such a mechanism.

V. DEVELOPMENTS SINCE 2004

Since the adoption of the 2001 and 2004 Resolutions, the ombuds role and function has continued to develop in a variety of ways.

Classical Ombuds

The ABA used the term “Classical Ombuds” in its 2001 report but re-classified this function as “Legislative Ombuds” and “Executive Ombuds” in its 2004 report. While the resolution itself does not specifically define roles, this report recognizes the definition of “classical” put forth by the USOA, the oldest ombuds association in the United States. As referenced in this report, the term “classical” is used to describe a form of practice in which the office has authority to independently and impartially investigate complaints against an entity or any complaints within the entity’s jurisdiction (i.e., engage in fact-finding). The responsibility to impartially investigate complaints in a

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14 Id.
15 See Resolution 04M 115, available at: http://www.americanbar.org/content/dam/aba/migrated/leadership/2004/dj/115.authcheckdam.pdf (last accessed March 18, 2016); see also Howard, supra note 2, Appendix 7.
16 Id.; see also, n.2 supra.
17 By definition, a Legislative Ombuds according to the ABA Standards would be a Classical Ombuds, but not all Classical Ombuds are Legislative Ombuds. Therefore, for purposes of this report, Legislative Ombuds are encompassed by Classical Ombuds.
formal way is a hallmark of the classical model. However, while the classical model may be characterized by the conducting of formal investigations, classical ombudsmen are not limited to conducting only “formal” investigations. A significant amount of their work is done informally, through inquiries, providing assistance and coaching, etc. In addition, unless specifically restricted, classical ombudsmen can also investigate or informally address complaints from employees of an agency, the same types of complaints that organizational ombuds handle. It is important when describing the classical model to be clear that the model does not limit the ombudsman to conducting only formal investigations of complaints against an agency from parties outside the agency.¹⁸

- **Growth and Development in the Classical Model**

Over the past decade, there has been growth in the number of classical ombuds at the local and state levels. At the local government level, this growth is most apparent in school districts. Portland and Seattle are examples of school districts creating a classical ombuds office to address education-related concerns.

Most municipal ombuds offices follow the classical model and deal with external complaints by users or those impacted by programs or agencies.¹⁹ King County, Washington, Dayton-Montgomery County, Ohio, and Detroit, Michigan are examples of general jurisdiction municipal offices.

At the state level, only five states have general jurisdiction ombuds offices created in pure classical form as offices housed in the legislative branch with oversight over executive branch functions: Alaska, Arizona, Hawaii, Iowa, and Nebraska.²⁰

The recent addition of classical ombudsman offices at the state level has primarily been within offices created to serve specific programs, such as children and family services, mental health services, or corrections. In 1995, Michigan created the Office of Children’s Ombudsman to independently investigate complaints about protective services, foster care, adoptions services and juvenile justice. According to the National

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¹⁸ Other terms have also evolved to help describe governmental programs that previously were considered to be “classical” because they were established by government agencies. For example, some of these programs are described as “externally facing” or “internally facing,” depending on whether the principal constituency served is the public or the agency’s employees. Some of these programs in other respects also more resemble “organizational” ombuds programs than what has been traditionally understood to be “classical” ombuds programs.


²⁰ South Carolina also has an ombuds office which arguably is not based on a “pure classical model.”
Conference of State Legislatures, twenty-two states now have Children’s Ombudsman Offices.\(^21\)

For those offices created at the state level to address specific programs, the models may differ. The office may be attached to the agency whose actions the ombudsman is authorized to investigate; others are attached to the governor or another agency within the executive branch. For those ombuds offices that lack structural independence from a sponsoring agency, particular steps must be taken to ensure functional independence. Such independence is intended to give complainants the confidence that any investigation is impartial and also lessens any fear of retaliation.

- **Standards of Practice**

The ABA adopted *Standards for the Establishment and Operations of Ombuds Offices* in 2001 and revised these Standards in 2004.\(^22\) Among other things, the final standards create a particular set of guidelines for those practicing under the various models, including both Legislative Ombuds and Executive Ombuds, These Standards can be and have been used to establish ombuds offices.\(^23\)

The USOA, a national organization for public sector ombuds professionals, did not fully endorse the 2001 standards or participate in the drafting of the revised 2004 standards. Instead, the USOA adopted Governmental Ombudsman Standards in 2003, identifying basic principles, guidelines, and best practices for ombudsman offices which follow the classical model of practice.\(^24\) USOA Standards include independence, impartiality, and confidentiality, with the addition of credible review process.\(^25\) USOA has also developed a model statute for state legislatures to use in creating new ombuds offices.\(^26\)

### Executive Ombuds

According to the 2004 ABA Standards, Executive Ombuds “may be located in either the public or private sector and receive[] complaints from the general public or internally”…to “hold the entity or specific programs accountable or work with officials to improve the performance of a program.” Executive Ombuds may conduct investigations and issue reports.

\(^{22}\) See 2004 Resolution, *supra* n. 2 and 12.
\(^{23}\) However, not all offices function in practice in accordance with the Standards. Urging adherence to recognized standards is an important objective of the present proposed resolution.
\(^{25}\) *Id.*
Externally-facing federal sector ombuds offices are often created by statute and assist in resolving process issues arising from the public’s interactions with a federal agency. While such ombuds usually do not have formal investigative authority, many of them review and study broader systemic issues and provide feedback and recommendations to the agency and, where required by law, to Congress. They typically practice according to the standards of independence, impartiality, and confidentiality in keeping with guidance set forth by USOA, the Coalition of Federal Ombudsmen, and others.\(^\text{27}\) This has been a growth sector for many years.

One example of the executive ombuds model is the US Government’s Freedom of Information Act (FOIA) ombudsman. Congress updated the FOIA in 2007 to establish a federal office—the Office of Government Information Services (OGIS)—to provide mediation services as an alternative to litigation between FOIA requesters and federal agencies.\(^\text{28}\) From the office’s inception, Congress referred to the office as the “FOIA Ombudsman” and though it is not a term used in the statute, the FOIA community has embraced both the name and the mission.\(^\text{29}\) Requests for assistance from the FOIA Ombudsman come from both requesters and agencies.

In addition to resolving disputes, the statute directs OGIS to review agency FOIA policies, procedures and compliance, with the goal of improving the FOIA process.\(^\text{30}\) The office’s handling of cases, as it mediates and facilitates disputes, allows for a first-hand observation of agency practices that also is helpful in its review role. As with its mediation services, the OGIS examines an agency’s FOIA process in the role of an advocate for the FOIA process in general, with a particular focus on impartiality and fairness. OGIS has made a number of recommendations to the President and to Congress to improve the administration of FOIA and to promote government openness, as directed by the statute.\(^\text{31}\) The 114\(^{\text{th}}\) Congress appears to have heeded concerns about the need to give the FOIA ombudsman more authority and independence.\(^\text{32}\) Both the House of Representatives and the Senate passed a FOIA reform bill to do just that, which the President signed into law as the FOIA Improvement Act of 2016.\(^\text{33}\)

Organizational Ombuds

Initially, Organizational Ombuds programs in the US were created in response to particular societal needs. In the college and university context, the rise of organizational ombuds programs coincided with student riots and campus unrest in the 1970’s. In the

\(^{\text{29}}\) FOIA Ombudsman blog, https://foia.blogs.archives.gov
corporate setting, many programs were created as a result of concerns over improving corporate responsibility and governance and to encourage employees and others to report misconduct without fear of retaliation.\footnote{See e.g., Charles L. Howard, \textit{The Organizational Ombudsman: Origins, Roles, and Operations - A Legal Guide}, (2010), at 79.} An Organizational Ombuds office works within an organization to serve as an informal line of communication, a resource for interpersonal and systemic challenges, and a champion of organizational best practices for corporate governance.

- \textit{The International Ombudsman Association Standards of Practice}

The formation of the IOA in 2005 was a major milestone for organizational ombuds. The IOA was created from the merger of the University and College Ombuds Association (UCOA) and The Ombudsman Association (TOA), which primarily served corporate and other organizational ombuds programs. IOA, the largest international association of professional organizational ombuds practitioners in the world, currently represents almost 900 members from the United States and across the globe. The IOA has established Standards of Practice for organizational ombuds, which include independence, impartiality, informality, and confidentiality.\footnote{IOA Standards of Practice, \textit{available at}: https://www.ombudsassociation.org/IOA_Main/media/SiteFiles/IOA_Standards_of_Practice_Oct 09.pdf (last accessed March 18, 2016). It bears noting that the Hawaii legislature has contemplated the creation of a university organizational ombuds office that would adhere to USOA standards of practice, though it is unclear how this will take shape in practice.}

- \textit{Organizational Ombudsman Certification}

In 2009, IOA established the Certified Organizational Ombudsman Practitioner (Co-Op) certification; this program requires certified organizational ombuds to meet training and experience prerequisites, successfully complete an examination and to adhere to the IOA Code of Ethics and Standards of Practice. In addition to passing required certification exams, Co-Op members must have at least one year of experience as a practicing organizational ombudsman and demonstrate that they operate as independent, impartial, neutral and confidential practitioners in accordance with the IOA Standards. Co-Op re-certification is required every four years and has continuing education requirements. A “Co-Op Professional Practices Committee” is charged with investigating and adjudicating any formal complaints filed against a Co-Op member.

- \textit{Federal Sector Ombuds}

The Coalition of Federal Ombudsman was formed in the mid-1990s and has grown in the federal space over the years. COFO is comprised of federal-sector ombuds that are internally-facing and therefore organizational ombuds (assisting on internal, workforce issues) externally-facing executive ombuds (assisting with process issues arising from the public’s interactions with the agency), or ombuds that are both internally- and externally-facing. The Coalition of Federal Ombudsmen supports the
principles of independence, impartiality (neutrality), and confidentiality. The Coalition of Federal Ombudsmen and the Federal Interagency ADR Working Group Steering Committee created the *Guide for Federal Employee Ombuds* in 2006. The Guide is intended to operate as a supplement to the ABA’s *Standards for the Establishment and Operations of Ombuds Offices* referenced above.

**Advocate Ombuds**

Advocate Ombuds serve as advocates for identified constituencies, often those identified as vulnerable populations, such as residents of nursing homes and prisoners. A key difference between an advocate ombuds and a legislative or executive ombuds is that many advocate ombuds do not practice impartiality/neutrality but do use impartiality in determining whether, and to what extent, advocacy is appropriate in any particular instance. Some examples of advocate ombuds are:

- **Long-Term Care Ombuds**

  Long-Term Care Ombudsmen (LTCOs) are “advocates for residents of nursing homes, board and care homes and assisted living facilities.” Under the Older Americans Act, every state is required to have a LTCO program to address complaints and advocate for improvements in the long-term care system. There are currently 53 LTCO programs – representing all 50 states, Guam, Puerto Rico, and Washington D.C. The LTCO program is federally-administered by the Agency on Aging, though each state program has autonomy in its day-to-day operations. LTCO programs may emphasize different practices due to the demographics and local needs they address, and they consistently strive to handle complaints, create awareness, and advocate on behalf of quality care. Their work is to remain confidential unless a resident gives permission. According to the Administration of Community Living, the LTCO program continues to flourish; in 2014 there were over 127,000 cases opened nationwide.

- **Corrections Ombuds**

  Several states have statutes establishing Corrections Ombuds offices, which advocate for fairness on behalf of those incarcerated. Corrections Ombuds also provide information about the prison system to inquirers, clarify policies, facilitate resolution of complaints and issues, and make recommendations. Ombuds operating in correctional facilities may also operate under what may be seen as classical ombuds standards: the exact nature of the work is dependent on the language of the charter or statute creating the office.

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News ombuds have been in practice in the United States since 1967 and the Organization of News Ombudsmen (ONO) was formed in 1980. Modern day news ombudsmen, also known as public editors or reader representatives, are typically tasked with dealing with listeners, readers, or viewers regarding ‘accuracy, fairness, balance, and good taste in news coverage.” The ombudsman will investigate the issue, attempt to find a solution, and at the very least provide an explanation of what caused the issue. Some news ombuds offer opinions or recommendations regarding the best way to resolve the particular issue, often openly criticizing the news outlet, an approach which is consistent with advocate ombuds standards. News ombudsmen offer a number of beneficial advantages to news organizations, including reducing libel lawsuits, strengthening the relationship with the public, and enhancing credibility. According to Jeffrey Dvorkin, former Executive Director of the Organization of News Ombudsmen, “Ombudsmen see the world differently. They are there to sort out the differences among the various critics, to engage with the public and to foster a culture inside the news organization to acknowledge that the public must be part of the journalistic process.”

VI. 2016 ADMINISTRATIVE CONFERENCE RECOMMENDATION 2016-5, “THE USE OF OMBUDS IN FEDERAL AGENCIES”

Background

More than twenty-five years ago, the Administrative Conference of the United States (ACUS), a small federal administrative agency which undertakes non-partisan research projects and then makes recommendations for the improvement of federal agency practices and processes, conducted a study of ombudsman programs in federal agencies, selecting for review six offices that were set up to help the public resolve problems arising in dealing with the government. That study served as the basis for the Administrative Conference’s Recommendation 90-2 (adopted in 1990) which urged “the President and Congress to support federal agency initiatives to create and fund an effective ombudsman in those agencies with significant interaction with the public” and provided guidance for the establishment and operation of federal ombudsman offices.

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39 Characterizing News Ombuds as Advocates is somewhat artificial. News ombuds advocate on behalf of journalistic integrity and honesty/transparency in news.
41 Id.
44 ACUS Recommendation 90-2, available at: https://www.acus.gov/recommendation/ombudsman-federal-agencies
Since that time, the number, prominence, and diversity of federal ombuds offices has grown dramatically. With urging from the Dispute Resolution Section Ombuds Committee, ACUS sponsored a new study in 2015 on the current status of ombuds in federal agencies. The study identified which federal agencies make use of ombuds offices, described the scope of their activities, identified best practices for the establishment and operation of ombuds offices, and recommended situations in which expanded use of ombuds may benefit agencies. The contractor selected to undertake the study (with a team of researchers that included prominent ombuds, lawyers, and academics) submitted its extensive (over 600 pages in length) Final Report, “A Reappraisal--The Nature and Value of Ombudsmen in Federal Agencies” to ACUS on November 14, 2016.45


Administrative Conference Recommendation 2016-5

Recommendation 2016-5 adds further support to both goals of the proposed resolution: it recognizes the value of ombuds programs and urges support for them by the President and Congress, and it encourages greater compliance with generally recognized standards for ombuds programs.

In particular, Recommendation 2016-5 states:

Federal ombuds now include multiple variations of both primarily externally-focused and primarily internally-focused ombuds (i.e., those who receive inquiries and complaints from persons within the agency). The individuals and offices can and do make a distinct and beneficial contribution to government effectiveness. While all forms of alternative dispute resolution embraced by the ADRA [Administrative Dispute Resolution Act] have the capacity to reduce litigation costs and foster better relationships, the ombuds alone affords the constituent and the agency the opportunity to learn about and address the issues before, in effect, they have been joined. Constituents and the agency are served by the ombuds’ skilled, impartial assistance in resolution, and the agency is served by the opportunity for critical early warning of specific and systemic issues.46

45 A copy of the Executive Summary of the Final Report is available at: https://www.acus.gov/sites/default/files/documents/PART%201_Executive%20Summary%202016%20ACUS%209%2011.16.16_0.pdf. Both the Executive Summary and the other sections of the Final Report provide in-depth support for the recommendations that were then adopted by the Administrative Conference.
46 Administrative Conference Recommendation 2016-5 at 1-2.
Recommendation 2016-5 noted the challenging environment in which federal agencies now work, and observed that ombuds are “uniquely situated to provide both pertinent information and assistance in resolving issues to constituents and the agency alike,” all of which leads to greater trust, which it described as “a commodity without which government in a democratic society cannot function effectively.” The same observations could also be made about ombuds in virtually all of the other contexts in which ombuds programs have been created.

Recommendation 2016-5 addressed head-on the issue underlying the second aspect of the proposed resolution—the need for compliance with generally recognized standards—and its conclusion is unequivocally consistent with the language of the proposed resolution. The Recommendation discussion of this point (which also applies to the other contexts in which ombuds programs have been created), could very well serve as a summary of this report and deserves quoting at some length:

Although the functionality of the federal ombuds landscape is quite diverse, most federal ombuds share three core standards of practice—dependence, confidentiality, and impartiality—and share common characteristics. The core standards are set forth in the standards adopted by the American Bar Association (ABA), the International Ombudsman Association (IOA), and the United States Ombudsman Association (USOA) though with some variations, particularly with respect to confidentiality. These organizations’ standards are generally followed, as applicable, and considered essential by the ombuds profession, both with and outside government.

Most federal ombuds also share the following common characteristics: (1) Ombuds do not make decisions binding on the agency or provide formal rights-based processes for redress; (2) they have a commitment to fairness; and (3) they provide credible processes for receiving, reviewing, and assisting in the resolution of issues. The three core standards and these common characteristics, taken together, are central to the ombuds profession. (Emphasis in the original)

Indeed, Recommendation 2016-5 goes even further: it recommends that, in addition to the creation of new ombuds programs that comply with these standards, existing ombuds programs in federal agencies which do not comply should “align their office standards and practices with those included in this recommendation” or “consider modifying their title, where permitted, to avoid any confusion.” It is precisely this point that the proposed resolution seeks to address: the American Bar Association should encourage the greater use and development of ombuds programs that comply with generally accepted standards.

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47 Id. at 3
48 Id.
49 Id. at 3-4
50 Id. at 3 and 6.
VII. CONCLUSION

An effective ombuds office serves as an alternative channel to assist people in resolving conflicts and in surfacing their concerns without fear of retaliation. Despite the many benefits offered by an effective ombuds office, many governments and organizations have not yet created ombudsman programs. This resolution is intended to call attention to and encourage the use of a broad range of ombuds functions, which likewise employ a range of ADR processes to effectively address systemic and individual issues. The ever-increasing need for mechanisms to resolve individual and systemic conflicts is recognized by multiple entities, including the media, universities, government, leading non-profit agencies and Fortune 500 companies. Such offices serve increasingly important societal interests, and as such, the value of the ombuds function in all sectors cannot be overstated. However, to maximize the effectiveness of these programs they should be created in such a manner that they will be able to operate consistently with the generally recognized standards that experience has shown are critical to effective ombuds programs.

Respectfully submitted,

Nancy Welsh, Chair
Section of Dispute Resolution
August, 2017
1. **Summary of Resolution.**

This resolution encourages the greater use and development of ombuds programs, consistent with recognized standards of practice, as an effective means of preventing, managing, and resolving individual and systemic conflicts and disputes.

2. **Approval by Submitting Entity.**

Yes. The proposed resolution was approved by the Dispute Resolution Section Council on February 4, 2017.

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

Yes. The ABA previously adopted four resolutions from 1969 to 2004 supporting the greater use of ombuds in a variety of sectors and functions. However, this resolution is the first proposal since 2004 and addresses definitional issues in the previous resolutions while also encouraging the use of generally recognized standards.

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

The proposed resolution builds upon four existing ABA resolutions adopted by the House of Delegates from 1969 to 2004 supporting the increased use of ombuds in a variety of sectors and functions. These include (1) a resolution adopted in February 1969 recommending that state and local governments consider establishing an ombudsman authorized to inquire into administrative action and to make public criticism, consistent with twelve essential characteristics; (2) a related resolution adopted in August 1971 recommending several amendments to the 1969 resolution; (3) ABA Resolution 107D, adopted in August 2001, supporting the greater use of ombuds to receive, review and resolve complaints involving public or private entities and endorsing the Standards for the Establishment and Operation of Ombuds Offices dated August 2001; and (4) ABA Resolution 115, adopted in February 2004, endorsing revised Standards for the Establishment and Operation of Ombuds Offices.

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)

During the 115th Congress, at least fourteen separate bills have been introduced that would establish or reform ombudsman positions in different federal agencies. However, the proposed resolution supports the greater use of ombuds in general and does not expressly address any of those bills or any other bills that may be proposed later in the 115th Congress. The proposed resolution, however, is entirely consistent with Recommendation 2016-5 adopted by the Administrative Conference of the United States on December 14, 2016 which encourages greater use of ombuds programs and that both new and existing programs should adhere to generally accepted standards.

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

On an ongoing basis, the Section of Dispute Resolution and the ABA Governmental Affairs Office will examine the various ombuds-related bills pending in Congress and determine whether ABA advocacy letters should be submitted in connection with any of those bills.

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

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

10. **Referrals.**

Referred to all Section, Division and Forum staff representatives including State and Local Government Law, Litigation, TTIPS, Government and Public Sector Lawyers, GP Solo, Young Lawyers Division, Law Student Division and Administrative Law Section.

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution encourages the greater use and development of ombuds programs, consistent with recognized standards of practice, as an effective means of preventing, managing, and resolving individual and systemic conflicts and disputes.

2. Summary of the Issue that the Resolution Addresses

The ever-increasing need for mechanisms to resolve individual and systemic conflicts is recognized by multiple entities, including the media, universities, government, leading non-profit agencies and Fortune 500 companies, and this proposal once again encourages the expanded use of ombudsman programs. During the most recent legislative cycle, a number of bills were introduced to establish or reform ombudsman positions in different federal agencies. The proliferation of Ombudsman programs since the 2004 resolution, both domestically and internationally, in conditions that did not always recognize or adhere to generally accepted ombuds standards, led the Ombuds Committee of the ABA Dispute Resolution Section to draft this resolution. The proposed resolution is consistent with Recommendation 2016-5 adopted by the Administrative Conference of the United States on December 14, 2016 which encourages greater use of ombuds programs and that both new and existing programs should adhere to generally accepted standards.

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

The proposed resolution language encourages greater use of ombuds programs in keeping with recognized standards of practice. The proposed resolution is not intended to favor any particular ombuds category or set of standards. Instead, it is intended to encourage members of the ABA, lawmakers, policy makers, and others to deepen their understanding of the different roles ombuds play, and how these ombuds functions relate to conflict management systems, government operations, and societal interests at large and to then implement a program that will best serve the identified needs.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA

The Dispute Resolution Section is not aware of opposition from any other section or division or from other sources.
RESOLVED, That the American Bar Association reaffirms its opposition to restructuring the United States Court of Appeals for the Ninth Circuit because there is no compelling empirical evidence of adjudicative or administrative dysfunction in the existing structure; and

FURTHER RESOLVED, That the American Bar Association supports ongoing efforts by the United States Court of Appeals for the Ninth Circuit and other federal courts to utilize technological and procedural innovations in order to continue to enable them to handle caseloads efficiently while maintaining coherent, consistent law in their respective jurisdictions.
I. Introduction

The federal circuit courts of appeals were established by Congress in 1891.\(^1\) Over time, the number of circuits has increased from the original nine circuits to the current 12 circuits. The federal circuits vary in size (i.e., the number of judges comprising the courts of appeals and the total number of judicial officers within the circuit), have differing caseloads and cover differing numbers of states, territories, residents and total geography. Proposals are occasionally made to divide the existing circuits,\(^2\) and on a few occasions such proposals have been adopted, e.g., the division of the old Fifth Circuit into the current Fifth Circuit and the Eleventh Circuit. Like the emergence of cicadas from the soil, periodic proposals have arisen in recent decades to split the Court of Appeals for the Ninth Circuit. Characterized by one of its critics as a “supersized appellate court,”\(^3\) the Ninth Circuit has been said to be in need of division for several reasons, including the oft-cited assertion that the circuit allegedly has a “high rate of reversal” by the United States Supreme Court. Current legislative proposals focus on the large geography of the circuit, promising that division of the circuit will “bring justice closer to the people.”\(^4\)

The proponents of the Resolution have studied all of the legislative proposals for splitting the Ninth Circuit and the relevant factual record. The proponents urge the American Bar Association (ABA) to oppose these proposals because there is no compelling empirical evidence of either adjudicative or administrative dysfunction in the existing structure that would warrant a split. The proponents believe that adoption of the Resolution is necessary because the House of Delegates needs to articulate clear policy on this important issue based upon the current factual record. The proponents also ask the House to adopt policy supporting the ongoing efforts of the Ninth Circuit and other federal courts to utilize technological and procedural innovations.

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\(^2\) While proposals to divide or restructure the circuits usually focus on the appellate court and the states that would be included in any new circuits, division would also result in the realignment of the lower courts and restructuring of the administrative and ancillary functions within the court system.


\(^4\) See the title of the House Judiciary Subcomm. Hearing, supra note 2. Some have suggested that the true objective of these recurring proposals to divide the Ninth Circuit is to “gerrymander” a circuit whose decisions are considered by some to be “too liberal.” See, e.g., House Judiciary Subcomm. Hearing, supra note 2, https://www.c-span.org/video/?425486-1/ninth-circuit-court-appeals-judges-testify-court-restructuring (transcript of opening statement at 6:25 by John Conyers, Jr., Ranking Member, House Comm. on the Judiciary, and transcript of statement at 15:34 by Jerrold Nadler, Ranking Member, Subcomm. on Courts, Intellectual Property, and the Internet). The authors take no position on this issue.
to enable the courts to handle caseloads efficiently while maintaining coherent, consistent law within their respective jurisdictions.

II. Past Congressional Inquiries and Legislative Proposals to Restructure the Ninth Circuit

The federal courts of appeals have long been the subject of study, primarily because of concerns about the persistent growth in the appellate caseload. The Ninth Circuit—the largest circuit in geographic size, population, judgeships, and annual caseload—has been the subject of numerous studies and proposals over the years.

In 1972, Congress created the Hruska Commission, formally called the Commission on Revision of the Federal Court Appellate System, to study the federal appellate system. In 1975, the Hruska Commission issued its final report, which included recommendations for dividing both the Fifth and Ninth Circuits (then composed of 15 and 13 judges respectively) on the basis of an announced preference for smaller circuits. The ABA endorsed those recommendations.

At that time, Congress declined to divide the circuits and instead implemented other Hruska Commission recommendations. These included substantially increasing the number of authorized judgeships in both circuits and authorizing any circuit with 15 or more judges to use limited en banc panels or to divide into administrative units to deal with rising caseloads. The Ninth Circuit chose to adopt these new procedures; the judges of the Fifth Circuit preferred division.

In 1980, Congress divided the Fifth Circuit by placing Florida, Georgia, and Alabama into a new Eleventh Circuit. This was the second (and last) time that Congress has

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5 In 1960, almost 4,000 appeals were filed in the regional courts of appeals, which were composed of 68 judges. In 1970, almost 12,000 appeals were filed and the number of authorized judgeships increased to 97. By 1980, appeals almost doubled and authorized judgeships increased to 132. In 1990, there were 40,898 appeals filed and 156 judgeships. The number of authorized judgeships increased to 167 in 1991 as a result of an omnibus judgeship bill. No additional judgeships have been created since then, despite more growth in caseload. In 2016, over 61,000 appeals were filed.

6 When it was established in 1891, the Ninth Circuit included California, Idaho, Montana, Nevada, Oregon and Washington. Hawaii, Arizona, Alaska, Guam and the Northern Mariana Islands were added subsequently. Fed. Judicial Ctr., History of the Federal Judiciary, http://www.fjc.gov/history/home.nsf/page/courts_coa_circuit_09.html. The total number of authorized court of appeals judgeships has increased from 2 in 1891 to 29 today. Id.


divided a circuit since 1891, when it created the system of regional circuit courts of appeals as we know them today.  

Although the ABA originally supported the Hruska Commission’s recommendation to split both the Fifth and Ninth Circuits, it rescinded that position in 1990 with respect to the Ninth Circuit, on the basis that procedural changes and court management innovations allowed the circuit to manage its rising caseload without sacrificing quality or timeliness.

In 1993, at the request of the Federal Courts Study Committee, which had been established three years earlier by Congress, the Federal Judicial Center (FJC) undertook a 15-month examination of the appellate court system and issued a report titled *Structural and Other Alternatives for the Federal Courts of Appeals*. The FJC concluded that the expansion of federal jurisdiction without a concomitant increase of resources was creating a burden for the federal courts of appeals and that it did not appear to be a stress that would be significantly relieved by structural changes to the appellate system. Its report stated that it could not “conclude, as some assert, that the justness of appellate outcomes has been detrimentally affected by caseload volume.” It advocated for non-structural efforts to deal with the problem of increased volume.

In 1997, Congress created the Commission on Structural Alternatives for the Federal Courts of Appeals, chaired by Justice Byron R. White (the “White Commission”), to study the structure and alignment of the federal appellate system, with particular focus on the Ninth Circuit, and to submit recommendations on changes in circuit boundaries or structure to the President and Congress. The White Commission’s report to Congress concluded that the Ninth Circuit should not be split:

> There is no persuasive evidence that the Ninth Circuit (or any other circuit, for that matter) is not working effectively, or that creating new circuits will improve the administration of justice in any circuit or overall. Furthermore, splitting the circuit would impose substantial costs of administrative disruption, not to mention the monetary costs of creating a new circuit. Accordingly, we do not recommend to Congress and the President that they consider legislation to split the circuit.

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10 The first split occurred in 1929, only after almost unanimous consensus was reached among members of Congress and judges on how to divide the circuit. A new Tenth Circuit was carved out of five contiguous westernmost states of the existing Eighth Circuit. Tenth Circuit Act of 1929, ch. 363, 45 Stat. 1346 (1929). The ABA supported this division.


The White Commission noted that there were benefits from the current makeup of the Ninth Circuit, including the development of a consistent body of law that applies to the entire western region of the United States and governs relations with the other nations of the Pacific Rim. It also noted financial and practical advantages of the circuit’s administrative structure.

The White Commission nevertheless recommended that Congress restructure the Ninth Circuit into three regionally based adjudicative divisions. The ABA opposed this recommendation on the ground that the only rationale for the recommendation—a subjective preference for smaller decisional units—was an insufficient reason to restructure a judicial circuit. Congressional reaction to the White Commission’s report was tepid, and legislation introduced during the 106th Congress by Senator Frank Murkowski (R-AK) received minimal attention.

During the 107th Congress, bills were introduced in the House and Senate by Representative Simpson (R-ID) and Senator Murkowski to split the Ninth Circuit into two circuits, with Arizona, California, and Nevada remaining in the Ninth Circuit and Alaska, Hawaii, Oregon, Washington, Idaho, and Montana forming a new Twelfth Circuit. Hearings were held, but no further action was taken.

During the 108th Congress, bills proposing three different ways to divide the Ninth Circuit were introduced. Representative Simpson reintroduced his previous bill; he and Senator Murkowski introduced bills with only California and Nevada remaining in the Ninth Circuit, and Representative Renzi (R-AZ) and Senator Ensign (R-NV) introduced bills containing a novel three-way split. Although the House Judiciary Committee had not held a hearing on the three-way circuit restructuring proposal, House members attempted to secure the bill’s passage by attaching it to an omnibus judgeship bill that had already passed the Senate. The strategy succeeded in the House, but failed in the Senate.

During the 109th Congress, seven circuit restructuring bills were introduced. Three bills (introduced by Senators Murkowski and Ensign and Representative Simpson) proposed keeping California, Guam, Hawaii, and the Northern Mariana Islands in the Ninth Circuit and placing the remaining states in the new Twelfth Circuit. A separate House bill (introduced by Representative Sensenbrenner (R-WI)) combined Representative Simpson’s bill with the omnibus judgeship bill from the previous Congress. With 10 cosponsors—more than any other circuit-splitting bill has garnered to date—it was reported to the House, but never scheduled for a vote.

During the 110th–114th Congresses, similar bills were introduced by many of the same members, but none received any action.

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14 The ABA House of Delegates adopted policy in August 1999 opposing the recommendations of the White Commission.

15 See Appendix A and Appendix B for visual representations of the circuit realignments proposed by the bills discussed in this report.
III. **Current Congressional Activity**

In the current 115th Congress, four circuit restructuring bills have been introduced. S. 295 and H.R. 196, introduced by Senator Daines (R-MT) and Representative Simpson respectively, share the same circuit reconfiguration but differ in other details. These bills would retain California, Guam, Hawaii, and the Northern Mariana Islands in the Ninth Circuit and assign the other states to the new Twelfth Circuit. Representative Biggs (R-AZ) has introduced H.R. 250, which would retain Oregon and Washington along with California, Guam, Hawaii, and the Northern Mariana Islands in the Ninth Circuit, and assign the other states to the new Twelfth Circuit. S. 276, introduced by Senator Flake (R-AZ), would tweak that arrangement a bit by assigning Washington to the new Twelfth rather than the Ninth Circuit. In addition to these realignment bills, legislation to establish a new Commission on Structural Alternatives for the Federal Courts of Appeals has been introduced by Senator Sullivan (R-AK).

IV. **Existing ABA Policy**

One of the primary goals of the ABA is to promote improvements in the administration of justice. It is therefore not surprising that the ABA has examined the issue of restructuring the Ninth Circuit on multiple occasions over the past 50 years. Originally supportive of realignment of the Ninth Circuit in the 1970s, the ABA continued to examine the issue over the next several decades in light of the emergence of technological developments that increasingly bridged geographical distances, the successful use of limited en banc review panels, and the circuit's innovative use of case management techniques. This culminated in the ABA rescinding its earlier position and adopting policies in the 1990s opposing division of the Ninth Circuit. Since then, the ABA has periodically reviewed new proposals to split the circuit. On March 16, 2017, the ABA submitted testimony, based upon previously adopted policy, opposing the current legislative proposals to restructure the Ninth Circuit at a hearing of the Subcommittee on Courts, Intellectual Property and the Internet of the House Committee on the Judiciary.

V. **No Compelling Evidence Exists that the Ninth Circuit Needs Restructuring**

The ABA has found no compelling evidence to support claims that the Ninth Circuit is failing to deliver quality justice. The perceived problems identified by supporters of

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16 In 1998, the ABA Board of Governors adopted a resolution that opposed restructuring of the Ninth Circuit “in view of the absence of compelling empirical evidence to demonstrate adjudicative or administrative dysfunction.” A resolution adopted by the ABA House of Delegates in 1999 opposed enactment of legislation that mandated restructuring of the Ninth Circuit into “adjudicative divisions” in view of the “absence of compelling evidence to demonstrate adjudicative dysfunction.”

17 The ABA last expressed opposition to circuit restructuring in a statement submitted to the Senate Judiciary Committee on September 20, 2006, for a hearing on proposals to split the Ninth Circuit.


19 The ABA’s findings are consistent with recent analyses and studies conducted by the Ninth Circuit. See House Judiciary Subcomm. Hearing, supra note 2 (written statements of Sidney R. Thomas, Chief Judge, and Alex Kozinski and Carlos T. Bea, Circuit Judges, United States Court of Appeals for the Ninth Circuit).
the legislation do not justify restructuring and would not be remedied by any of the various proposed circuit divisions. Two examples will demonstrate this disconnect between perception and intent.

A. **Delay and Backlog**

Critics often complain that the circuit has a backlog of pending cases and is slow to process new cases. Even if true, neither of these concerns would be resolved by realignment. Circuit division does not reduce caseload or eliminate backlog; it only reallocates it. Circuit size is not the critical factor in appellate delay—too many vacancies, too few authorized judgeships, and national policy decisions that increase workload without providing concomitant resources are the prime causes of delay and backlog.

The Ninth Circuit does indeed have the slowest median processing time for cases terminated on their merits, but that one statistic does not convey very much about the way the Ninth Circuit is handling its caseload. Statistics compiled by the Administrative Office of the U.S. Courts (AO) for the 12-month period ending June 30, 2016\(^\text{20}\) show that in recent years the Ninth Circuit has been getting ahead of the curve by terminating more cases than are commenced. It is also notable that the circuit’s disposition times have steadily improved over the past decade. In fact, Judge Sidney R. Thomas, Chief Judge of the Ninth Circuit, reported that case processing time has been reduced by almost 35%. Furthermore, while the circuit may lag behind others in the median time from the date of filing to final disposition, once cases are ready for oral argument, they move expeditiously through the system and are closed in record time. The Ninth Circuit was the second fastest circuit in terms of median time from the date of the oral argument to final disposition with a rate of 1.1 months. It also shared with four other circuits the distinction of having the fastest median time from submission on the briefs to disposition—a record-breaking 0.2 months.

One of the reasons that the Ninth Circuit has been able to function so well despite its growing caseload is because it has been on the forefront of utilizing technology to enhance administrative efficiency. In fact, the Ninth Circuit was the first to institute automated docketing and electronic web-based filing. It also developed and uses to great advantage an automated issue identification system that inventories cases in a way that flags potential conflicts for early resolution and facilitates efficient resolution of cases that share the same central issue. The system also enables the court to issue pre-publication reports to court members to advise them in advance of the filing of every published opinion and to identify pending cases that might be affected by the lead opinion. In addition to using technology effectively, the Ninth Circuit has introduced case management solutions, such as the creation of the positions of Appellate Commissioner and Circuit Mediator, to help resolve cases that do not require resolution by an Article III judge. These programs, available to the circuit because of its aggregate resources, have produced administrative efficiencies that have improved case management and increased productivity.

\(^{20}\) The AO’s statistical tables are available on its website at http://www.uscourts.gov/statistics-reports.
Moreover, dividing the Ninth Circuit would not be a likely cure for whatever delay problems exist. Wherever California goes, with or without any other states, the system will be overburdened unless and until new judgeships are created. Indeed, one of the primary academic proponents of dividing the Circuit admitted in his testimony before the Congress that the purported benefits that he believes would flow from splitting the Circuit could not be achieved without dividing California and placing the state in two circuits.21 Because California has far fewer judges on the Ninth Circuit than its proportion of the cases in the Circuit, splitting off other states from California would effectively increase the caseload for the judges that remained in the Circuit with California.

The Ninth Circuit is also the only federal circuit that currently has live streaming of its video arguments. In commenting on the leadership role that the circuit has taken in allowing cameras in the courtroom, Chief Judge Thomas recently remarked that “[t]he more transparent we are the more confidence people will have in our judicial institutions.”22

B. **Reversal Rate**

Contrary to often-repeated statements, the rate of reversal of Ninth Circuit decisions by the Supreme Court is not the highest of all the circuits and, even if it were, there is no evidence that size has any bearing on reversal rates.23

The Supreme Court, not surprisingly, reverses more cases than it affirms. According to an analysis by Politifact, between 2010 and 2015, the Supreme Court reversed about 70% of the cases it reviewed.

During the same time period, 79% of the Ninth Circuit cases were reversed, and the Sixth Circuit, with a reversal rate average of 87%, had the highest reversal rate.24 Our review of reversal rates, as reported by SCOTUSblog, confirms these statistics.25 Further proof that reversal rate has nothing to do with the size or volume of cases decided by a circuit is readily

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23 Indeed, one academic proponent of splitting the Ninth Circuit conceded in recent written testimony submitted to Congress that “the existing studies are inconclusive” on whether the “size of the Circuit [is] one of the causes of the high reversal rate.” House Judiciary Subcomm. Hearing, *supra* note 2 (written statement of Brian T. Fitzpatrick, Professor, Vanderbilt Law School).


apparent when one reviews reversal rates year-by-year; there simply is no discernable correlation.

VI. Views of Judges and Lawyers of the Ninth Circuit Count

We believe that the views of judges and the lawyers who practice daily before the courts in the Ninth Circuit should be accorded great deference. In his testimony before Congress, Ninth Circuit Chief Judge Sidney R. Thomas stated: “I oppose division of the Ninth Circuit. Circuit division would have a devastating effect on the administration of justice in the western United States. A circuit split would increase delay, reduce access to justice, and waste taxpayer dollars. Critical programs and innovations would be lost, replaced by unnecessary bureaucratic duplication of administration. Division would not bring justice closer to the people; it would increase the barriers between the public and the courts.”26 In his testimony, former Chief Judge Alex Kozinski of the Ninth Circuit stated: “Our geographic size has forced us to experiment and innovate. The size of our judicial corps has given us the resources to develop and deploy innovative techniques. Because circuits are funded based on the number of judicial positions they have, we have the resources with which to hire staff and purchase equipment that will bring our courts closer to the people we serve.”27 In his testimony, Judge Carlos T. Bea of the Ninth Circuit stated: “In conclusion, I think you should take into consideration . . . the views [of] people on the ground—the litigants practitioners and judges in the circuit. The overwhelming majority of the people directly involved is against a split of the Circuit. Talk to the people who deal with the issue daily, and I think you will come around to agreement with them.”28

As the Ninth Circuit judges who appeared before the Congress testified, there are substantial advantages to the region being under a consistent body of case law. Technology companies present a good example. The tech corridors in Seattle, Silicon Valley, Los Angeles and Phoenix are presently under a consistent regime that promotes understanding and balance for the players in each location. Settled laws promote economic growth. Balkanized or disparate interpretations are not good for commerce.

In the past, Congress has agreed that the views of the affected legal community carry great weight and has refrained from using its power to restructure a circuit unless there was consensus within Congress and the affected legal community that it was absolutely necessary, and there was agreement over how best to reconfigure the circuit. There are, of course, some judges in the circuit who support division, but we surmise that they comprise a scant minority. While we do not know the exact number of judges of the Ninth Circuit that oppose division, we do know that the past three chief judges of the Ninth Circuit, spanning back to 2000, have strongly opposed division and have been vocal in their support for the benefits derived from the circuit’s size. We also know that neither the Judicial Council of the Ninth Circuit nor the

26 House Judiciary Subcomm. Hearing, supra note 2 (written statement of Chief Judge Thomas).

27 Id. (written statement of Judge Kozinski).

28 Id. (written statement of Judge Bea).
Judicial Conference of the United States supports restructuring. These facts strongly suggest that there is no groundswell of support among the judges of the Ninth Circuit or elsewhere in the legal community for division.

In addition to the ABA and its thousands of members who practice daily before the courts of the Ninth Circuit, many other segments of the organized bar have also spoken out in opposition to splitting the circuit. In 2006, all but one of the state bar associations that had adopted a policy position on the issue opposed division, and several specialty bars, including the Federal Bar Association, likewise opposed division. Outside of those state and local bar associations that are co-sponsors of this Resolution, we do not have statistics with regard to the current positions of the organized bar in the Ninth Circuit but we are in the process of updating our information and will share the results as soon as possible.

Critics often mention that large circuits suffer from a loss of collegiality and cite it as a reason to divide the Ninth Circuit. While one could just as easily argue that collegiality is fostered by the diversity of voices in a large circuit, the judges of the Ninth Circuit are in the best position to comment on their working relationships.

VII. Circuit Restructuring Is a Costly Proposition

This is not a minor point, especially at a time when budgets continue to be slashed and the national deficit continues to grow. Splitting the circuit would not only result in the loss of efficiencies mentioned earlier, it would also result in steep startup costs (especially if new courthouses needed to be constructed) and duplicative overhead costs. In 2006, the AO estimated that startup costs for a two-way split could run as much as $96 million, with recurring annual costs ranging from $13–$16 million, and that a three-way split could cost as much as $134 million initially and an additional $22 million annually thereafter. The potential cost of circuit restructuring alone counsels against division, absent verifiable compelling evidence of dysfunction.

VIII. Conclusion

In conclusion, we respectfully request that the House of Delegates adopt the Resolution, thereby (i) opposing restructuring of the United States Court of Appeals for the Ninth Circuit because there is no compelling empirical evidence of adjudicative or administrative dysfunction in the existing structure and (ii) supporting ongoing efforts of the United States Court of Appeals for the Ninth Circuit and other federal courts to utilize technological and procedural innovations in order to continue to enable them to handle caseloads efficiently while maintaining coherent, consistent law in their respective jurisdictions.

Respectfully submitted,

Michael H. Reed.
Chair, Subcommittee on Federal Courts of the
Standing Committee on the American Judicial System
August 2017
APPENDIX A
Current Proposals to Divide the 9th Circuit

115th Congress
H.R. 250
(Biggs, R-AZ)

114th Congress
H.R. 4457
(Salmon, R-AZ)
S.2490
(Flake, R-AZ)

115th Congress
S. 276
(Flake, R-AZ)

115th Congress
S. 295 (Daines, R-MT)
20/14 Judgeships split
H.R. 196 (Simpson, R-ID)
25/9 Judgeships split

114th Congress
H.R.166 (Simpson, R-ID)
S. 2477 (Daines, R-MT)

113th Congress
H.R.144 (Simpson, R-ID)

112th Congress
H.R.162 (Simpson, R-ID)

111th Congress
H.R.191 (Simpson, R-ID)
S. 1727 (Ensign, R-NV)

110th Congress
H.R.221 (Simpson, R-ID)

109th Congress
H.R.3125 (Simpson, R-ID)
S. 1845 (Ensign, R-NV)
S. 1296 (Murkowski, R-AK)

KEY:
- New 9th Circuit
- New 12th Circuit
Earlier Proposals to Divide the 9th Circuit

- **109th Congress**
  - H.R. 212 (Simpson, R-ID)

- **108th Congress**
  - H.R. 1033 (Simpson, R-ID)

- **107th Congress**
  - H.R. 1203 (Simpson, R-ID)
    - S.346 (Murkowski, R-AK)

- **106th Congress**
  - H.R. 211 (Simpson, R-ID)
    - S. 1301 (Ensign, R-NV)

- **105th Congress**
  - H.R. 4247 (Renzi, R-AZ)
    - S. 2278 (Ensign, R-NV)

**KEY:**
- Gray = New 9th Circuit
- Medium Gray = New 12th Circuit
- Black = New 13th Circuit
GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on the American Judicial System

Submitted By: Michael H. Reed, Chair, SCAJS Subcommittee on Federal Courts

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

   This Resolution opposes restructuring the United States Court of Appeals for the Ninth Circuit because there is no compelling empirical evidence of adjudicative or administrative dysfunction in the existing structure. It further supports ongoing efforts by the Ninth Circuit and other federal courts to utilize technological and procedural innovations in order to continue to enable them to handle caseloads efficiently while maintaining coherent, consistent law in their respective jurisdictions.

2. **Approval by Submitting Entity.**

   The Standing Committee on the American Judicial System approved this Resolution by email on April 25, 2017. The Section of Litigation Council approved this Resolution on May 6, 2017. The Tort Trial and Insurance Practice Section Council approved this Resolution on April 29, 2017. The Criminal Justice Section Council approved this Resolution on May 6–7, 2017. The Washington State Bar Association Board of Governors approved this Resolution on May 19, 2017. The Hawaii State Bar Association approved this Resolution on May 25, 2017. The King County Bar Association approved this Resolution on May 19, 2017. The Beverly Hills Bar Association approved this Resolution on May 23, 2017. The Judicial Division Council provided notice on May 3, 2017 of its support for this Resolution. The Standing Committee on Legal Assistance to Military Personnel provided notice of its support on May 9, 2017.

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

   A similar resolution has not been submitted previously.

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

   This Resolution would build upon and enhance existing ABA policy, but would not change any current ABA policy.

Originally supportive of realignment of the Ninth Circuit in the 1970s, the ABA continued to examine the issue over the next several decades in light of the emergence of technological developments that increasingly bridged geographical distances, the successful use of limited en banc review panels, and the Ninth Circuit's innovative use of case management techniques. This culminated in 1990, when the House of Delegates adopted Resolution 123 at the Annual meeting, rescinding its earlier position in support of realignment of the Ninth Circuit. In 1998, the ABA Board of Governors adopted a resolution that opposed restructuring of the Ninth Circuit.
“in view of the absence of compelling empirical evidence to demonstrate adjudicative or administrative dysfunction.” Resolution 110A, adopted by the ABA House of Delegates at the Annual Meeting in 1999, opposed enactment of legislation that mandated restructuring of the Ninth Circuit into “adjudicative divisions” in view of the “absence of compelling evidence to demonstrate adjudicative dysfunction.”

Since then, the ABA has periodically reviewed new proposals to split the circuit. The ABA last expressed opposition to circuit restructuring in a statement submitted to the Senate Judiciary Committee on September 20, 2006, for a hearing on proposals to split the Ninth Circuit. On March 16, 2017, the ABA submitted testimony, based upon previously adopted policy, opposing the current legislative proposals to restructure the Ninth Circuit at a hearing of the Subcommittee on Courts, Intellectual Property and the Internet of the House Committee on the Judiciary.

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)

In the current 115th Congress, four circuit restructuring bills have been introduced. S. 295 and H.R. 196, introduced by Senator Daines (R-MT) and Representative Simpson (R-ID) respectively, share the same circuit reconfiguration but differ in other details. These bills would retain California, Guam, Hawaii, and the Northern Mariana Islands in the Ninth Circuit and assign the other states to the new Twelfth Circuit. Representative Biggs (R-AZ) has introduced H.R. 250, which would retain Oregon and Washington along with California, Guam, Hawaii, and the Northern Mariana Islands in the Ninth Circuit, and assign the other states to the new Twelfth Circuit. S. 276, introduced by Senator Flake (R-AZ), would tweak that arrangement a bit by assigning Washington to the new Twelfth rather than the Ninth Circuit. As of the date of filing this Form, the Senate bills have been read twice and referred to the Committee on the Judiciary and the House bills have been referred to the Subcommittee on Courts, Intellectual Property, and the Internet.

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

The adoption of this Resolution will enhance the ability of the ABA to oppose the restructuring of the Ninth Circuit and to support technological and procedural innovations by the federal courts.

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

None.

9. Disclosure of Interest. (If applicable)

N/A.
10. **Referrals.**

Business Law Section  
Criminal Justice Section (Co-Sponsor)  
Government and Public Sector Lawyers Division  
Judicial Division (Supporter)  
Judicial Division Appellate Judges Conference  
Judicial Division Lawyers Conference  
Judicial Division National Conference of Federal Trial Judges  
Law Practice Division  
Section of Administrative Law and Regulatory Practice  
Section of Intellectual Property Law  
Solo, Small Firm and General Practice Division  
State and Local Government Law Section  
Tort Trial & Insurance Practice Section (Co-Sponsor)  
Young Lawyers Division  
Standing Committee on Election Law  
Standing Committee on Legal Aid and Indigent Defendants  
Standing Committee on Legal Assistance for Military Personnel (Supporter)  
Commission on Immigration  
Alaska Bar Association  
State Bar of Arizona  
State Bar of California  
Hawaii State Bar Association (Co-Sponsor)  
Idaho State Bar  
State Bar of Montana  
State Bar of Nevada  
Oregon State Bar  
Washington State Bar Association (Co-Sponsor)  
Guam Bar Association  
Commonwealth of the Northern Mariana Islands Bar Association  
King County Bar Association (Co-Sponsor)  
Beverly Hills Bar Association (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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EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   This Resolution opposes restructuring the United States Court of Appeals for the Ninth Circuit because there is no compelling empirical evidence of adjudicative or administrative dysfunction in the existing structure. It further supports ongoing efforts by the Ninth Circuit and other federal courts to utilize technological and procedural innovations in order to continue to enable them to handle caseloads efficiently while maintaining coherent, consistent law in their respective jurisdictions.

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

   There is no compelling empirical evidence of either adjudicative or administrative dysfunction in the existing structure of the United States Court of Appeals for the Ninth Circuit that would warrant a split. Nevertheless, members of Congress continue to propose splitting the Ninth Circuit without justification.

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

   This Resolution clarifies the ABA’s position and enhances the ABA’s ability to oppose restructuring of the United States Court of Appeals for the Ninth Circuit absent compelling evidence justifying restructuring.

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 urges Congress to enact legislation enabling the United States Department of Justice to initiate and pursue civil actions to obtain equitable relief for systemic violations of the constitutional right to the effective assistance of counsel, both directly and through private litigants deputized to file such actions in the name of the United States;

FURTHER RESOLVED, That the American Bar Association urges Congress to enact legislation recognizing the right of private litigants, in their individual capacity or as members of a class action, to obtain equitable relief in federal court for systemic violations of the constitutional right to the effective assistance of counsel.
REPORT

Introduction

The ongoing crisis in indigent defense is well-documented. Given continued failures by state and local governments to fully enforce the right to effective assistance of counsel, this Resolution recommends that the federal government and private individuals, subject to such violations be granted the tools necessary to ensure that the Sixth Amendment’s mandate is fulfilled. It proposes that Congress vest the Department of Justice with authority to file civil lawsuits challenging systemic violations of the right to counsel. Because the Department will always be severely limited by time and resources, the resolution also recommends that the Department be permitted to deputize private litigants, acting on its behalf, to seek equitable relief for criminal defendants whose right to counsel is being violated. Last, it urges that private litigants be empowered to file such actions in an individual or class action capacity to vindicate their Sixth Amendment rights. This Resolution aligns with the ABA’s consistent recognition of the failure to fulfill the Sixth Amendment’s mandate and its opinion that the constitutional guarantee of effective assistance of counsel must be strictly enforced.

This Resolution does not seek to supplement or alter the means by which an individual convicted of a crime can raise post-conviction claims—for example, through petitions for writ of habeas corpus or ineffective assistance of counsel claims raised on appeal. Rather, the Resolution seeks only to enable the ABA to urge Congress to enact legislation recognizing the validity of prospective claims for equitable relief where systemic violations of the right to counsel are alleged and to enable the Department of Justice to pursue such claims when it deems appropriate.

Background: Gideon’s Promise Still Broken

In the years that have passed since the Supreme Court’s landmark decision Gideon v. Wainwright,1 various studies have documented the obstacles criminal defendants face in attempting to secure the effective assistance of counsel.2 Among other things, these studies have highlighted inadequate funding of public defense systems across the country, chronic appointment of incompetent or inexperienced lawyers, severe delays in the appointment of counsel, discontinuity of attorney representation, a lack of training and oversight for attorneys representing criminal defendants, excessive public defender caseloads and understaffing of public defender offices, inadequate or nonexistent expert and investigative resources for defense counsel, and a lack of meaningful attorney-client contact.3

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Although defendants are guaranteed the right to counsel in theory, it often fails to translate into practice; this gap has worsened as state and local budgets have been forced to tighten and the provision of public defense given low priority in the spending of such limited funds. The problems referenced above, and suggestions for guiding principles that would help to ensure effective provision of defense services to clients, have been chronicled in previous ABA reports and publications—yet the Sixth Amendment’s guarantee to adequate counsel remains vastly underenforced.

Various proposals have been made in an attempt to address the public defense crisis, including calls for better training of public defenders and increased funding for public defense. Yet many of those proposals rely on state governments taking action—often an unlikely solution, given that criminal defendants remain a minority with little to no political clout. Even if such proposals were successful, increased funding and better training alone would not solve all of the problems plaguing public defense, including the problems of insufficient independence and oversight.

While litigation has often been used to seek reform at the state and local levels, it too suffers from critical limitations. Individual defendants may raise a claim of ineffective assistance of counsel, but seeking such relief can take years, and often defendants are not entitled to legal assistance in making such challenges during habeas review. Moreover, many courts have been


5 See, e.g., GIDEON’S BROKEN PROMISE, supra note 3; ABA Resolution 107, Adopted by ABA House of Delegates, Aug. 9, 2005.


7 Brensike Primus, supra note 6, at 3.

8 Brensike Primus, supra note 6, at 3.
unwilling to entertain such claims prospectively, before a defendant has already received the ineffective assistance of counsel.\textsuperscript{9}

As described below, in several cases, defendants have attempted to bring class-action lawsuits to challenge systemic public defense failures.\textsuperscript{10} Although some state courts have been receptive to these claims, many have been hesitant to find such claims justicia
cble or to address claims regarding systemic deficiencies in performance (as compared to the constructive or actual denial of counsel).\textsuperscript{11} The federal courts have often relied on the abstention doctrine in refusing to hear such claims.\textsuperscript{12}

The Need for Federal Enforcement to Vindicate the Right to Adequate Counsel

This Resolution suggests Congress should provide the federal government with authority to initiate and pursue lawsuits to protect against systemic violations of the Sixth Amendment for adult defendants, as it already has the authority to do in the context of juvenile defendants (see discussion of 42 U.S.C. §14141 below). In doing so, Congress would merely be allowing the executive branch authority to ensure compliance with the Sixth Amendment, a power the federal judiciary already possesses but cannot fully implement, given procedural obstacles and the inability of pro se litigants to effectively litigate the issue on their own. Given the limited capacity and resources of the federal government, this Resolution further suggests that the Justice Department have the ability to deputize private litigants to file such actions in the name of the United States.

Current Federal Involvement in Public Defense Reform

While this Resolution proposes that the federal government play a more direct role in ensuring compliance with the Sixth Amendment, it has already assumed an important, if limited, role in public defense reform. In recent years, the Department of Justice has taken a more active stance with regard to pending public defense litigation filed by others, due in large part to the creation of the Office for Access to Justice, which was established in March 2010 to address the access-to-justice crisis in the criminal and civil justice system.\textsuperscript{13}

The Department has filed a number of statements of interest in important cases regarding systemic public defense failures, including \textit{Hurrell-Harring v. State of New York}, a class action

\textsuperscript{9} See Lucas, \textit{Reclaiming Equality}, supra note 3, at 1216.


\textsuperscript{11} See Drinan, supra note \textbf{Error! Bookmark not defined.}. Brensike Primus, supra note 6, at 4 n.21 (describing limitations in New York and Michigan cases).

\textsuperscript{12} Under \textit{Younger v. Harris}, 401 U.S. 37 (1971), federal courts must abstain from interfering with state court criminal proceedings. See also Luckey v. Miller, 976 F.2d 673, 676-79 (11th Cir. 1992) (affirming district court’s dismissal, based on abstention doctrine, of a class action lawsuit challenging Georgia’s public defense system). As Eve Brensike Primus has explained, federal legislation authorizing federal enforcement by DOJ would not raise the same abstention concerns and could, if needed, specify that the limited number of enforcement actions brought under such a statute be exempted from abstention. Brensike Primus, \textit{supra} note 6, at 6, 15.

\textsuperscript{13} https://www.justice.gov/atj.
lawsuit filed in the Supreme Court of the State of New York alleging that due to systemic failures in four New York counties, criminal defendants had been constructively denied the right to counsel. The Department’s brief was filed in September 2014, just weeks before a historic settlement was reached in the case. The Department also filed a statement of interest in August 2013 in federal court in Washington State in Wilbur v. City of Mount Vernon, a class action lawsuit alleging that excessive misdemeanor caseloads prevented public defenders from providing effective representation. Just months later, on December 4, 2013, the district court found a systematic deprivation of the right to assistance of counsel and issued an injunction in favor of the plaintiffs requiring the defendant cities to hire a part-time public defender supervisor tasked with monitoring and reporting on the delivery of public defense representation. In 2015, the Department filed a statement of interest in federal court in Georgia in N.P. v. State of Georgia, a class action asserting that the public defense system in the Cordele Judicial Circuit was so underfunded and poorly staffed that juveniles were routinely denied their right to legal representation. The case settled less than a month after the Department filed its statement.

The Department has also filed amicus briefs in cases like Adam Kuren, et al. v. Luzerne County, et al, a class action filed in the Supreme Court of Pennsylvania alleging that the public defense system in Luzerne County, Pennsylvania, is so underfunded and poorly staffed that attorneys appointed to represent adults accused of committing criminal acts serve as attorneys in name only. The sole focus of the Department’s brief was whether criminal defendants could bring a civil claim alleging a constructive denial of counsel under the Sixth Amendment to the United States Constitution. Notably, the ABA also filed an amicus brief in the Luzerne County case in support of the criminal defendants, arguing that, where excessive workloads and a lack of resources prevent defenders from providing adequate representation, the court should recognize a prospective cause of action and provide systemic relief.

Most recently, the Department filed an amicus brief in Tracy Tucker et al. v. State of Idaho, et al., in the Supreme Court of Idaho. The brief argues, on behalf of the United States, that criminal defendants who cannot afford an attorney may bring a prospective civil lawsuit to prevent violations of their constitutional right to counsel under the Sixth Amendment, rather than waiting to bring an ineffective assistance of counsel claim after conviction. The ability to bring pre-conviction claims is critical to systemic reform and yet they have been “relatively rare” and “deemed cognizable with little frequency.”

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20 https://www.americanbar.org/content/dam/aba/images/abanews/Amicus_Flora.pdf.
22 Lucas, Reclaiming Equality, supra note 3, at 1216 (explaining that most courts view such claims as reserved for postconviction review).
**Federal Enforcement Authority in Other Contexts**

The authority referenced in this Resolution is not without parallel in existing federal law. Congress has created similar enforcement actions to prevent state officials from engaging in systemic violations of civil rights, including 42 U.S.C. § 14141.

Section 14141 authorizes the Attorney General to conduct investigations and, if warranted, file civil litigation to eliminate a “pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice… that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.” As a result of § 14141, DOJ is authorized to file lawsuits against state officials who systematically deny juveniles their due process rights to effective legal representation. The proposal to provide DOJ with enforcement authority to file federal enforcement actions to obtain equitable relief from systemic right-to-counsel violations is merely an extension of the type of authority DOJ now has pertaining to state juvenile court proceedings.\(^{23}\)

Similarly, the notion that private individuals might be deputized to bring civil actions on behalf of the United States government is not a novel concept. To the contrary, the government’s authority to deputize in areas where the government has a conflict or lacks the time and resources to fully enforce federal law on its own, is grounded in both practice and history. One such example is the qui tam provision of the False Claims Act, 31 U.S.C. § 3730, which authorizes private citizens with independent knowledge of fraud perpetrated against the government to sue and recover a portion of the claim. Other examples of deputization include the independent counsel statute\(^{24}\), and DOJ’s use of a private attorney (David Boies) for its antitrust suit against the Microsoft Corporation. The general authority to deputize is grounded in practice and history and the DOJ would retain approval over any actions filed on its behalf.

**The Importance of Federal Enforcement Authority**

As discussed above, a federal enforcement mechanism is necessary to ensure that state and local governments fulfill their responsibility to provide effective legal representation to criminal defendants who cannot afford counsel. As evidenced by decades of reporting on such failures by the ABA and others, many defendants are still not receiving effective legal representation, and states and localities are not solving the problem on their own.

Litigants seeking redress in federal court have been unable to make much headway. Defendants attempting to file civil actions to obtain systemic relief in federal court are often stymied by procedural barriers, like abstention and standing doctrine. By carving out a federal path for such lawsuits, this Resolution supports the availability of a new and untapped mechanism to ensure compliance with the Sixth Amendment. Moreover, it is apparent from the Department’s current, yet limited, involvement—its filing of amicus briefs and statements of interest in right to counsel

\(^{24}\) 28 U.S. Code Chapter 40
cases—and the speed with which many of those cases have been resolved after the Department’s appearance in the case, that the federal government possesses unmatched influence in this area.

The Need for Private Enforcement to Vindicate the Right to Adequate Counsel

While the federal government’s influence and power to have an impact through litigation in federal court is tremendous, there still remains a possibility that the Department will fail to pursue such actions or will be unable to do so at the level needed to provide redress for systemic violations across the country. Thus, it is critical that private individuals, subject to such systemic violations, be able to initiate and pursue such actions, either as individuals or as part of a class.

Currently, individual defendants wishing to challenge systemic violations of the right to counsel, or public interest legal organizations bringing challenges on behalf of such defendants—which is often the relevant posture—face myriad obstacles in trying to bring such a claim in federal court. Aside from issues of abstention and standing, many such cases encounter courts only willing to entertain claims of ineffective assistance post-conviction. Therefore, even when the systemic failures are clear, and when representation of indigent defendants will almost certainly suffer as a result, those seeking to raise such a claim cannot seek injunctive relief and prevent further future Sixth Amendment violations from occurring. Instead, they must wait until after conviction (and the consequences that accompany conviction) to file suit. In one recent example, the Utah Attorney General filed a motion to dismiss a class-action challenge to Utah’s indigent defense system, arguing “a criminal defense must first be provided before the Court can determine whether a criminal defendant received constitutionally insufficient counsel.” Although a growing number of jurisdictions allow for such a claim to be filed in state court, and one federal court of appeals has recognized such a prospective cause of action, defendants in other jurisdictions lack a clear path to injunctive relief.

The notion that Congress should provide a vehicle to prevent such violations before they happen is not novel: United States Representative Sean Maloney of New York and United States Senator Cory Booker of New Jersey introduced legislation this past session proposing that federal district courts be empowered by Congress to provide declaratory and injunctive relief against systemic violations of the right to counsel.

Alignment with ABA Goals and Objectives

For decades, the ABA has chronicled the failure to fulfill Gideon’s mandate. In 1982 in Gideon Undone, the Standing Committee on Legal Aid and Indigent Defendants, in conjunction with the

25 See supra note 12.
26 Lucas, Reclaiming Equality, supra note 3, at 1216 & n.75 (providing numerous examples of courts deeming such claims appropriate for collateral, post-conviction review).
29 Luckey v. Harris, 860 F.2d 1012 (11th Cir. 1988).
Criminal Justice Section and General Practice Sections, and the National Legal Aid and Defender Association, relayed witness testimony documenting, among other things: inadequate funding for public defense (only 1.5% of total criminal justice expenditures by state and local governments); excessive public defender caseloads; the failure to advise misdemeanor defendants of their right to counsel and frequent waiver by such defendants; a tendency by states to place much of the funding burden on counties; and inadequate compensation of appointed private attorneys.\footnote{31}

Nearly two decades later, on the 40th anniversary of \textit{Gideon}, the ABA held extensive public hearings to assess the current state of public defense.\footnote{32} In \textit{Gideon’s Broken Promise}, an ABA report summarizing the testimony provided at those hearings, it became clear that many of the same issues remained: inadequate funding for public defense; the failure to appoint counsel in cases where a right to counsel exists; a lack of basic oversight and accountability in public defense systems, and a failure by lawyers providing public defense services to deliver competent representation.\footnote{33}

In response to these findings, the ABA has attempted to define what is necessary to establish and maintain an effective public defense system. In \textit{Providing Defense Services}, the ABA promulgated thorough standards intended to guide public defense providers in ensuring all eligible persons have quality legal representation.\footnote{34} In February 2002, the ABA approved \textit{Ten Principles of a Public Defense Delivery System}, focused on characteristics critical to an effective public defense system, such as independence of the defense function, manageable workloads, and parity between the prosecution and the defense.\footnote{35} And in 2009, the ABA released a set of guidelines focused specifically on the management of excessive caseloads, a primary obstacle to the provision of effective assistance of counsel.\footnote{36}

In 2005, the ABA passed another Resolution, recommending specific steps be taken to fulfill \textit{Gideon's} mandate including, among other things: increased funding by state and territorial governments; establishing oversight organizations to ensure the independence and uniformity of defense services; substantial federal financial support of public defense services; and a suggestion that attorneys carrying excessive caseloads should decline to take on additional cases, consistent with their ethical obligations.\footnote{37}

While these efforts by the ABA do much more than restate the Sixth Amendment’s requirement that defendants be provided with the effective assistance of counsel, they clearly demonstrate the ABA’s consistent commitment to this issue and to the notion that the federal government has an important role to play in fulfilling that requirement. And with good reason, as the provision of counsel is fundamental to ensuring so many other constitutional guarantees are met. The Resolution described herein does not encompass all that the ABA has promulgated on

\footnote{31} \textit{GIDEON UNDONE: THE CRISIS IN INDIGENT DEFENSE FUNDING} (1982).
\footnote{32} \textit{GIDEON’S BROKEN PROMISE}, supra note 3, at iv.
\footnote{33} Id.
\footnote{34} \textit{ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES} (3d. ed. 1992).
\footnote{35} \textit{AMERICAN BAR ASS’N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM} (2002).
\footnote{36} \textit{AMERICAN BAR ASS’N, EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS} (2009).
\footnote{37} ABA Resolution 107, Adopted by ABA House of Delegates on Aug. 9, 2005.
the subject; instead, it is merely an attempt to ensure systemic violations of the Sixth Amendment can be addressed effectively.

**Conclusion**

More than 50 years after *Gideon* was decided, its promise remains unfulfilled. For decades, the ABA has documented these failures and also promulgated detailed standards to guide attorneys in providing quality legal representation to criminal defendants and jurisdictions in structuring sound public defense systems. Yet, efforts to date have been unsuccessful, due in large part to the unwillingness of state and local governments to provide what is needed for an effective public defense system. The federal courts have not played a major role in the implementation of *Gideon*, and this Resolution aims to change that. The ABA should support legislation that would enable the Department of Justice to seek redress for systemic Sixth Amendment violations. In doing so, it should also support the Department’s ability to deputize civil litigants to bring such suits, given the time and resource limitations of the Department itself and the fact that this practice has precedent in other contexts. Last, where the federal government is unwilling or unable to intervene, it should support legislation enabling private citizens to file such suits to ensure their Sixth Amendment rights remain intact.

Respectfully submitted,

**Hon. Lora Livingston, Chair**
Standing Committee on Legal Aid and Indigent Defendants
August 2017
GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Legal Aid and Indigent Defendants

Submitted By: Hon. Lora Livingston, Chair

1. **Summary of Resolution(s).** This resolution urges Congress to enable the United States Department of Justice to ensure compliance with the Sixth Amendment right to effective assistance of counsel. Specifically, it urges Congress to (1) enable the DOJ, or its deputies to pursue civil action to obtain equitable relief where violations of that right occur; and (2) recognize a cause of action in federal court for equitable relief from systemic violations of the right to counsel.

2. **Approval by Submitting Entity.** This resolution was passed by the Standing Committee on Legal Aid and Indigent Defendants on April 23, 2017. Co-sponsorship approved by the Criminal Justice Section Council on May 4, 2017.

3. **Has this or a similar resolution been submitted to the House or Board previously?**
   An earlier version of this resolution was submitted, then withdrawn, at the February 2017 Midyear meeting.

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.** (If applicable)
   The Equal Justice Under Law Act (S. 238 & H.R. 968) has been introduced in the current 115th Congress, First Session, and would enable a plaintiff, individually or as part of a class, to bring a civil action in federal court for systemic failures to enforce the right to counsel.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.**
   This policy will enable the ABA Governmental Affairs Office to educate and lobby Congress to enact legislation that would help protect the Sixth Amendment right to the effective assistance of counsel.

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

9. **Disclosure of Interest.** (If applicable)
10. **Referrals.**
At the same time this policy resolution is submitted to the ABA Policy Office for inclusion in the 2017 Annual Agenda Book for the House of Delegates, it is being circulated to the chairs and staff directors of the following ABA entities:

**Sections, Divisions**
Criminal Justice
Government and Public Sector Lawyers Division
Civil Rights and Social Justice
Judicial Division
Litigation
State and Local Government Law
Young Lawyers
Ethics and Professional Responsibility
Solo, Small Firm and General Practice Division

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

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges Congress to enable the United States Department of Justice to ensure compliance with the Sixth Amendment right to effective assistance of counsel. Specifically, it urges Congress to (1) enable the DOJ, or its deputies to pursue civil action to obtain equitable relief where violations of that right occur; and (2) recognize a cause of action for equitable relief, cognizable in federal court, by persons charged with crimes, either individually or as representatives of a class, for systemic violations of the right to counsel.

2. Summary of the Issue that the Resolution Addresses

Public defense has, for several decades, been in a state of crisis. Throughout the nation, public defense providers are inadequately funded and carry grossly excessive workloads. These attorneys, saddled with hundreds or thousands of cases per year, are frequently unable to meet their Sixth Amendment duties to effective assistance of counsel. The United States Department of Justice has authority to pursue civil actions to obtain equitable relief where violations of this right occur in the juvenile context, but that authority does not presently exist in the adult context. Given the Department’s limited time and resources, deputization, as well as a private enforcement through individual and class action lawsuits are also necessary to ensure that such violations do not occur.

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

The United States Department of Justice is better positioned than any other organization or entity in our nation to enforce the right to effective assistance of counsel. Where the federal government cannot or will not intervene, an alternative mechanism is necessary to ensure that private litigants and the public interest legal organizations that pursue impact litigation on their behalf can also seek redress for systemic Sixth Amendment violations. By enacting the legislation recommended in this resolution, Congress will greatly deter widespread violation of the Sixth Amendment.

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

The Judicial Division expressed concerns with a previous version of this Resolution submitted for consideration at the 2017 Midyear Meeting. The Resolution was withdrawn for revision. In the current Resolution, SCLAID was able to address a number of the concerns raised by the Judicial Division, however, the Judicial Division continues to have concerns regarding extending the private right of action.
RESOLVED, That the American Bar Association adopts the *American Bar Association Model Provisions on Electronic Commerce for International Trade Agreements*, dated August 2017, and recommends them as a standard template for use in international trade agreements and other relevant international agreements and guidelines.
Article 1.1: Definitions

For the purposes of this [Chapter]:

1. **computing facilities** means computer servers and storage devices for processing or storing information for commercial use;

2. **covered person** means:
   
   (a) a covered investment as defined in Article [x.1 (Definitions)];
   
   (b) an investor of a Party as defined in Article [x.1 (Definitions)]; or
   
   (c) a service supplier of a Party as defined in Article [x.1 (Definitions)];

3. **digital product** means a computer program, text, video, image, sound recording or other product that is digitally encoded, produced for commercial sale or distribution, and that can be transmitted electronically;¹ ²

4. **electronic authentication** means the process or act of verifying the identity of a party to an electronic communication or transaction and ensuring the integrity of an electronic communication;

5. **electronic transmission or transmitted electronically means** a transmission made using any electromagnetic means, including by photonic means;

6. **personal information** means any information, including data, about an identified or identifiable natural person;

7. **trade administration documents** means forms issued or controlled by a Party that must be completed by or for an importer or exporter in connection with the import or export of goods; and

8. **unsolicited commercial electronic message** means an electronic message which is sent for commercial or marketing purposes to an electronic address, without the consent of the recipient or despite the explicit rejection of the recipient, through an Internet access service supplier or, to the extent provided for under the laws and regulations of each Party, other telecommunications service.

¹ For greater certainty, digital product does not include a digitized representation of a financial instrument, including money.

² The definition of digital product should not be understood to reflect a Party’s view on whether trade in digital products through electronic transmission should be categorized as trade in services or trade in goods.
Article 1.2: Scope and General Provisions

1. This Chapter shall apply to measures adopted or maintained by a Party that affect trade by electronic means.

2. This Chapter shall not apply to:

   (a) government procurement; or

   (b) information held or processed by or on behalf of a Party, or measures related to such information, including measures related to its collection.

Article 1.3: Customs Duties

1. No Party shall impose customs duties on electronic transmissions, including content transmitted electronically, between a person of one Party and a person of another Party.

2. For greater certainty, paragraph 1 shall not preclude a Party from imposing internal taxes, fees or other charges on content transmitted electronically, provided that such taxes, fees or charges are imposed in a manner consistent with this Agreement.

Article 1.4: Non-Discriminatory Treatment of Digital Products

1. No Party shall accord less favorable treatment to digital products created, produced, published, contracted for, commissioned or first made available on commercial terms in the territory of another Party, or to digital products of which the author, performer, producer, developer or owner is a person of another Party, than it accords to other like digital products.3

2. This Article shall not apply to broadcasting.

Article 1.5: Domestic Electronic Transactions Framework


2. Each Party shall endeavor to:

   (a) avoid any unnecessary regulatory burden on electronic transactions; and

   (b) facilitate input by interested persons in the development of its legal framework for electronic transactions.

3 For greater certainty, to the extent that a digital product of a non-Party is a “like digital product”, it will qualify as an “other like digital product” for the purposes of this paragraph.
Article 1.6: Electronic Authentication and Electronic Signatures

1. Except in circumstances otherwise provided for under its law, a Party shall not deny the legal validity of a signature solely on the basis that the signature is in electronic form.

2. No Party shall adopt or maintain measures for electronic authentication that would:
   (a) Prohibit parties to an electronic transaction from mutually determining the appropriate authentication methods for that transaction; or
   (b) prevent parties to an electronic transaction from having the opportunity to establish before judicial or administrative authorities that their transaction complies with any legal requirements with respect to authentication.

3. Notwithstanding paragraph 2, a Party may require that, for a particular category of transactions, the method of authentication meet certain performance standards or is certified by an authority accredited in accordance with its law.

4. The Parties shall encourage the use of interoperable electronic authentication.

Article 1.7: Online Consumer Protection

1. The Parties recognize the importance of adopting and maintaining transparent and effective measures to protect consumers from fraudulent and deceptive commercial activities as referred to in [Article x (Consumer Protection)] when they engage in electronic commerce.

2. Each Party shall adopt or maintain consumer protection laws to proscribe fraudulent and deceptive commercial activities that cause harm or potential harm to consumers engaged in online commercial activities.

Article 1.8: Personal Information Protection

1. The Parties recognize the economic and social benefits of protecting the personal information of users of electronic commerce and the contribution that this makes to enhancing consumer confidence in electronic commerce.

2. To this end, each Party shall adopt or maintain a legal framework that provides for the protection of the personal information of the users of electronic commerce. In the development of its legal framework for the protection of personal information, each Party should take into account principles and guidelines of relevant international bodies.4

4 For greater certainty, a Party may comply with the obligation in this paragraph by adopting or maintaining measures such as a comprehensive privacy, personal information or personal data protection laws, sector-specific laws covering privacy, or laws that provide for the enforcement of voluntary undertakings by enterprises relating to privacy.
3. Each Party shall endeavor to adopt non-discriminatory practices in protecting users of electronic commerce from personal information protection violations occurring within its jurisdiction.

4. Each Party should publish information on the personal information protections it provides to users of electronic commerce, including how:
   (a) individuals can pursue remedies; and
   (b) business can comply with any legal requirements.

5. Recognizing that the Parties may take different legal approaches to protecting personal information, each Party should encourage the development of mechanisms to promote compatibility between these different regimes. These mechanisms may include the recognition of regulatory outcomes, whether accorded autonomously or by mutual arrangement, or broader international frameworks. To this end, the Parties shall endeavor to exchange information on any such mechanisms applied in their jurisdictions and explore ways to extend these or other suitable arrangements to promote compatibility between them.

Article 1.9: Paperless Trading

Each Party shall endeavor to:

(a) make trade administration documents available to the public in electronic form; and

(b) accept trade administration documents submitted electronically as the legal equivalent of the paper version of those documents.

Article 1.10: Principles on Access to and Use of the Internet for Electronic Commerce

Subject to applicable policies, laws and regulations, the Parties recognize the benefits of consumers in their territories having the ability to:

(a) access and use services and applications of a consumer’s choice available on the Internet, subject to reasonable network management;\(^5\)

(b) connect the end-user devices of a consumer’s choice to the Internet, provided that such devices do not harm the network; and

(c) access information on the network management practices of a consumer’s Internet access service supplier.

\(^5\) The Parties recognize that an Internet access service supplier that offers its subscribers certain content on an exclusive basis would not be acting contrary to this principle.
Article 1.11: Cross-Border Transfer of Information by Electronic Means

1. The Parties recognize that each Party may have its own regulatory requirements concerning the transfer of information by electronic means.

2. Each Party shall allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business of a covered person.

Article 1.12: Internet Interconnection Charge Sharing

The Parties recognize that a supplier seeking international Internet connection should be able to negotiate with suppliers of another Party on a commercial basis. These negotiations may include negotiations regarding compensation for the establishment, operation and maintenance of facilities of the respective suppliers.

Article 1.13: Location of Computing Facilities

1. The Parties recognize that each Party may have its own regulatory requirements regarding the use of computing facilities, including requirements that seek to ensure the security and confidentiality of communications.

2. No Party shall require a covered person to use or locate computing facilities in that Party’s territory as a condition for conducting business in that territory.

Article 1.14: Unsolicited Commercial Electronic Messages

1. Each Party shall adopt or maintain measures regarding unsolicited commercial electronic messages that:

   (a) require suppliers of unsolicited commercial electronic messages to facilitate the ability of recipients to prevent ongoing reception of those messages;

   (b) require the consent, as specified according to the laws and regulations of each Party, of recipients to receive commercial electronic messages; or

   (c) otherwise provide for the minimization of unsolicited commercial electronic messages.

2. Each Party shall provide recourse to suppliers of unsolicited commercial electronic messages that do not comply with the measures adopted or maintained pursuant to paragraph 1.

3. The Parties shall endeavor to cooperate in appropriate cases of mutual concern regarding the regulation of unsolicited commercial electronic messages.
Article 1.15: Cooperation

Recognizing the global nature of electronic commerce, the Parties shall endeavor to:

(a) work together to assist SMEs to overcome obstacles to its use;
(b) exchange information and share experiences on regulations, policies, enforcement and compliance regarding electronic commerce, including:
   (i) personal information protection;
   (ii) online consumer protection, including means for consumer redress and building consumer confidence;
   (iii) unsolicited commercial electronic messages;
   (iv) security in electronic communications;
   (v) authentication; and
   (vi) e-government;
(c) exchange information and share views on consumer access to products and services offered online among the Parties;
(d) participate actively in regional and multilateral fora to promote the development of electronic commerce; and
(e) encourage development by the private sector of methods of self-regulation that foster electronic commerce, including codes of conduct, model contracts, guidelines and enforcement mechanisms.

Article 1.16: Cooperation on Cybersecurity Matters

The Parties recognize the importance of:

(a) building the capabilities of their national entities responsible for computer security incident response; and
(b) using existing collaboration mechanisms to cooperate to identify and mitigate malicious intrusions or dissemination of malicious code that affect the electronic networks of the Parties.

Article 1.17: Source Code

1. No Party shall require the transfer of, or access to, source code of software owned by a person of another Party, as a condition for the import, distribution, sale or use of such software, or of products containing such software, in its territory.
2. Nothing in this Article shall preclude the inclusion or implementation of terms and conditions related to the provision of source code in commercially negotiated contracts; or

3. This Article shall not be construed to affect requirements that relate to patent applications or granted patents, including any orders made by a judicial authority in relation to patent disputes, subject to safeguards against unauthorized disclosure under the law or practice of a Party.
REPORT

1. INTRODUCTION

The ability of companies and consumers to move data has become paramount in promoting, fostering, and expanding commerce and services around the globe. Many countries have enacted rules that stifle competition and disadvantage American entrepreneurs, by imposing burdensome barriers or overly restricting the free flow of information. This Resolution supports modernization and uniformity of the regulation of business data flows from one country to another country. It also urges the United States to adopt the American Bar Association Model Provisions on Electronic Commerce for International Trade Agreements, dated August 2017, (“the Model Provisions”) as the standard template for use in international trade agreements and other relevant international agreements and guidelines, subject to reasonable safeguards such as the protection of consumer data upon its exportation.

The establishment and promotion of a freer and more open Internet will enable entrepreneurial opportunities, expand social-networking, broaden access to a myriad of services and information sources, and stimulate economic growth throughout the world. The Model Provisions focus on protecting the free flow of cross-border data and help to ensure digital products originating from member States of international trade agreements are not at a competitive disadvantage in another member’s market.

The Model Provisions are based upon the basic framework of electronic commerce provisions supported by the United States in a recent international trade agreement negotiation, and they take into consideration the fast-changing pace of globalization and technology. For example, the availability of cloud computing and of Internet-based products and services should not require companies and digital entrepreneurs “to build physical infrastructure and expensive data centers in every country they seek to serve.” However, as the Office of the U.S. Trade Representative has observed, “many countries have tried to enforce such requirements which add unnecessary costs and burdens on providers and customers alike.” The Model Provisions specifically address these localization barriers through specific provisions designed to promote access to networks and efficient data processing. In essence, “fundamental non-discrimination principles are at the core of an efficient global trading system for goods and services,” and the Model Provisions ensure that these principles apply to cross-border data.

2. DIGITAL TRADE AND E-COMMERCE

While there is no generally accepted meaning of the terms, “digital trade” and “e-commerce” generally describe transactions that involve, or are enabled by, the Internet. The U.S.

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3 Id.
4 Id.
International Trade Commission ("USITC") has broadly defined digital trade as "U.S. domestic commerce and international trade in which the Internet and Internet-based technologies play a particularly significant role in ordering, producing, or delivering products and services."\(^5\) The USITC explained that this definition was "adopted to capture a wide variety of economic activities that are facilitated by or occur via the internet."\(^6\) These can include "orders placed on an e-commerce website; information streams needed by manufacturers to manage global value chains; communication channels such as email and voice over Internet protocol (VoIP); and financial data and transactions relied on for online purchases or electronic banking."\(^7\)

The World Trade Organization (WTO) has defined e-commerce as "the production, distribution, marketing, sale or delivery of goods and services by electronic means."\(^8\) The Organization for Economic Cooperation and Development (OECD) has defined it as "the sale or purchase of goods or services, conducted over computer networks by methods specifically designed for the purpose of receiving or placing of orders."\(^9\) In order to fall under the definition, the goods or services must be ordered by such methods; however, the "payment and the ultimate delivery of the goods or services" do not have to be conducted by such methods.\(^10\) E-commerce can involve several forms, including business-to-business transactions,\(^11\) business-to-consumer transactions,\(^12\) consumer-to-consumer transactions,\(^13\) and business-to-government transactions.\(^14\)

In short, any transaction that is facilitated by, or occurs through, the Internet can fall under one of the articulated definitions of digital trade or e-commerce.

### 3. BENEFITS OF CROSS-BORDER DATA TRANSFERS

An OECD report has found that the "Internet has become a key economic infrastructure, revolutionizing businesses and serving as a platform for innovation."\(^15\) A 2014 McKinsey Global Institute study estimated that global transactions via e-commerce amounted to US$8 trillion per

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\(^6\) Id.


\(^10\) Orders made through "telephone calls, facsimile or manually typed e-mail" are excluded from the definition. See id.

\(^11\) United Nations Conference on Trade and Development, *In Search of Cross-Border E-Commerce Trade Data*, April 2016, at 2. These can include online transactions related to goods that are subsequently sold to end-users through retail outlets or the provision of goods are services to other businesses; business to consumer transactions.

\(^12\) These can include online sales channels of retail or manufacturing companies of digital products and services or physical goods. See id.

\(^13\) These can include sales via “online marketplace platforms” or communities. See id.

\(^14\) These can include bids by the government through “e-procurement.” See id.

year.\textsuperscript{16} The advancement of Internet-based growth has been coupled with global advances in data collection, retention, and analysis, covering a broad array of sectors.\textsuperscript{17} In turn, the need for, and value added from, cross-border information flows have increased significantly.

Both large companies and small-and-medium enterprises (SMEs) benefit from cross-border data flows. Data transfers enable large companies to, among other things, support “diversified supply chains, global talent sourcing, and analysis of large data sets.”\textsuperscript{18} Aided by connectivity and critical marketing information, SMEs benefit by the ability to target customers around the world. As such, cross border data flows can help level the playing field for such entities based in smaller towns or remote locations around the world. Indeed, a 2012 study found that SMEs that “rely heavily on Internet services typically have 22\% greater revenue growth than those that use the Internet minimally.”\textsuperscript{19} All companies (regardless of whether they engage in the sale of goods or services online) can benefit from the ability to transfer records, data, or communications in connection with the traditional goods or services they provide.\textsuperscript{20}

A recent study by McKinsey found that cross-border data trade generates greater economic impact relative to trade in traditional goods.\textsuperscript{21} These benefits increase the demand for and reliance upon access to data. Along with fueling revenue growth and economic development, cross-border data transfers can advance a variety of public interest or social objectives. A 2014 U.S. Chamber of Commerce study provided six relevant case studies, related to the following: transfer of medical data across borders for “maintenance and repair;” maintenance of accurate databases related to individuals that are in transit or have permanently migrated; facilitation of efficiencies for manufacturing and energy development; management of a global workforce; and the monitoring of “outbreaks and spreads of infectious diseases around the world.”\textsuperscript{22}

4. E-COMMERCE PROVISIONS IN TRADE AGREEMENTS OF OTHER COUNTRIES

Several recent trade agreements have included provisions related to e-commerce. Some agreements have been more robust than others in terms of commitments. For example, the e-commerce chapter in the European Union (“EU”)-Canada Comprehensive Economic and Trade

\textsuperscript{17} U.S. Chamber of Commerce & Hunton & Williams, \textit{Business Without Borders, The Importance of Cross-Border Data Transfers to Global Prosperity}, 2014, at 5-6.
\textsuperscript{19} U.S. Chamber of Commerce & Hunton & Williams, \textit{Business Without Borders, The Importance of Cross-Border Data Transfers to Global Prosperity}, 2014, at 5; David Dean et. al., \textit{The Internet Economy in the G-20}, Boston Consulting Group, March 2012.
\textsuperscript{20} U.S. Chamber of Commerce & Hunton & Williams, \textit{Business Without Borders, The Importance of Cross-Border Data Transfers to Global Prosperity}, 2014, at 5.
\textsuperscript{22} U.S. Chamber of Commerce & Hunton & Williams, \textit{Business Without Borders, The Importance of Cross-Border Data Transfers to Global Prosperity}, 2014, at 7-10.
Agreement, which was signed in October 2016,\textsuperscript{23} does not contain provisions on cross-border data flows. The parties agreed \textit{inter alia} to “promote the development of electronic commerce” and “maintain a dialogue on issues raised by electronic commerce, and committed to “not impose a customs duty, fee, or charge on a delivery transmitted by electronic means;” with an exception for certain internal tax or charges.\textsuperscript{24} Notably, in the Trans-Pacific Partnership (“TPP”), Canada agreed to a range of provisions related to e-commerce, which are described in more detail in Section 7(a) below. As such, the omission of these provisions in CETA can reasonably be taken to be indicative of the EU’s position on the issue.

By contrast, the e-commerce chapter in the Agreement to Amend the Singapore-Australia Free Trade Agreement (“SAFTA”), which was also signed in October 2016,\textsuperscript{25} contains a host of commitments related to \textit{inter alia} data flow transfers, location of source code, consumer protection, customs duties, and electronic authorization.\textsuperscript{26} In particular, like the TPP, Article 13.2 provides that “[e]ach Party shall allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business of a covered person,” with certain exceptions.\textsuperscript{27} In addition, under the e-commerce chapter of the trade agreement between Chile and Uruguay, which was also signed in October 2016,\textsuperscript{28} the parties reportedly agreed to “provisions aimed at maintaining a trans-[b]order flow fluid information.”\textsuperscript{29} In short, several agreements that have been completed after the TPP have incorporated the wide-ranging, robust standards provided in that agreement.

5. E-COMMERCE IN THE WORLD TRADE ORGANIZATION

The WTO came into existence in 1995 without much thought given to electronic commerce, its texts having been negotiated in the late 1980s and early 1990s. But, WTO members recognized the growing importance of electronic commerce in international trade transactions at the organization’s second Ministerial Conference in May 1998. At the Conference, Ministers adopted the Declaration on Global Electronic Commerce, which called for the establishment of a “comprehensive work programme to examine all trade-related issues relating to global electronic commerce,”


\textsuperscript{27} Id. at Chapter 14, Article 13.2.


\textsuperscript{29} Kawesqar, Chancellor Muñoz stresses free trade between Chile and Uruguay: “We are deepened our integration”, available at http://www.revistakawesqar.cl/en/canciller-munoz-destaca-tratado-de-libre-comercio-entre-chile-y-uruguay-estamos-profundizado-nuestra-integracion/
commerce[.]”

Specifically, the Ministers declared that Members “will continue their current practice of not imposing customs duties on electronic transmissions[.]” and stated that the work program would consider the economic, financial, and development needs of developing countries, and “recognize that work is also being undertaken in other international fora.”

In September 1998, the General Council adopted the “Work Programme on Electronic Commerce” (“Work Programme”). The Work Programme defines the term “electronic commerce” as “the production, distribution, marketing, sale or delivery of goods and services by electronic means.” The Work Programme declares that its scope will also include issues related to the infrastructure for electronic commerce.

The Work Programme includes input from other WTO bodies, as follows:

- The Council for Trade in Services: tasked with examining and reporting on the treatment of electronic commerce within the General Agreement on Trade in Services (GATS), including issues of transparency; domestic regulation and standards; market access commitments regarding the electronic supply of services; use of public communications transport networks; and customs duties.

- The Council for Trade in Goods: directed to examine and report on aspects of electronic commerce relevant to the General Agreement on Tariffs and Trade (“GATT”), including market access for, and access to, products related to electronic commerce; the valuation of imported goods; import licensing; rules of origin; and customs duties.

- The Council for TRIPS (Trade-Related Aspects of Intellectual Property Rights): directed to examine and report on intellectual property issues in electronic commerce, including protection and enforcement of copyrights and trademarks, and new technologies.

- The Committee on Trade and Development: tasked with examining and reporting on the economic and financial needs of developing countries and the development implications of electronic commerce, including the role of electronic commerce in integrating developing countries into the world trading system.

In addition to these four WTO bodies, the WTO General Council oversees the Work Programme and examines, in Dedicated Discussions, issues in electronic commerce that cut across different portfolios. Cross-cutting issues include the classification of an electronic transaction as a trade in goods or a trade in services (where the classification triggers the relevant legal text; GATT or

31 Id.
32 Id.
34 Id.
35 Id., ¶ 2.1.
36 Id., ¶ 3.1.
37 Id., ¶ 4.1.
38 Id., ¶ 5.1.
GATS); the role of electronic commerce in promoting trade in developing countries; the ways in which some countries levy internal taxes on electronic commerce transactions; technological neutrality (treatment that is neutral with respect to the technology (existing or future) used); “likeness” (electronic communication is considered equivalent to paper-based communication); and jurisdiction and applicable law. 39 Most Members agreed that the WTO should not create any “unnecessary obstacles” to the development of e-commerce. 40

In general, the Work Programme and the Dedicated Discussions have uncovered important and complex issues. However, very little substantive progress has been made on most issues. In July 2015, the General Council issued its latest progress report on the Work Programme. 41 At that date, the General Council had engaged in ten Dedicated Discussions on cross-cutting issues. The report, in keeping with previous status reports, distills the difficulty that the Work Programme has had in making progress clarifying the WTO’s jurisdiction over electronic commerce. In particular, the Work Programme has not yet determined whether GATT, the agreement covering the trade in goods, or GATS, the agreement covering the trade in services, governs electronic transactions. Moreover, if GATS covers the transaction, the Work Programme provides no direction as to which “modes” of trading services 42 and which services commitments 43 apply. 44

Additionally, the report outlined many complex issues for which Members had yet to reach agreement: some Members wanted the temporary moratorium on customs duties on electronic transmissions to be made permanent, while some Members only wanted the temporary ban extended; some Members wanted to clarify the directive of the Work Programme; Members from some developing countries noted that their internal e-commerce laws were still being drafted and that, therefore, they could not comment on specific Work Programme proposals; and

40 Id. at 2.
42 GATS outlines four “modes” of supply of services:
   • Mode 1: “cross-border supply” – services supplied from one country to another;
   • Mode 2: “consumption abroad” – consumers or firms making use of a service in another country;
   • Mode 3: “commercial presence” – a foreign company setting up subsidiaries or branches to provide services in another country;
   • Mode 4: “presence of natural persons” – individuals traveling from their own country to supply services in another.
43 In GATS, member countries provide specific commitments to access to service sectors in their markets. These commitments are listed in schedules and, unless a sector is listed, a member has not agreed to market access in that sector. Members may also agree to certain limitations on access to a service sector. See, e.g., World Trade Organization, Understanding the WTO: Services: Rule for Growth and Investment, available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm.
44 Two dispute settlement decisions, however, clarified the issues somewhat by concluding that electronic, cross-border delivery of a service implicates GATS mode 1 commitments (e.g., non-resident service providers supply services cross-border into a Member’s territory). See Panel Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/R, adopted 19 November 2004, para. 3.29 and Appellate Body Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting, para. 215.
some Members noted the importance of focusing on small- and medium-sized enterprises, while others noted the importance of issues related to data flows and privacy, among other issues.\textsuperscript{45} The report stressed that any progress on issues must be Member-driven and that the time had come to submit concrete proposals.

Despite these open issues, the Work Programme nonetheless appears to be approaching a consensus on the applicability of GATS in disputes involving the electronic delivery of service; that GATS is "technologically neutral" and, therefore, Members’ specific commitments include the electronic supply of services unless specifically stated; and on the applicability of all provisions of GATS to the electronic supply of services.\textsuperscript{46}

However, many issues await resolution, including further clarification of whether the cross-border, electronic delivery of a service implicates GATS mode 1 or mode 2 commitments; scheduling of new electronic services that were unknown at the start of the Work Programme; the status of the moratorium on customs duties on electronic transactions; and clarification of the scope of the WTO Annex on Telecommunications\textsuperscript{47} with respect to access to and use of internet services.

6. MAJOR U.S. FREE TRADE AGREEMENTS

Two major U.S. free trade agreements widely discussed by the public or news media are the North American Free Trade Agreement ("NAFTA") and United States-Korea Free Trade Agreement ("KORUS FTA"). NAFTA does not have an electronic commerce chapter or provision. However, as discussed in detail below, KORUS FTA contains an article setting forth standards for digital products and electronic signatures.

KORUS FTA, which entered into force on March 15, 2012, provides a recent example of the coverage of electronic commerce within a bilateral free trade agreement. With respect to the trade in digital products, Chapter 15 of the KORUS FTA provides that:

\textbf{ARTICLE 15.3: DIGITAL PRODUCTS}\textsuperscript{48}

1. Neither Party may impose customs duties, fees, or other charges on or in connection with the importation or exportation of:

   (a) if it is an originating good, a digital product fixed on a carrier medium; or

\textsuperscript{45} Work Programme on Electronic Commerce, fn. 12, at 2-3.
\textsuperscript{46} World Trade Organization, GATS Training Module, Ch. 6, The Challenges Ahead, available at https://www.wto.org/english/tratop_e/serv_e/ebt_course_e/c6s5p2_e.htm.
\textsuperscript{47} The Telecommunications Annex “requires each Member to ensure that all service suppliers seeking to take advantage of scheduled commitments are accorded access to and use of public basic telecommunications, both networks and services, on reasonable and non-discriminatory basis.” World Trade Organization, Explanation of the Annex on Telecommunications, available at https://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_annex_expl_e.htm.
\textsuperscript{48} Footnotes omitted.
(b) a digital product transmitted electronically.

2. Neither Party may accord less favorable treatment to some digital products than it accords to other like digital products

(a) on the basis that:

(i) the digital products receiving less favorable treatment are created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms in the territory of the other Party, or

(ii) the author, performer, producer, developer, distributor, or owner of such digital products is a person of the other Party; or

(b) so as otherwise to afford protection to other like digital products that are created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms in its territory.

3. Neither Party may accord less favorable treatment to digital products:

(a) created, produced, published, contracted for, commissioned, or first made available on commercial terms in the territory of the other Party than it accords to like digital products created, produced, published, contracted for, commissioned, or first made available on commercial terms in the territory of a non-Party; or

(b) whose author, performer, producer, developer, distributor, or owner is a person of the other Party than it accords to like digital products whose author, performer, producer, developer, distributor, or owner is a person of a non-Party.

The KORUS FTA also clarifies the use of electronic signatures by providing that:

Neither party may adopt or maintain legislation regarding electronic authentication that would:

(a) prohibit parties to an electronic transaction from mutually determining the appropriate authentication methods for that transaction;

(b) prevent parties from having the opportunity to establish before judicial or administrative authorities that their electronic transaction complies with any legal requirements with respect to authentication; or

(c) deny a signature legal validity solely on the basis that the signature is in electronic form.49

49 KORUS FTA, Art. 15.4.
Additionally, the agreement encourages the free flow of digital information across borders:

> Recognizing the importance of the free flow of information in facilitating trade, and acknowledging the importance of protecting personal information, the Parties shall endeavor to refrain from imposing or maintaining unnecessary barriers to electronic information flows across borders.\(^{50}\)

KORUS FTA also governs the electronic supply of services delivered or performed electronically in separate chapters related to investment, cross-border trade in services, and financial services.

The following section outlines potential opportunities for including e-commerce commitments, including provisions that promote cross-border data flows and prohibit data localization measures, in ongoing and prospective trade negotiations. These agreements may offer the best prospects for setting enforceable internationally-recognized standards for the movement of electronic information across borders.

### 7. RECENT HISTORY OF KEY U.S. TRADE NEGOTIATIONS

**a. Trade in Services Agreement**

Trade in Services Agreement (TiSA) negotiations, launched in 2013, have taken place among 23 members of the World Trade Organization (WTO)\(^{51}\) that represent nearly 70 percent of the world’s $55 trillion services market in 2014.\(^{52}\) As proposed, TiSA would stand alongside and be modeled after the General Agreement on Trade in Services. While GATS predated e-commerce disciplines at the WTO and in other trade agreements, TiSA was envisaged to include e-commerce commitments that would consider new technology and the changes to the way businesses and consumers participate in trade through an increasingly digitized trading system.

As stated by USTR, the United States would pursue “the development of appropriate provisions to support services trade through electronic channels.”\(^{53}\) Similarly, the EU envisioned that the TiSA E-Commerce Annex would include provisions on cross-border data flows, localization, network access, customs duties, electronic authentication and electronic signatures, online consumer protection and spam, net neutrality, and source code.\(^{54}\) Accordingly, the United States, “tabled an ambitious proposal to address restrictions on cross-border data flows and the troubling trend toward localization requirements.”\(^{55}\) In addition, the United States tabled a proposal to

\(^{50}\) KORUS FTA, Art. 15.8.
\(^{51}\) https://ustr.gov/tisa/participant-list.
\(^{52}\) https://ustr.gov/TiSA.
limit liability for online services\textsuperscript{56} and U.S. officials signaled they would pursue a data localization provision that would not exclude financial services data.\textsuperscript{57}

Ministers from TiSA parties last met informally in 2016 to discuss progress and reaffirmed their commitment to conclude an ambitious agreement.\textsuperscript{58} While the outlook for concluding negotiations is uncertain, cross-border data flows and localization provisions continue to garner high-levels of attention due to the EU’s current position on data protection and privacy rules. To date, the EU has yet to table a proposal for the full suite of e-commerce disciplines.\textsuperscript{59} However, in its 2015 “Trade for All Strategy” the European Commission stated that it would use FTAs and TiSA “to set rules for e-commerce and cross-border data flows and tackle new forms of digital protectionism, in full compliance with and without prejudice to the EU’s data protection and data privacy rules.”\textsuperscript{60} Given additional political uncertainty in the United States related to trade in general, prospects for TiSA’s E-Commerce Annex are unknown at this time. In the absence of the TPP agreement, TiSA may still represent the largest plurilateral opportunity to further expand international rules on digital trade.

b. Transatlantic Trade and Investment Partnership

The United States and the European Union launched negotiations on a comprehensive free trade agreement in 2013. The Transatlantic Trade and Investment Partnership (T-TIP) was envisioned to strengthen what was already the world’s largest trading relationship through additional goods and services trade liberalization, while also addressing regulatory differences that affect transatlantic trade and investment flows. Annually, $260 billion in digital services trade moves between the United States and the EU.\textsuperscript{61}

With respect to e-commerce and ICT services, the United States is seeking “to develop appropriate provisions to facilitate the use of electronic commerce to support goods and services trade, including through commitments not to impose customs duties on digital products or unjustifiably discriminate among products delivered electronically; [and to] include provisions that facilitate the movement of cross-border data flows.”\textsuperscript{62} While U.S. negotiators highlighted this area in initial statements, the EU’s negotiating mandate was void of references to data flows or data localization. Instead, the mandate discussed generally the EU’s intent to seek an agreement that would, “provide for the reciprocal liberalization of trade in goods and services as well as rules on trade-related issues, with a high level of ambition going beyond existing WTO commitments.”\textsuperscript{63}

\begin{itemize}
\item \textsuperscript{56} http://trade.ec.europa.eu/doclib/docs/2016/july/tradoc_154824.pdf.
\item \textsuperscript{57} https://insidetrade.com/inside-us-trade/services-sector-awaits-tpp-data-fix-enforcement-non-tisa-countries.
\item \textsuperscript{59} https://insidetrade.com/daily-news/eu-decision-data-flow-language-tisa-not-expected-until-fall-us-position-still-unknown.
\item \textsuperscript{60} European Commission, \emph{Trade for All: Towards a more responsible trade and investment policy}, http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf
\item \textsuperscript{61} https://www.commerce.gov/news/blog/2016/03/making-difference-worlds-digital-economy-transatlantic-partnership
\item \textsuperscript{62} https://ustr.gov/trade-agreements/free-trade-agreements/transatlantic-trade-and-investment-partnership-t-tip/t-tip-15
\end{itemize}
Like TiSA, e-commerce discussions in T-TIP have largely been hampered by internal EU deliberations on the appropriate role of privacy and data protection in trade agreements. Even with the resolution and implementation of a U.S.–EU data transfer framework in 2016, EU negotiators have yet been unable to finalize negotiations over data flows. The uncertain political dynamics on trade in the United States and the EU’s lack of progress on tabling a proposal further diminishes the likelihood T-TIP may serve as a vehicle for an ambitious e-commerce chapter.

c. Potential U.S. Trade Negotiation Opportunities

Presently, the new Trump Administration has not yet formally proposed the scope and objectives for negotiating new or updating previously negotiated U.S. FTAs, but there is significant potential for including meaningful e-commerce disciplines in these agreements. Most U.S. FTAs include very little on information flows and none guarantee that data flows freely across borders or address data localization measures through enforceable mechanisms. If negotiations launch to update NAFTA or a bilateral trade deal between the United States and United Kingdom, as is widely under discussion, the United States will be well positioned to work toward including data flows and localization language in these agreements. Similarly, if negotiations move forward to update other FTAs or launch new FTAs, new disciplines on data flows and localization may also be considered.

d. Non-U.S. Trade Negotiations

1. Regional Comprehensive Economic Partnership

The Regional Comprehensive Economic Partnership (RCEP) is a trade agreement currently under negotiation between 16 Association of Southeast Asian Nations (ASEAN) and ASEAN Free Trade Partners (AFPs). RCEP was established to “broaden and deepen the engagement among parties and to enhance parties’ participation in economic development of the region.” E-Commerce disciplines are under negotiation as partners work toward “[achieving] a modern, comprehensive, high-quality, and mutually beneficial economic partnership agreement among the ASEAN Member States and ASEAN’s FTA partners.” The 16th RCEP Trade Negotiating Committee (TNC) meetings were held in December 2016. The meetings included meetings by the Working Group on Trade in Services and the Sub-Working Group on E-commerce.

While little is known publicly about the textual proposals RCEP partners are exchanging related to e-commerce disciplines, if any, the fact remains that the elimination of restrictions on server localization measures remain critical for powering both goods and services trade in the region. Business groups are actively encouraging negotiators to promote “rules that enable information

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64 http://asean.org/?static_post=rcep-regional-comprehensive-economic-partnership
65 Id.
66 Id.
68 Id.
flows and prohibit data localization.” In particular, private sector proposals currently advocate for an agreement that would limit a party from preventing a service provider of another party from transferring information outside the party’s territory, including personal information, and would prohibit any requirements to use or locate computing facilities within a country as a condition for doing business in that country.

Given the scope and magnitude of RCEP negotiations, outcomes on data flows or server localization measures would be significant. Unfortunately, due to the relatively closed nature of some RCEP markets – namely China and India – ambitious outcomes on these disciplines may be difficult to realize.

2. EU – Japan Free Trade Agreement

In 2013, the European Union and Japan launched negotiations to pursue a free trade agreement that according to the EU, “is expected to enhance trade and investment relationships between the two parties.” Japan is the EU’s second biggest trading partner in Asia after China. E-commerce disciplines are under discussion and according to a readout of the 17th round of talks in September 2016, “no major breakthroughs on e-commerce could be achieved during this round […] and further discussions on…localization of computing facilities were as yet inconclusive. Parties agreed to continue the discussions intersessionally.” While talks continue, EU privacy concerns continue to present challenges for the inclusion of data flows language. Although it is not a prerequisite for negotiating disciplines on data flows, Japan does not have an EU “adequacy decision” that would give Japanese privacy laws equal footing to the EU. Similar to other EU trade negotiations, data flows and localization restrictions continues to be a highly sensitive topic, with unclear prospects for the conclusion of an agreement.

e. Trans-Pacific Partnership (TPP)

While President Obama supported the ratification of the Trans-Pacific Partnership agreement (“TPP”), the Trump Administration has opposed the agreement, in large part, due to concerns related to its potential negative economic impact on jobs and companies within the U.S. On January 20, 2017, the Office of the U.S. Trade Representative (USTR) issued a letter to signatories of TPP that the United States has formally withdrawn from the agreement per guidance from President Trump. The brief letter also encourages future discussions on “measures designed to promote more efficient markets and higher levels of economic growth.” Despite the Trump Administration’s recent actions, the TPP agreement has useful provisions related to e-commerce, which have not been the subject of the Administration’s opposition to TPP.

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70 Id.
The guiding principle of the TPP Agreement’s e-commerce chapter is that the Internet and digital technologies provide growing opportunities for companies in all sectors and of all sizes to participate in and benefit from international trade. The global reach of the Internet, the exponential generation of data and cross-border data flows, and the growth and proliferation of massive computing power continue to lower the costs of trade and are expanding the universe of what is tradable and who can trade. The TPP’s e-commerce chapter aims to create a new body of trade rules designed to benefit a broad group of traders relying on digital technologies to advance their businesses, from micro-enterprises in Malaysia to app developers in Vietnam to farmers in Canada.

Through the Internet and digital technologies, a company or individual can almost seamlessly trade goods, data-sets, software, digital products and content (e.g. films and programs), and digitally-intensive services. All of this is digital trade. A small company in a far-flung location, if it has Internet access, can potentially use the same suite of services that would also be available to any large multinational company and store and process its data in a global cloud computing center. An individual making a bespoke product or a developer producing an app in one market can access customers in myriad markets at historically low costs because of the Internet and digital technologies.

However, governments, in response to these evolving market and policy dynamics, are attempting to address legitimate public policy objectives through the application of blunt policy instruments. Intentionally or not, governments increasingly are erecting barriers to digital trade and depriving traders and investors of economic opportunities. Examples of such unnecessary barriers that the Model Provisions addresses include restrictions on cross-border data flows, data localization requirements, mandates to transfer source code, and the absence of high standards for data protection and privacy of personal information.

8. PROPOSED MODEL PROVISIONS ON E-COMMERCE

When negotiating the e-commerce provisions in international trade agreements and relevant agreements and guidelines, the United States should include provisions that will not only prevent unnecessary barriers to digital trade from occurring in the parties’ markets but establish policy frameworks to allow digital trade to flourish. In general, this is best accomplished by including digital transactions within the fundamental non-discriminatory principles and exceptions of free trade agreements, rather than drafting language that specifically relates to digital trade. The following are highlights of the key Model Provisions that will be helpful in advancing both high-level objectives noted above. The framework for the proposed provisions is based on Chapter 14 of the TPP, and the relevant material differences between the two sets of provisions are discussed below.75

- **Article 1.3: Customs Duties.** This provision explicitly prohibits the parties from applying customs duties on cross-border data flows (i.e., electronic transmissions). While

75 The Model Provisions are intended to apply to the broadest range of business sectors. Thus, Article 1.1 does not contain TPP’s carve-out for financial services or financial institutions.
the WTO has had since 1998 a moratorium on the imposition of customs duties on electronic transmissions and digital content, the parties to trade agreements should make that prohibition binding and enforceable. This is a core provision that prevents the parties from ever using such policy tools.

- **Article 1.4: Non-Discriminatory Treatment of Digital Products.** This provision ensures that the fundamental trade principle of national treatment covers digital products, so that such products created in the market of one of the parties are not discriminated against in the markets of another party. This core provision would help to ensure that digital products are not subject to trade barriers.

- **Article 1.6: Electronic Authentication and Electronic Signatures; and Article 1.7: Online Consumer Protection.** Taken together, these provisions enable digital transactions to occur more seamlessly across borders and increase consumer trust in digital trade. Traders want to know that the parties’ markets will recognize electronic signatures and consumers want assurances that their governments will protect them from fraudulent and deceptive online commercial activities. Without trust, digital trade will not grow, so these provisions are critical elements of the proposed digital trade framework.

- **Article 1.8: Personal Information Protection.** This provision is a fundamental, innovative element of the chapter designed to give greater assurances to users and digital traders that parties will protect their personal data and information. The parties would be bound to establish frameworks for the protection of personal information of users of electronic commerce. In the development of these frameworks, they should consider the principles and guidelines of relevant international bodies, such as the OECD Privacy Principles, APEC Privacy Framework, and APEC Cross-Border Privacy Rules System.

- **Article 1.11: Cross-Border Transfer of Information by Electronic Means.** This provision is one of the most crucial elements of the Model Provisions. In obligating the parties to allow the cross-border transfer of information by electronic means, including personal information, the Model Provisions establish a norm that the flow of data across borders, including personal data, enables trade, investment, and economic activity at the global level. Unlike TPP’s Article 14.11, this provision does not include an exception allowing a “Party from adopting or maintaining measures inconsistent with [Article 14.11] to achieve a legitimate public policy objective,” which is consistent with the intent of the Model Provisions to establish an efficient legal approach to allow parties to negotiate and rely upon general exceptions to a trade agreement instead of establishing new provision-specific exceptions. This approach is consistent with existing trade agreements, such as Article XIV of GATS. It also mitigates the risk of creating confusion regarding which exceptions take precedence in dispute settlement proceedings. Additionally, new provision-specific exceptions would set precedent for future agreements, and the Model Provisions address that issue by establishing a framework relying on general exceptions to a trade agreement.

- **Article 1.13: Location of Computing Facilities.** Data localization requirements are policy approaches that an increasing number of governments are using in the name of
protecting personal data, strengthening cybersecurity, accessing data for law enforcement purposes, or bolstering local technology sectors. Such measures are primary examples of barriers to digital trade that restrict data flows, raise costs for local and foreign companies, depress economic activity, and largely do not meet their stated policy objectives. This provision is a critical complement to Model Article 1.11. Also, similar to Model Article 1.11, this provision does not include an exception for public policy objectives for the reasons discussed above.

- **Article 1.17: Source Code.** Digital product, digitally-intensive services, cloud computing, and other digital technologies rely on software. Some governments are requiring companies as a condition of market access to transfer or provide access to software source code. This provision would expressly prohibit such requirements. In addition, the provision broadly applies to a wide range of software and does not include the mass-market software limitation or critical infrastructure software carve-out contained in Chapter 14 of TPP.

9. **CONCLUSION**

E-commerce continues to play a vital role in cross-border business transactions. The ability of companies and consumers to move data is critical in promoting, fostering and expanding international commerce and services. The Model Provisions on Electronic Commerce for International Trade Agreements address these localization barriers through specific provisions designed to promote access to networks and efficient data processing. It also ensures that the fundamental non-discrimination principles of an efficient global trading system for goods and services apply to cross-border data by subsuming electronic commerce under the overarching principles of a free trade agreement. Therefore, the American Bar Association strongly urges the United States to adopt the Model Provisions, including its cross-border data flow protections, as a standard template for negotiating electronic commerce provisions in international trade agreements and other relevant international agreements and guidelines.

Respectfully submitted,

Sara P. Sandford  
Chair, Section of International Law  
August 2017
1. **Summary of Resolution(s).** The Resolution calls for the American Bar Association to urge the United States to adopt the American Bar Association Model Provisions on Electronic Commerce for International Trade Agreements, dated August 2017, and recommends them as a standard template for use in international trade agreements and other relevant international agreements and guidelines.


3. **Has this or a similar resolution been submitted to the House or Board previously?** None known.

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

   The following Resolutions on electronic commerce are relevant:

   - The ABA Section of Science & Technology Law, Section of International Law, and Section of Business Law, (collectively the “ABA Sections”) submitted the 1997 Report in support of a Resolution recognizing that electronic commerce is increasingly important and global in nature, requiring international communication and cooperation. It also encourages international discussion and cooperation by the private sector, governments, and international organizations to remove unnecessary legal and functional obstacles to electronic commerce, to establish a legal framework within which global electronic commerce can flourish, and to develop self-regulating practices by the private sector that will protect the rights of individuals and promote the public welfare. 97A114.

   - Resolution urging the United States to ratify the United Nations Convention on the Use of Electronic Communications in International Contracts. 06A303

   - Resolution urging the U.S. Government to ratify the United Nations Convention on the Use of Electronic Communications in International Contracts. 08A100

   - Resolution supporting modernization and simplification of the requirements, procedures, laws and regulations related to verification of signatures in cross-border contexts to increase reciprocal recognition among jurisdictions. 14A114A

   Existing Association policies are not affected by this Resolution if it were adopted. This Resolution would expand the groundwork established by existing Resolutions in promoting the modernization and uniformity of the regulation of electronic commerce in
international trade agreements, including business data flows from one country to another country.

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 law and practices of many countries pertaining to the requirements and procedures related to electronic commerce, including cross-border data flows, in cross-border contexts are evolving.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates: If the U.S. Government considers new international trade agreements or guidelines, or amendments thereof, that would affect electronic commerce, the ABA will be able to share its position based on this subject and other ABA policies.


10. Referrals.
    ABA Cybersecurity Legal Task Force
    Section of Science & Technology Law
    Section of Business Law
    Commission on Interest on Lawyer Trust Accounts

11. Contact Name and Address Information.
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EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   The Resolution calls for the American Bar Association to urge the United States to adopt the American Bar Association Model Provisions on Electronic Commerce for International Trade Agreements, dated August 2017, and recommends them as a standard template for use in international trade agreements and other relevant international agreements and guidelines.

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

   The ability of companies and consumers to move data has become paramount in promoting, fostering, and expanding commerce and services around the globe. Many countries have enacted rules that stifle competition and disadvantage American entrepreneurs, by imposing burdensome barriers or overly restricting the free flow of information. This resolution supports modernization and uniformity of the regulation of business data flows from one country to another country. It also urges the United States to adopt the American Bar Association Model Provisions on Electronic Commerce for International Trade Agreement (“the Model Provisions”) as the standard template for use in international trade agreements and other relevant international agreements and guidelines, subject to reasonable safeguards such as the protection of consumer data upon its exportation.

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

   The Resolution enables the ABA to urge the United States to adopt the ABA Model Provisions on Electronic Commerce as an effective and efficient means to promote the modernization and uniformity of provisions for electronic commerce, including cross-border data flow, in international trade agreements, taking into account new technologies and associated costs, as well as the need for appropriate protection of data.

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

   At the time of the writing of this R&R and summary, we are not aware of any formal reported direct opposition to the approval of this Resolution.
RESOLVED: That the American Bar Association amends the black letter of Rule 7 of the Model Rules for Lawyer Disciplinary Enforcement as follows (insertions underline, deletions struck through):

RULE 7. ROSTER OF LAWYERS

Disciplinary counsel shall maintain or have ready access to current information relating to all lawyers subject to the jurisdiction of the board including:

(a) full name and all names under which the lawyer has been admitted or practiced;
(b) date of birth;
(c) current law office business address, and telephone number, and email address;
(d) current residence address;
(e) date of admission in the state;
(f) date of any transfer to or from inactive status;
(g) all specialties in which certified;
(h) other jurisdictions in which the lawyer is admitted and date of admission;
(i) location the name of the financial institution and account numbers for each account in which clients’ funds are held by the lawyer holds the funds of clients or third persons in connection with a representation;
(j) the name and business address of the lawyer(s) and any other individual(s) with authority to disburse funds from each account in which the lawyer holds the funds of clients or third persons in connection with a representation;
(k) the name and business address of the lawyer(s) responsible for complying with the applicable rules governing trust accounts, and of any other individual(s) to whom the lawyer delegates tasks related to the operation of such accounts;
(l) nature, date, and place of any discipline imposed and any reinstatements in any other jurisdiction; and
(m) date of death; and

(l) the universal lawyer identification number [together with the jurisdiction's prefix or suffix number, if any, issued by the court].
REPORT

Overview

It is an unfortunate fact that some lawyers continue to misappropriate client or third person funds. For example, according to the most recent ABA Survey of Lawyers’ Funds for Client Protection (2011-2013), U.S. jurisdictions’ lawyers’ funds for client protection (“client protection fund”) collectively paid out in claims approximately $32.4 million in 2011, $27.4 million in 2012, and $36.6 million in 2013.\(^1\) Preliminary results for the 2017 Survey of Lawyers’ Funds for Client Protection (2014-2016) indicate that large payouts due to the misappropriation of client funds continues. The Pennsylvania Lawyers Fund for Client Protection reported losses of over $3.8 million in 2014 and $4.4 million in 2016.\(^2\) The Illinois Client Security Fund paid $1.3 million in 2014 and over $3 million in 2016.\(^3\) Every U.S. jurisdiction has and administers a client protection fund to reimburse victims for losses caused by the dishonest conduct of lawyers occurring in the course of the client-lawyer or other fiduciary relationship.

This Resolution, jointly proposed by the ABA Standing Committee on Client Protection and the ABA Standing Committee on Professional Discipline, seeks to amend the black letter of Rule 7 (Roster of Lawyers) of the ABA Model Rules for Lawyer Disciplinary Enforcement (MRLDE). Currently, Rule 7 sets forth the minimum information that disciplinary counsel shall maintain or have ready access to for all lawyers subject to a jurisdiction’s disciplinary authority.\(^4\) This information is generally collected as part of the jurisdiction’s annual registration process, and it is the individual lawyer’s responsibility to ensure the information remains current.\(^5\) In addition to providing identifying information (e.g., name, date of birth, law office and residential addresses, and bar admission information), MRLDE 7 currently states that lawyers must provide the “location and account numbers in which client funds are held by the lawyer.”\(^6\)

If adopted, the proposed amendments would update and minimally expand the type of information that lawyers provide and disciplinary agencies can access as part of the annual licensing registration process, thereby enhancing the ability of lawyer regulators to promptly and effectively address lawyer misappropriation of funds belonging to clients or third persons. For example, the Resolution proposes that lawyers be required to provide their email address(es), as well as the name and business address of anyone to whom the lawyer delegates tasks related to the operation of a trust account. The proposed changes are simple but necessary, and are in the best interest of the public and the profession. They are consistent with the requirements of Rule 1.15 of the ABA Model Rules of Professional Conduct and other longstanding ABA policies described below.

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\(^1\) See ABA Survey of Lawyers’ Funds for Client Protection (2011-2013), http://www.americanbar.org/content/dam/aba/events/professional_responsibility/2016%20Meetings/Forum/Materials/Hot%20Topics%204%20for%20Client%20Protection%20Funds/3_survey_of_lawyers_funds_2011_2013.authcheckdam.pdf. This number reflects the cumulative amount of claims paid by the 36 U.S. jurisdictions that reported claims information. The actual amount paid for all U.S. jurisdictions is higher.


\(^3\) Id.

\(^4\) MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 7 (2002).


\(^6\) See MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 7(i) (2002).
While House of Delegates’ approval is required for changes to the black letter of the MRLDE, House action is not required for changes to the accompanying Commentary. In order to fully inform the House regarding the proposed changes to the black letter of Rule 7, the Client Protection and Discipline Committees have included in the Resolution the text of what will be accompanying changes to the Commentary to MRLDE 7. The Discipline and Client Protection Committee broadly disseminated for comment within and outside the ABA drafts of this Resolution and the accompanying Report. The Committees thank those who provided helpful comments, and as of the time of the filing of this Resolution, they were aware of no opposition.

Current ABA Policies

The safekeeping of money and property belonging to clients or third persons is a fundamental ethical and fiduciary obligation of lawyers. Rule 1.15 of the ABA Model Rules of Professional Conduct (“MRPC”), in relevant part, requires lawyers to maintain such funds in trust accounts, separate from their own monies, to preserve “complete records” with respect to trust accounts, and to “render a full accounting” for the receipt and distribution of the monies from those accounts. Every United States jurisdiction, including territories, has included in their professional conduct rules the requirements of MRPC Rule 1.15. Most jurisdictions include in those rules a requirement that lawyers maintain such records for a certain period of years, and that lawyers make the records and books of such accounts readily available upon demand for production by disciplinary agencies.⁷

The ABA has long been a leader in adopting policies that are implemented by jurisdictions to prevent and mitigate losses caused by the dishonest conduct of lawyers in handling funds of clients or third persons. In 1988, the ABA adopted the Model Rules for Trust Account Overdraft Notification⁸ requiring financial institutions to notify the state lawyer disciplinary agency when an overdraft on a trust account occurred. The Model Rule for Payee Notification⁹ adopted in 1991, requires insurers to provide written notice to a claimant that payment for the claim has been forwarded to the claimant’s lawyer. In 1993, the ABA adopted the Model Rule for Random Audit of Lawyer Trust Accounts¹⁰, which authorizes a jurisdiction’s lawyer disciplinary agency to conduct audits of lawyers’ trust accounts, selected at random, without needing a basis to believe that misconduct has occurred. In August 2010, the ABA House of Delegates adopted the ABA Model Rules for Client Trust Account Records¹¹ to delineate the types of records that lawyers must maintain in order to comply with the recordkeeping obligations outlined in the MRPC. In jurisdictions that have adopted similar policies, these measures have proven effective in deterring

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⁷ See ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 29 (2002); see also, ABA CPR Policy Implementation Committee chart, Rule 1.15 Safekeeping Property (Dec. 12, 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_15.pdf.
⁸ See ABA MODEL RULES FOR TRUST ACCOUNT OVERDRAFT NOTIFICATION, http://www.americanbar.org/content/aba/groups/professional_responsibility/resources/client_protection/over.html.
⁹ See ABA MODEL RULE FOR PAYEE NOTIFICATION, http://www.americanbar.org/content/aba/groups/professional_responsibility/resources/client_protection/pay.html.
¹⁰ See ABA MODEL RULE FOR RANDOM AUDIT OF TRUST ACCOUNTS, http://www.americanbar.org/content/aba/groups/professional_responsibility/resources/client_protection/audit.html.
¹¹ See ABA MODEL RULES FOR CLIENT TRUST ACCOUNT RECORDS, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rules_on_client_trust_account_records.pdf.
and detecting the mishandling of funds even before clients or third persons file complaints with
disciplinary agencies. These requirements have provided useful guidance to lawyers about proper
accounting procedures, and are not considered to be a regulatory burden.\(^\text{12}\)

**Proposed Amendments**

In addition to updating Rule 7 to include lawyers providing an email address, the proposed
amendments would expand the scope of trust account information that a lawyer must submit as
part of the annual registration process. The proposed amendment to Rule 7(i) clarifies that lawyers
should provide the name of the financial institution, in addition to the account number, for each
account in which the lawyer holds client or third person funds in connection with a representation.
The proposed amendments to Rule 7(j) would require lawyers, as part of their annual registration,
to provide the name and business address not only of the lawyer(s) with authority to disburse funds
from trust accounts, but of any others to whom the lawyer has delegated authority to disburse funds
from each trust account where client or third person funds are held in connection with a
representation. This proposed amendment would make MRLDE 7 consistent with Rule 2(a) of
the Model Rules for Client Trust Account Records, which provides that “a lawyer admitted to
practice law in this jurisdiction or a person under the direct supervision of the lawyer” (emphasis
added) can be an authorized signatory on the client trust account.\(^\text{13}\)

Similarly, new Rule 7(k) would require lawyers, as part of their annual registration, to provide the
name and business address of the lawyer responsible for complying with the applicable rules
governing client trust accounts as well as that information relating to any individual to whom the
lawyer delegates tasks relating to the operation of such accounts, such as bookkeeping duties. New
Rule 7(k) recognizes the reality that many law firms use the services of outside accountants or
other firm employees to conduct monthly and annual account reconciliations. Any such delegation
of tasks must be done in compliance with Rules 5.1 and 5.3 of the ABA Model Rules of
Professional Conduct.

Data collected by the Client Protection and Discipline Committees when preparing this Resolution
revealed that twenty-four jurisdictions already require lawyers to provide similar trust account
information on their annual registration statement.\(^\text{14}\) In twenty-one of these jurisdictions, lawyers
must report the name on their trust account, the account number, and the name of the financial
institution.\(^\text{15}\) In a few of these jurisdictions, more detailed information in the registration

\(^\text{12}\) **AM. BAR ASS’N COMM’N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, LAWYER REGULATION FOR A NEW
CENTURY** (1992),
\(^\text{13}\) See **ABA MODEL RULES FOR CLIENT TRUST ACCOUNT RECORDS** R. 2(a) (2010).
\(^\text{14}\) The Client Protection and Professional Discipline Committees distributed an informal survey to the 51 U.S.
disciplinary jurisdictions inquiring about the type of information collected about lawyer trust accounts. Thirty-two
jurisdictions responded, including four New York jurisdictions.
\(^\text{15}\) AL, AZ, AR, CO, DE, ID, IL, IA, LA, ME, MD, MA, MN, NE, NM, ND, OR, RI, TN, VT, and WY require
lawyers to report on the annual registration statement the name on the trust account, the account number, and the
name of the financial institution. Wisconsin requires only the bank name.
statements is required, including the name of each lawyer responsible for depositing and disbursing funds, as well as the names of individuals responsible for reconciling the accounts.\textsuperscript{16}

The proposed changes to MRLDE would not create an undue burden for lawyers, are protective of clients and the public, and help lawyer regulators as they continue to work to minimize instances of lawyer misappropriation of monies held in trust accounts and hold lawyers accountable via discipline when appropriate. These changes also enhance the efficient use of disciplinary resources in cases where the risk to the public is high, by allowing disciplinary counsel to readily access critical information when investigating allegations of dishonest conduct resulting in misappropriation of client or third person funds. This is especially relevant when the lawyer who is alleged to have committed the misconduct is not necessarily the lawyer whose name appears on the trust account, or in small or solo firms, for example, where nonlawyer employees are often, by necessity, authorized signatories on trust accounts. The proposed amendments also allow disciplinary counsel to readily access trust account information when necessary for a more effective accounting and distribution of client funds if the lawyer dies, is missing, or becomes incapacitated.\textsuperscript{17} These changes will also help lawyers comply with the “complete records” requirement in Rule 1.15 of the ABA Model Rules for Professional Conduct.

Commentary

The House of Delegates does not adopt the Commentary to the MRLDE. If the proposed amendments are adopted, the Commentary to MRLDE 7 will be amended as follows:

\textbf{COMMENTARY}

A permanent registration system should be established from which the agency can determine whether an individual is licensed to practice in the state, is living or deceased, and where the individual is located, and information regarding all accounts in which the lawyer holds client or third person funds in connection with a representation. Such information maintained via the registration system should include the name of any individual(s) authorized to disburse funds from such accounts or who are designated by the responsible lawyer to perform tasks related to the operation of such accounts. Such tasks could include performing bookkeeping functions. The lawyer’s assignment of such tasks must be done in accordance with Rules 5.1 and 5.3 of the Model Rules of Professional Conduct. The registration records may be maintained by the court, a court-designated agency, or in unified bar states by the state bar association. Disciplinary counsel should have ready access to the records.

The individual lawyer has the responsibility of keeping his or her registration information current, and should be required to promptly inform the registration agency of any change. Generally, the \textit{current business} address listed in the roster is the lawyer's legal address for purposes of service of process and any other notices. See Rule 13.

\textsuperscript{16} Arizona and Delaware require lawyers to report the name of each lawyer responsible for depositing and disbursing funds (as does Maryland) and the names of individuals responsible for reconciling the accounts.

\textsuperscript{17} \textit{See} \textsc{Model Rules for Lawyer Disciplinary Enforcement R. 28 (2002).}
Registration records should be updated to include information if the lawyer is deceased or no longer engaged in the practice of law. When a lawyer has disappeared or is deceased or disabled, the lawyer's relatives or law partners or associates in the firm, corporation, or agency in which the lawyer was employed should report that fact to the registration agency. See Rule 28(A).

Upon the convening of a hearing on formal charges against a lawyer, disciplinary counsel should require the lawyer to verify the accuracy of the information contained in the roster, and to correct any part thereof which is out of date.

A coordinated system of assigning a universal registration number is urgently needed to make interstate reciprocal enforcement of discipline effective.

**Conclusion**

For the reasons set forth above, the Client Protection and Discipline Committees respectfully request that the House of Delegates adopt these proposed changes to MRLDE 7.

Respectfully submitted,

Frank X. Neuner, Chair  
ABA Standing Committee on  
Client Protection

August 2017
1. **Summary of Resolution(s).** The Resolution, jointly proposed by the ABA Standing Committee on Client Protection and the ABA Standing Committee on Professional Discipline, seeks to amend the black letter of Rule 7 (Roster of Lawyers) of the ABA Model Rules for Lawyer Disciplinary Enforcement (MRLDE). The proposed amendments would update and minimally expand the type of information that lawyers provide and disciplinary agencies can access as part of the annual licensing registration process to include the lawyer’s business email address, the name of the financial institution and the account number for each account in which the lawyer holds client or third person funds in connection with a representation, the name and business address of the lawyer(s) or other individual(s) with authority to disburse funds from trust accounts, and the name and business address of the lawyer responsible for complying with the applicable rules governing client trust accounts and any individual to whom the lawyer delegates tasks relating to the operation of such accounts, such as bookkeeping duties.

2. **Approval by Submitting Entity.** The Standing Committee on Client Protection approved the Resolution on Thursday, May 4, 2017. The Standing Committee on Professional Discipline approved the Resolution on Friday, May 5, 2017.

3. **Has this or a similar resolution been submitted to the House or Board previously?** The proposed amendments have not previously been submitted to the House of Delegates or the Board of Governors.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** Rule 1.15 of the ABA Model Rules of Professional Conduct, in relevant part, requires lawyers maintain client and third-party funds in trust accounts, separate from their own monies, to preserve “complete records” with respect to trust accounts, and to “render a full accounting” for the receipt and distribution of the monies from those accounts. The ABA Model Rules for Client Trust Account Records requires lawyers to delineate the types of records that lawyers must maintain in order to comply with the recordkeeping obligations outlined in the Model Rules of Professional Conduct. The proposed amendments are consistent with the requirements of Rule 1.15 of the ABA Model Rules of Professional Conduct and the ABA Model Rules for Client Trust Account Records.

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 Standing Committees on Client Protection and Professional Discipline will
circulate the amended policy to the highest court of appellate jurisdiction and lawyer regulatory authorities in each U.S. jurisdiction with recommendations to adopt the amendments.

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

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

10. Referrals. The Resolution was forwarded to ABA Committees and Commissions, ABA Section and Division Chairs, presidents of state and local bar associations through The Bridge, and affiliated organizations including the Association of Professional Responsibility Lawyers, the National Organization of Bar Counsel, and the National Client Protection Organization, and circulated on various Center of Professional Responsibility list serves.

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

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

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EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   The Resolution, jointly proposed by the ABA Standing Committee on Client Protection and the ABA Standing Committee on Professional Discipline, seeks to amend the black letter of Rule 7 (Roster of Lawyers) of the ABA Model Rules for Lawyer Disciplinary Enforcement (MRLDE). The proposed amendments would update and minimally expand the type of information that lawyers provide and disciplinary agencies can access as part of the annual licensing registration process to include the lawyer’s business email address, the name of the financial institution and the account number for each account in which the lawyer holds client or third person funds in connection with a representation, the name and business address of the lawyer(s) or other individual(s) with authority to disburse funds from trust accounts, and the name and business address of the lawyer responsible for complying with the applicable rules governing client trust accounts and any individual to whom the lawyer delegates tasks relating to the operation of such accounts, such as bookkeeping duties.

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

   The proposed amendments are part of the ongoing effort to minimize instances of lawyer misappropriation of monies held in trust accounts and hold lawyers accountable via discipline when appropriate.

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

   The proposed amendments allow disciplinary counsel to readily access critical information when investigating allegations of dishonest conduct resulting in misappropriation of client or third person funds. This is especially relevant when the lawyer who is alleged to have committed the misconduct is not necessarily the lawyer whose name appears on the trust account or where nonlawyer employees are authorized signatories on trust accounts. The proposed amendments also allow disciplinary counsel to readily access trust account information when necessary for a more effective accounting and distribution of client funds if the lawyer dies, is missing, or becomes incapacitated. These changes will also help lawyers comply with the “complete records” requirement in Rule 1.15 of the ABA Model Rules for Professional Conduct. The proposed amendments would not create an undue burden for lawyers and are protective of clients and the public.

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

   The submitting entities were not aware of any opposition at the time of filing.
AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON SPECIALIZATION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association accredits the Privacy Law program of the
2 International Association of Privacy Professionals of Portsmouth, New Hampshire for a five-year
3 term as a designated specialty certification program for lawyers.
Background and Synopsis of the Resolutions

The United States Supreme Court held in Peel v. Attorney Registration and Disciplinary Commission of Illinois, 496 U.S. 91 (1990), that states may not constitutionally impose a blanket prohibition on a truthful communication by a lawyer that he or she is certified as a specialist by a bona fide organization. Following the Peel decision, legal specialty groups began developing programs to certify attorneys as specialists.

An August, 1992, House resolution (1992-AM-128) revised Model Rule of Professional Conduct 7.4 (“Communication of Fields of Practice and Specialization”). It now provides: “(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless: (1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and (2) the name of the certifying organization is clearly identified in the communication” (emphasis added). This created a need for the Association to develop accreditation standards to ensure that (a) private organizations that certify lawyers as specialists are “bona fide,” and (b) their certification programs are robust. A national accreditation mechanism administered by the Association according to uniform standards, it was believed, would be an efficient and effective means of dealing with a multiplicity of organizations that were offering, or planning to offer, certification programs.

Importantly, lawyers may practice in a field of law without certification. Rule 7.4 applies only to a claim by an attorney that he or she is certified as a specialist, and requires that such claim be truthful, and that the certification be bona fide.

At the 1993 Midyear Meeting, the House adopted Standards for Accreditation of Specialty Certification Programs For Lawyers (the “Standards”) and delegated to the Standing Committee on Specialization the task of developing and conducting a process to accredit (and re-accredit) legal specialist certification programs sponsored by private national organizations. At the 1999 Annual Meeting, the House extended the initial period of accreditation approved in the Standards from three years to five.

In many states today, specialist certification programs now must be accredited by the Association, approved by state regulatory authorities, or both, before lawyers may publicize their certification.

Section 4 of the Standards requires that a certifying organization applying for accreditation by the Association demonstrate to the Standing Committee on Specialization its program’s compliance with several requirements to help guarantee the bona fides of the organization and its program. The Standards say that accreditation “shall be granted” if the certifying organization shows that the program complies with the Standards’ detailed accreditation requirements.\(^1\) This is consistent with Peel, which provided that a claim by an attorney that he or she is certified as a

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\(^1\) Those accreditation requirements are set out below as an Appendix to this Report.
legal specialist by an organization is not misleading if the organization and its program have rigorous standards.

Pursuant to the Association’s current accreditation Standards and procedures, the Standing Committee has reviewed, and hereby unanimously recommends the approval of, an application submitted by the International Association of Privacy Professionals (“IAPP”) for accreditation of its Privacy Law Specialist certification program. The Standing Committee has determined that the IAPP is a *bona fide* organization and that its lawyer specialty certification program rigorously meets all of the Association’s Standards.

**Organization Description**

According to the Standing Committee on Specialization’s Governing Rules (“Rules”), applicants for specialty certification accreditation are reviewed to determine whether their “organizational features, operational methods and certification standards comply with the requirements of the Standards.”

The Standing Committee on Lawyer Specialization therefore undertook to review the IAPP’s organizational structure and viability as well as its organizational features and operational methods for certifying attorneys as specialists. Among the factors the Standing Committee considered, consistent with Rule 6-4.2, were the IAPP’s governing structure and supporting documents, its financial viability, and biographical information regarding the IAPP’s governing board and senior staff. Rule 6-4.2 (a-d).

The IAPP has been organized under IRS Rule 501(c)(6) as a not-for-profit professional membership association since 2000. It currently has nearly 30,000 members in approximately 90 countries worldwide. The IAPP estimates that 30-40 percent of these members are attorneys. A section of the IAPP, known as the Privacy Bar Section, was recently formed to address the unique needs of the growing number of attorney members in the IAPP.

The IAPP is financially viable as demonstrated by its financial statements. It employs over 100 full time employees. It has a Board of Directors comprised of attorneys, chief legal counsel, chief privacy officers, and former regulators. Board members include lead in-house counsel and privacy officers at such organizations as Google, Bank of America, Intel, LinkedIn, Mastercard, GE Digital, Naspers, Northrop Grumman, DHL, and Promontory. The IAPP’s Chief Executive Officer and President, its Vice President for Research and Education, and its Research Director are also attorneys.

In addition to hosting events and publishing articles and research reports on the rapidly-changing field of privacy law, the IAPP also offers certifications. The Certification Director has a Ph.D. in English and a staff of three additional full-time, credentialed employees with considerable experience in exam writing and deployment. The volunteer Certification Advisory Board consists of nine accomplished privacy professionals representing a variety of business sectors, four of whom are practicing attorneys. They guide the operations of the IAPP’s certification efforts and ensure the impartiality of the program.
In February 2016, the IAPP submitted a Notice of Intent to apply for accreditation of its Privacy Law Specialist certification program. The Notice of Intent was accompanied by an Application for Accreditation and the appropriate application fees of $4,500.

The Standing Committee has determined that the IAPP is a *bona fide* organization with the capacity to administer a lawyer specialist certification program.

**Program Description**

The IAPP offers several privacy certifications. The longest-standing and most popular is the Certified Information Privacy Professional (CIPP). As the field and the IAPP have developed, and as privacy and data protection law have grown globally, the IAPP has offered a variety of certifications including CIPP/United States (CIPP/US), CIPP/ U.S. Government (CIPP/G), CIPP/Canada (CIPP/C); CIPP/Europe (CIPP/E), and CIPP/Asia (CIPP/A). The IAPP also offers a certification in the technology associated with privacy practice, known as the Certified Information Privacy Technologist (CIPT) certification, and a certification associated with creating and monitoring a privacy program as an in-house privacy professional or on behalf of an institutional client (the Certified Information Technology Manager or CIPM certification). Each certification requires passage of an examination and maintenance of continuing education over time.

The IAPP has awarded many attorneys with the CIPP/US and other certifications for several years, although the exam is available to non-attorneys as well. The IAPP sought and in 2015 obtained accreditation for four of its certifications from the American National Standards Institute (ANSI), including the ones required for Association accreditation. ANSI accreditation demonstrates that the IAPP’s exams and its procedures for awarding certification meet the highly rigorous standards set forth in ISO/IEC 17024:2012.

When the IAPP applied for accreditation from the Association, it created a program designed to match the Standards for Accreditation of Specialty Programs for Lawyers. The IAPP’s initial application materials set forth a program requiring attorneys seeking Privacy Law Specialist certification to: (a) successfully pass the CIPP/US exam; and (b) successfully pass either the CIPM or the CIPT exam. The Bodies of Knowledge for each of these exams are attached to this Report. These exams were sent for review to Professor Dennis Hirsch, who is Professor of Law and Director of the Program on Data and Governance at The Ohio State University Moritz College of Law. Professor Hirsch is widely published in the fields of privacy and cybersecurity law, including European data protection law and comparative information privacy law. He holds degrees from Columbia University and Yale Law School. Professor Hirsch provided the Standing Committee with a favorable review of the exams.

The IAPP’s Privacy Law Specialist certification program also requires, consistent with the accreditation Standards, that attorneys submit evidence of at least 36 hours of participation in qualified continuing legal education in the field of Privacy Law for the 3-year period preceding the application. Qualified CLE programs include those offered by Association sections and task forces. Applicants must also submit at least five but no more than eight peer references attesting to the applicant’s qualifications and involvement in the practice of privacy law. “Peers” include
other attorneys, clients, regulators, or judges who can personally attest to the applicant’s qualifications.

Because none of the IAPP’s required exams contained a section covering ethics and professional responsibility, however, the Standing Committee noted this as a deficiency in the IAPP’s application. The IAPP thereafter created an exam specifically covering ethics and professional responsibility issues to be administered exclusively to attorneys seeking the Privacy Law Specialist certification. Prof. Hirsch provided a favorable review of that exam.

Finally, applicants must demonstrate current and ongoing “substantial involvement” in the practice of Privacy Law. The Standing Committee noted some deficiencies in the IAPP’s initial application regarding its definition of “substantial involvement” in the practice of Privacy Law. In particular, the Standing Committee felt the IAPP needed to be more specific in the types of activities and areas of law in which attorneys must be engaged to qualify for the certification. The IAPP amended and clarified its definition and the Standing Committee ultimately concluded that the following definition meets the Standards for accreditation:

**Definition of “substantial involvement in the practice of Privacy Law”:**

Applicant must demonstrate (in a manner that does not reveal confidential and privileged information) that Applicant has been actively engaged in the practice of privacy law either as a transactional lawyer, in privacy program management, privacy litigation or regulatory practice, or a combination of these. Active engagement in information security law will also be considered provided Applicant demonstrates its connection to and role in the privacy specialist certification practice area.

Applicant must demonstrate that Applicant has both quantitative and qualitative substantial involvement in the field. In particular, Applicant must declare and demonstrate through narrative description and through support letters that at least one-quarter (25%) of Applicant’s full-time practice in each of the prior three years has been devoted to the practice of privacy law. In the narrative description, Applicant must provide specific examples of his or her engagement with the following types of privacy law practice activities:

*For outside counsel and in-house lawyers with principally a transactional practice, at least 15% of Applicant’s full time practice must include:*

- Preparation and review of privacy notices compliant with state, federal and/or international laws and regulations, and reflective of an organization’s privacy practices, and privacy and security policy development, including development of information handling, sharing, storage, training, and security policies and programs (at least 5% of a full-time law practice);

- Contract development, negotiation, and compliance, which may include review of vendor, purchase, procurement, or acquisition contracts as well as drafting and negotiation of contracts for inclusion of privacy and security provisions (at least 5% of full time law practice); and
• Privacy advice in compliance with state and federal laws, including legal advice on privacy by design in product design or services (at least 5% of full-time law practice).

*Some elements of the 25% minimum may also include:*

• Conducting Privacy Impact Assessments and providing advice in connection with them;
• Risk assessment with regard to use and potential misuse of personally identifiable information, and corresponding legal advice to clients and organizational leadership;
• Counseling on cross-border data transfers, and other compliance with international privacy laws pertaining to data transfer (such as drafting Binding Corporate Rules, standard contractual contacts, certifying to US-EU Safe Harbor/Privacy Shield, and the like);
• Counseling on cybersecurity issues, breach preparedness, and breach remediation;
• Legislative or regulatory public policy engagement, which may include drafting of position papers or opinions, and interaction with legislative or regulatory bodies, which develop laws or regulate privacy practices;
• Advice about cyber insurance and negotiating cyber insurance policies.

*For attorneys primarily engaged in data breach response, adversarial proceedings and/or litigation, at least 20% of Applicant’s full time practice must include:*

• Internal breach investigation and evaluation, involving managing internal investigations of data breaches and evaluating risks for mitigation and policy development, as well as engaging and overseeing the work of forensic teams, preparing breach notification letters, and working with regulators (at least 10% of full time law practice);
• Litigation of data protection and data breach matters in state, federal, international, and administrative tribunals (at least 5% of full time law practice); and
• Regulatory investigations and defense, including federal, state, or international filings of regulatory inquiries or responses to regulatory inquiries of privacy and data protection practices (at least 5% of full time law practice).

*Some elements of the 25% minimum may also include:*

• Privacy tort litigation such as litigation of consumer protection / privacy statutes that provide a private right of action (federal and state), including without limitation rights of publicity, rights against publication of false information, intrusion on seclusion, or public disclosure of private facts; and
• Advice about cyber insurance and negotiating cyber insurance policies.

In sum, the IAPP’s Privacy Law Specialist certification program meets the Standards for Accreditation of Specialty Certification Programs for Lawyers by requiring that an applicant:

1. Be an attorney admitted in good standing in at least one U.S. state.
3. Hold one of the following: current CIPM® or CIPT® certification.
4. Pass an IAPP examination on professional responsibility in the practice of Privacy Law.
5. Demonstrate current and ongoing “substantial involvement” in the practice of Privacy Law.
6. Submit evidence of at least 36 hours of participation in qualified continuing legal education in the field of Privacy Law for the 3-year period preceding the application date.
7. Provide at least 5 but no more than 8 peer references attesting to applicant’s qualifications and “substantial involvement” in the practice of Privacy Law. “Peers” are other attorneys, clients, regulators, or judges who can personally attest to applicant’s qualifications.

Accreditation and Evaluation Procedures for the Privacy Law Application

In evaluating the application, the Standing Committee followed the Governing Rules it adopted on March 2, 1993, as amended from time to time since.

In order to ensure that every accredited program continues to comply with Association Standards, the Standing Committee required that the following accompany all reaccreditation applications:

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

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

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

iv. A copy of the recent examinations given to applicants for specialty certifications, along with a description of how the exam was developed, conducted and reviewed; a description of the grading standards; and the names of persons responsible for determining pass/fail standards.

In addition, the Standards include non-discrimination provisions requiring that a program not condition the grant of certification to a lawyer on the lawyers “membership in any organization or completion of educational programs offered by any specific organization” [Section 4.04(B)]; and that a program “not discriminate against any lawyers seeking certification on the basis of race, religion, gender, sexual orientation, disability, or age” [Section 4.04(C)].

The Standing Committee confirms that the IAPP’s application contained the requisite materials and met the requisite standards.
Accreditation Application and Examination Review Panelists

The Accreditation Review Panel appointed by the Standing Committee on Specialization consisted of a chair and two other members, as well as the appointed examination reviewer (Prof. Hirsch). Because the Committee’s reaccreditation procedures provide certifying organizations the opportunity to object for cause to the appointment of examination reviewers and the Accreditation Review Panel members, the IAPP was provided notice, in writing, of the names and affiliations of the members of the Accreditation Review Panel and the examination reviewer prior to appointment. The Accreditation Review Panel members and examination reviewer were:

Shontrai DeVaughn Irving (Hammond, Indiana), Chair, Privacy Law Application Review Panel. Mr. Irving is the Chair of the Standing Committee on Specialization. He teaches Business Law at Purdue University’s Calumet’s School of Business.

The Hon. Melissa May (Indianapolis, Indiana), Member, Privacy Law Application Review Panel. Judge May sits on the Fourth District of the State of Indiana’s Court of Appeals in Indianapolis. She is also the Special Adviser to the Standing Committee on Specialization.

Wendy Weiss (Trenton, New Jersey), Member, Privacy Law Application Review Panel. Ms. Weiss is Court Executive at the New Jersey Supreme Court Board on Attorney Certification.

Examination Reviewer: Prof. Dennis Hirsch (Columbus, Ohio), Mr. Hirsch is Professor of Law and Director of the Program on Data and Governance at The Ohio State University Moritz College of Law.

Respectfully submitted,

Shontrai Irving, Chair
Standing Committee on Specialization
August 2017
SECTION 4: REQUIREMENTS FOR ACCREDITATION OF CERTIFYING ORGANIZATIONS

In order to obtain accreditation by the Association for a specialty certification program, an Applicant must demonstrate that the program operates in accordance with the following standards:

4.01 Purpose of Organization -- The Applicant shall demonstrate that the organization is dedicated to the identification of lawyers who possess an enhanced level of skill and expertise, and to the development and improvement of the professional competence of lawyers.

4.02 Organizational Capabilities -- The Applicant shall demonstrate that it possesses the organizational and financial resources to carry out its certification program on a continuing basis, and that key personnel have by experience, education and professional background the ability to direct and carry out such programs in a manner consistent with these Standards.

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

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

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

4.06 Certification Requirements -- An Applicant shall require for certification of lawyers as specialists, at a minimum, the following:

(A) Substantial Involvement -- Substantial involvement in the specialty area throughout the three-year period immediately preceding application to the certifying organization. Substantial involvement is measured by the type and number of cases or matters handled and the amount of time spent practicing in the specialty area, and require that the time spent in practicing the specialty be no less than twenty-five percent (25%) of the total practice of a lawyer engaged in a normal full-time practice.

(B) Peer Review -- A minimum of five references, a majority of which are from attorneys or judges who are knowledgeable regarding the practice area and are familiar with the competence of the lawyer, and none of which are from persons related to or engaged in legal practice with the lawyer.

   (1) Type of References -- The certification requirements shall allow lawyers seeking certification to list persons to whom reference forms could be sent, but shall also provide that the Applicant organization send out all reference forms. In addition, the organization may seek and consider reference forms from persons of the organization's own choosing.

   (2) Content of Reference Forms -- The reference forms shall inquire into the respondent's areas of practice, the respondent's familiarity with both the specialty area and with the lawyer seeking certification, and the length of time that the respondent has been practicing law and has known the applicant. The form shall inquire about the qualifications of the lawyer seeking certification in various aspects of the practice and, as appropriate, the lawyer's dealings with judges and opposing counsel.

(C) Written Examination -- An evaluation of the lawyer's knowledge of the substantive and procedural law in the specialty area, determined by written examination of suitable length and complexity. The examination shall include professional responsibility and ethics as it relates to the particular specialty. On written request from an Applicant, the Standing Committee may allow the Applicant to certify up to twelve lawyers who create and grade the initial version of the examination required under this paragraph without requiring those lawyers to take and pass the examination. Such written request to the Standing Committee shall include the names and addresses of the lawyers, and shall expressly state that they have created and graded, or will grade, the initial version of the examination required under this paragraph, and that they otherwise meet the certification requirements described in ¶¶4.06(A), (B), (D), (E), and (F).

(D) Educational Experience -- A minimum of 36 hours of participation in continuing legal education in the specialty area in the three-year period preceding the lawyer's application for certification. This requirement may be met through any of the following means:

   (1) Attending programs of continuing legal education or courses offered by Association accredited law schools in the specialty area;

   (2) Teaching courses or seminars in the specialty area;

   (3) Participating as panelist, speaker or workshop leader at educational or professional conferences covering the specialty area; or

   (4) Writing published books or articles concerning the specialty area.
(E) Good Standing -- A lawyer seeking certification is admitted to practice and is a member in good standing in one or more states or territories of the United States or the District of Columbia.

(F) Affirmation of Compliance – A lawyer seeking certification shall affirm in a manner satisfactory to Applicant that the lawyer’s practice in the specialty area is consistent with the lawyer’s status as a certified specialist.

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

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

4.09 Revocation of Certification -- The Applicant shall maintain a procedure for revocation of certification. The procedures shall require a certified lawyer to report his or her disbarment or suspension from the practice of law in any jurisdiction to the certifying organization.
1. **Summary of Resolution(s).**

   The Resolution grants accreditation to the Privacy Law certification program of the International Association of Privacy Professionals for a 5-year term.

2. **Approval by Submitting Entity.**

   At its meeting on October 22, 2016, the Standing Committee on Specialization considered the application of the International Association of Privacy Professionals for accreditation and voted unanimously that it submit a resolution to the House of Delegates for consideration at the 2017 Midyear Meeting. After discussion with interested entities, the Committee on Specialization withdrew the original resolution from consideration at the 2017 Midyear Meeting, contemplating re-submission at the 2017 Annual Meeting. On May 4, 2017, the Committee unanimously approved this Resolution for submission to the House of Delegates at the 2017 Annual Meeting.

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

   Yes. A similar resolution was submitted and withdrawn at the 2017 Midyear Meeting.

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

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

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

   Not Applicable.

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

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

   Implementation will be self-executing if the program is accredited by the House of Delegates.

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

   There are no costs associated with the accreditation of specialty certification programs as proposed in the recommendation.

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

   None.

10. **Referrals.**

    As required by the Standards, this Resolution has been referred for comment to interested entities of the Association:

    - The Section of Science and Technology Law; the Section of Labor and Employment Law; the Litigation Section; the Business Law Section; the International Law Section; the Health Law Section; the Forum on Communications Law; the Tort Trial and Insurance Practice Section; the Solo, Small Firm and General Practice Division; and the Cybersecurity Legal Task Force.

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

    Shontrai D. Irving
    Chair, Standing Committee on Specialization
    Purdue University Calumet
    2200 169th Street
    Hammond IN 46323
    Phone: 812-219-8697
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    Martin Whittaker
    Staff Counsel, Standing Committee on Specialization
    321 North Clark Street
    Chicago IL 60654
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    Email: Martin.Whittaker@Americanbar.org

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

    Shontrai D. Irving
    Chair, Standing Committee on Specialization
    Purdue University Calumet
    2200 169th Street
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EXECUTIVE SUMMARY

1. **Summary of the Resolution**

The Resolution will grant accreditation to the Privacy Law certification program of the International Association of Privacy Professionals.

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

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

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

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

4. **Summary of Minority Views**

The Council of the Section of Science and Technology Law has created a working group to examine the existing privacy certification credentials offered by the IAPP, the contemplated program IAPP is seeking to have accredited, and to report to the Council regarding the suitability of “Privacy Law” as a distinct practice area suitable for certification of practitioners as experts. Communication among that working group of the Section Council, members of the Specialization Committee, and officers of the IAPP has been ongoing since the filing of this Resolution for House consideration, and all interested persons are working to resolve the Section Council’s questions and concerns.
AMERICAN BAR ASSOCIATION
SECTION OF INTELLECTUAL PROPERTY LAW
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association favors an interpretation of Section 35(a) of the Lanham Act, 15 U.S.C. §1117(a), that proof of willfulness is not required, but may be taken into account as among the equitable considerations, for a prevailing plaintiff to recover a defendant’s profits in actions involving trademark infringement, unfair competition, or cyber-piracy under the Lanham Act, 15 U.S.C. §§ 1114, 1125(a), and 1125(d).
REPORT

This Resolution and Report addresses an issue of statutory interpretation and application of federal law and equity about which the federal circuits are split: whether a showing of willfulness is a prerequisite for a prevailing plaintiff to receive an accounting of the defendant’s profits in a trademark infringement, unfair competition, or cyber-piracy action. Some circuits require a showing of willfulness before a plaintiff can obtain such disgorgement. Others consider the defendant’s intent among a variety of factors when ordering such an equitable remedy. Because the standard applied to an accounting of a defendant’s profits has a significant potential impact on the monetary relief potentially available to a trademark plaintiff, this circuit split promotes forum shopping, a circumstance the Supreme Court has repeatedly recognized as incompatible with the fair and efficient administration of justice. The Resolution supports the view that a prevailing plaintiff seeking the disgorgement of the profits of a defendant found liable for infringement, unfair competition or cyber-piracy should not be required to demonstrate that the defendant’s conduct rose to the level of willfulness, but instead any evidence of willfulness should be considered among other evidence supporting this equitable relief.

The Section of Intellectual Property Law requests the House of Delegates to approve this Resolution, which would support either an Association amicus curiae brief addressing a circuit split that attracts forum shopping, which affects clients and their counsel throughout the country, or the Association’s support for legislation that would end the split, and favors the rule in six circuits: to wit, that willfulness is not required, but may be taken into account among other equitable considerations, for a prevailing plaintiff to recover the profits of a defendant found liable for infringement, unfair competition, and cyber-piracy. This position addresses three critical issues, namely:

1. The current split among the circuits is irreconcilable without intervention by the Supreme Court or enactment of legislation by Congress. This has and will continue to result in plaintiffs shopping for the forum providing them with the best chance of recovering defendant’s profits, a practice with broad impact potential plaintiffs and defendants. Indeed, the Supreme Court recently has issued a writ of certiorari on the issue, albeit without reaching its merit;

2. The resolution favors an interpretation based on rules of statutory construction, which dictate that, in the absence of an expression from Congress that willfulness is a prerequisite to an accounting of an infringing defendant’s profits, such a showing is indeed not required and is only a factor to be considered within the court’s discretion, and is not based on the interest of a party in any particular case; and

3. Unless specifically directed by Congressional legislation, statutes should not be interpreted to tie the hands of federal courts by imposing mandatory requirements that undermine a court’s inherent and broad discretion when ordering the equitable remedy of an accounting.

Both Section 35 of the federal Lantham Act, 15 U.S.C. § 1117 (2012), and the common law recognize the possibility of a prevailing plaintiff recovering several different types of monetary relief. The most commonly invoked is the legal remedy of an award of actual damages
Based on the plaintiff’s own lost profits. That remedy is generally available, provided the plaintiff can prove both causation and amount. J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 30:72 (4th Ed. 2017). This resolution does not address a plaintiff’s ability to recover actual damages in the form of its lost profits.

Instead, this resolution focuses on the second primary type of monetary recovery recognized by Section 35 and the common law: the remedy of an accounting, or disgorgement, of a defendant’s profits. Such disgorgement is generally premised on an unjust enrichment or deterrence of future misconduct theory. Specifically, a defendant that has unlawfully used a plaintiff’s trademarks to sell the defendant’s goods – thereby allowing the defendant to trade off the plaintiff’s goodwill and reputation – would be unjustly enriched by retaining the profits it obtained through its illegal activity. See, e.g., *Burger King Corp. v. Mason*, 855 F.2d 779, 781 (11th Cir. 1988) (identifying unjust enrichment as basis for accounting remedy). In contrast to an award of actual damages, disgorgement of a defendant’s profits is an equitable remedy. See, e.g., *Fifty-Six Hope Rd. Music, Ltd. v. A.V.E.L.A., Inc.*, 778 F.3d 1059, 1075 (9th Cir.) (“A claim for disgorgement of profits under § [35(a)] is equitable, not legal.”), *cert. denied*, 136 S. Ct. 410 (2015); *G.A. Modefine S.A. v. Burlington Coat Factory Warehouse Corp.*, 888 F. Supp. 44, 45 (S.D.N.Y. 1995) (“As to Plaintiffs’ claim for an accounting and disgorgement of profits, the law in the Second Circuit is clear that this is an equitable remedy.”). For the reasons more fully articulated below, the Section of Intellectual Property Law recommends that the ABA adopt policy reinforcing a court’s discretion to impose equitable remedies, and to discourage requiring plaintiffs seeking this remedy from having to demonstrate willful infringement by defendants.

### A. Circuit Split and Forum Shopping

Currently, the Third, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits hold that a showing of willfulness is not required before an accounting of profits can be made, but that the defendant’s intent is a factor to be considered among the other equitable factors available for the court’s consideration. The Resolution is consistent with this view. In contrast, the Second, Eighth, Ninth, Tenth, and District of Columbia Circuits require prevailing plaintiffs to demonstrate defendants’ willful misconduct as a prerequisite to an accounting of defendants’ profits. Finally, in a blend of the two main positions, the First Circuit requires a plaintiff to prove that the defendant willfully violated the plaintiff’s rights only if the parties are not direct competitors. Section D includes a circuit-by-circuit breakdown of the issue including a summary of the key decisions in each circuit.

The recent decision of *Romag Fasteners, Inc. v. Fossil, Inc.*, 817 F.3d 782 (Fed. Cir. 2016), *cert. granted and vacated on other grounds*, No. 16-202, 2017 WL 1114951 (U.S. Mar. 27, 2017), squarely presents the issue of whether a prevailing plaintiff must demonstrate the defendant’s willfulness before recovering the defendant’s profits. In this case, the Federal Circuit

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1 Section 35 codifies the remedy available under the common law prior to the enactment of the Lanham Act, *see, e.g., Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 262 (1916); an accounting also generally is available under state-law causes of action for infringement. *See, e.g., DeCelles v. Morgan Cleaners & Laundry, Inc.*, 583 S.E.2d 462, 464-65 (Ga. Ct. App. 2003).

2 Willfulness is not a prerequisite for liability for trademark infringement or unfair competition under Sections 1114 and 1125(a) of the U.S. Lanham Act, 15 U.S.C. §§ 1051, et seq.
interpreted Second Circuit law to hold the prevailing plaintiff could not recover the defendant’s profits because the jury had found the defendant’s infringement was not willful. *Id.* at 791. In reaching this decision, the court rejected the plaintiff’s argument that Second Circuit precedent and other pre-1999 decisions no longer applied given the 1999 statutory amendment to the U.S. Trademark Act, by which, the plaintiff contended, Congress chose to make willfulness a prerequisite to the recovery of monetary relief for trademark dilution, but not for other types of infringement. 3 *Id.* at 786-88. On March 27, 2017, the U.S. Supreme Court granted the plaintiff’s petition for a writ of certiorari, vacated the decision below, and remanded the case to the Federal Circuit for further consideration in light of *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, 137 S. Ct. 954 (2017), on an apparently unrelated ground. The question of whether willfulness is a prerequisite for an accounting of the profits of a defendant found liable for infringement, unfair competition, or cyber-piracy remains an unresolved question subject to a complete circuit split.

This split among the circuits encourages forum shopping; in other words, enterprising plaintiffs seek out those courts most likely to order the disgorgement of a defendant’s profits in situations where the facts may not directly support a finding of willfulness. The different rule in different circuits presents clients and their counsel with uncertain and variable assessments of potential risk. Forum shopping based on different treatment of substantive law is generally discouraged. *See, e.g., Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1969 (2014) (discussing federal copyright law superseding state statutes of limitation as serving the purpose, among others, of “prevent[ing] the forum shopping invited by disparate state limitations periods”); *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 583 (2013) (“Not only would it be inequitable to allow the plaintiff to fasten its choice of substantive law to the venue transfer, but it would also encourage gamesmanship.”).

This circuit split is irreconcilable without the intervention of either the Supreme Court or the passage of legislation clarifying the availability of an accounting. The resolution would provide a basis for the ABA to urge the Court’s resolution of the circuit split and interpretation of this statutory provision in any case in which certiorari is granted on the issue. One possible opportunity may be the *Romag Fastener* case, but it appears that such consideration in that case may be delayed due to other procedural issues.

**B. Statutory Construction**

Section 35(a) of the Lanham Act provides:

When a violation of any right of the registrant of a mark registered in the Patent and Trademark Office, a violation under section [43(a)] or (d) . . . , or a willful violation under section [43(c)] of this title, shall have been established in any civil action arising under this chapter, the plaintiff shall be entitled, . . . subject to the principles of equity, to

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3 Section B. (Statutory Construction), below, discusses the statutory history and construction regarding whether willfulness was added to only the dilution action, or to all actions raised the Lanham Act.
As the italicized language suggests, Section 35(a) expressly requires a showing of willfulness for a prevailing plaintiff to recover a defendant’s profits in a case in which the defendant has violated Section 43(c) of the Act. Id. § 1125(c) (recognizing federal cause of action against conduct likely to dilute the distinctiveness of a famous mark). However, Section 35(a) does not expressly refer to “willfulness” with respect to violations under Section 32 (infringement of a registered mark), id. § 1114, Section 43(a) (unfair competition), id. § 1125(a), or Section 43(d) (cyber-piracy), id. § 1125(d). Under the legal principle of statutory construction, expressio unius est exclusio alterius (i.e., expression of one is the exclusion of another), some courts have interpreted this to mean that, by specifying willfulness for violation of the dilution clause, Congress did not intend for willfulness to also be a requirement for the disgorgement of an infringer’s profits for the infringement of a registered trademark or unfair competition in violation of Section 43(a) of the Act, id. § 1125(a). See Banjo Buddies, Inc. v. Renosky, 399 F.3d 168, 174 (3d Cir. 2005) ("By adding this word to the statute in 1999, but limiting it to § 43(c) violations, Congress effectively superseded the willfulness requirement as applied to § 43(a)."; see also Russello v. United States, 464 U.S. 16, 23, (1983) (cited with approval in Banjo Buddies) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion” (internal quotation marks omitted)).

Prior to the amendment of Section 35(a) of the Act in 1999, the majority view required proof of willfulness for an accounting of an infringer’s profits. In 1999, Congress amended

4 As discussed below, the “willfulness” requirement language was added as part of the 1999 amendments to the Lanham Act, and the legislative history shows the intent of this amendment to Section 35 was only to clarify the remedies with respect to the law on dilution.

5 Before the statutory amendments, the Second, Third, Eighth, Tenth, and District of Columbia Circuits required proof of willfulness. George Basch Co. v. Blue Coral, Inc., 968 F.2d 1532, 1540 (2d Cir. 1992) (holding “under [15 U.S.C. § 1117(a)] of the U.S. Trademark Act, a plaintiff must prove that an infringer acted with willful deception before the infringer’s profits are recoverable by way of an accounting.”); SecuraComm Consulting Inc. v. Securacom Inc., 166 F.3d 182, 190 (3d Cir. 1999) (“[A] plaintiff must prove that an infringer acted willfully before the infringer’s profits are recoverable.”), overruled by Banjo Buddies, Inc. v. Renosky, 399 F.3d 168, 175 (3d Cir. 2005); Minn. Pet Breeders, Inc. v. Schell & Kemper, Inc., 41 F.3d 1242, 1247 (8th Cir. 1994) (holding that an accounting of profits is available only “[i]f a registered owner proves willful, deliberate infringement or deception.”); Bishop v. Equinox Int’l Corp., 154 F.3d 1220, 1223 (10th Cir. 1998) (requiring proof that “defendant’s actions were willful or in bad faith” for an award of profits); ALPO Petfoods, Inc. v. Ralston Purina Co., 913 F.2d 958, 968 (D.C. Cir. 1990) (concluding “an award based on a defendant’s profits requires proof that the defendant acted willfully or in bad faith”). However, the Fifth, Sixth, Seventh, and Eleventh Circuits did not require a finding of willfulness for an accounting of profits. Pebble Beach Co. v. Tour 18 I Ltd., 155 F.3d 526, 554 (5th Cir. 1998) (holding “whether the defendant had the intent to confuse or deceive” is simply a “relevant factor[ ] to the court’s determination of whether an award of profits is appropriate.”); Roulo v. Russ Berrie & Co., 886 F.2d 931, 941 (7th Cir. 1989) (“Other than general equitable considerations, there is no express requirement that ... the infringer willfully infringe the trade dress to justify an award of profits.”); Wynn Oil Co. v. Am. Way Serv. Corp., 943 F.2d 595, 607 (6th Cir. 1991) (holding that the plaintiff is not required to prove actual confusion to recover profits, and quoting the Seventh Circuit rule that “there is no express requirement ... that the infringer willfully infringe ... to justify an award of profits”) (internal quotation marks omitted) (quoting Roulo, 886 F.2d at 941); Burger King Corp. v. Mason, 855 F.2d 779, 781 (11th Cir. 1988) (“Nor is an award
Section 35(a) to add the phrase “or a willful violation under Section 43(c),” which referred to the likelihood-of-dilution cause of action under the latter statute.

The legislative history of the 1999 Trademark Amendments Act discloses no indication that Congress considered overruling the then-existing majority rule requiring willfulness for an accounting of a defendant’s profits, except in cases involving violations of Section 43(c); rather, the legislative history shows an intent to clarify the remedies under Section 35 with respect to the Federal Trademark Dilution Act. See, e.g., Trademark Amendments Act of 1999, Rep. No. 106-250, § 3(b) (“Section three seeks to clarify that in passing the Dilution Act, Congress did intend to allow for injunctive relief and/or damages against an infringer found to have willfully intended to engage in commercial activity that would cause dilution of a famous trademark.”).

If Congress had intended to change the language with respect to infringement actions, it could have done so either at the time or at any time in the intervening eighteen years. See, e.g., Fox Television Stations, Inc v. Aereokiller, LLC, 851 F.3d 1002, 1009 (9th Cir. 2017) (“If Congress had intended § 111 to service the entire secondary transmission community, doling out statutory licenses without regard to the technological makeup of its members, it would have been easy enough for Congress to say so . . . .”); Romag Fasteners, Inc v. Fossil, Inc., 817 F. 3d 782, 790 (Fed. Cir. 2016) (“Given the alleged significance of the purported change, one would have expected to see an acknowledgement or discussion from Congress of the courts of appeals cases in the relevant area if Congress had intended to resolve the circuit conflict.”), cert. granted, judgment vacated on other grounds, No. 16-202, 2017 WL 1114951 (U.S. Mar. 21, 2017).

As a result of the amendments, only the Third Circuit changed its position and no longer requires willfulness as a prerequisite to an accounting of a defendant’s profits in a trademark infringement case. Banjo Buddies, Inc. v. Renosky, 399 F.3d 168, 171 (3d Cir. 2005) (“We hold that willfulness is an important equitable factor but not a prerequisite to . . . [an accounting of a trademark infringer’s profits for a violation of section 43(a)], noting that our contrary position in SecuraComm Consulting Inc. v. Securacom Inc., 166 F.3d 182, 190 (3d Cir. 1999), has been superseded by a 1999 amendment to the Lanham Act.”). The remaining circuits that did not require willfulness or a willful violation under Section 43(c) prior to 1999 have maintained their position following the enactment of the amendments.

Some courts have interpreted Congress’s use of “willful” in the new language concerning a violation of Section 43(c), and the lack of a “willful” requirement for other violations of the Lanham Act, to mean that Congress did not intend willfulness to be a prerequisite for an accounting of an infringer’s profits. Following the 1999 amendments, a handful of district courts have ordered accountings of the profits of a defendant found liable for violating sections of the Lanham Act other than Section 43(c) in the absence of findings of willfulness. Other courts have continued to maintain that willfulness is required. See, e.g., Romag Fasteners, 817 F.3d at 791. Thus, there is conflict and inconsistency among the circuits as to whether willfulness is required for a disgorgement of such a defendant’s profits—the conflict is the crux of the petition for a writ of certiorari by the plaintiff in Romag Fasteners, Inc v. Fossil, Inc., 817 F.3d 782 (Fed. Cir. 2016), which was granted on March 27, 2017, by the U.S. Supreme Court, and has resulted in a

of profits based on either unjust enrichment or deterrence dependent upon a higher showing of culpability on the part of the defendant, who is purposely using the trademark.”).

C. Judicial Discretion In Courts’ Entry of Equitable Relief

Imposing willfulness as a *sin qua non* prerequisite to an accounting of an infringer’s profits effectively limits such a remedy to cases in which a plaintiff can prove deliberate deception. However, because willfulness can be very difficult to prove, such a requirement could prevent a trademark owner from obtaining any meaningful monetary recovery despite a finding of infringement because it likewise can be very difficult for a plaintiff to prove it has incurred actual damages proximately arising from the infringement. See, e.g., Fishman Transducers, Inc. v. Paul, 684 F.3d 187 (1st Cir. 2012) (“Proving causation and amount are very difficult unless the two products directly compete.”); Harper House, Inc. v. Thomas Nelson, Inc., 889 F. 2d 197, 210 (9th Cir. 1989) (reversing $1.8 million jury award; “[i]n a suit for damages under section 43(a), actual evidence of some injury resulting from the deception is an essential element”). This is especially true if the plaintiff and the defendant are not competitors. See, e.g., McCarthy, supra, § 30:64.

The disgorgement of a defendant’s profits is an equitable remedy which the court has discretion to enter if the facts of a particular case warrant such extraordinary relief. See, e.g., Fifty-Six Hope Rd. Music, Ltd. v. A.V.E.L.A., Inc., 778 F.3d 1059, 1075 (9th Cir.) (“A claim for disgorgement of profits under § 1117(a) is equitable, not legal.”), cert. denied, 136 S. Ct. 410 (2015); see also Klein-Becker USA, LLC v. Englert, 711 F.3d 1153, 1163 (10th Cir. 2013) (“Courts have wide discretion to fashion appropriate equitable remedies such as disgorgement of profits.”). Historically, courts have been given wide berth to enter such relief and the imposition of rigid rules restraining the exercise of that discretion have been disfavored. See, e.g., Franklin v. Gwinnett Pub. Cnty. Schools, 503 U.S. 60, ___, 112 S.Ct. 1028, 1029 (1992) (“The longstanding general rule is that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute.”) (citing Bell v. Hood, 327 U.S. 678, 684 (1946); Davis v. Passman, 442 U.S. 228, 246-47(1979)); see also First Commodity Traders, Inc. v. Heinold Commodities, Inc., 766 F.2d 1007, 1011 (7th Cir. 1985) (“Because an accounting is an equitable remedy, a court has broad discretion to determine whether it is appropriate to order an accounting.”). The willfulness requirement for disgorgement of a defendant’s profits unnecessarily limits the court’s discretion to craft equitable relief if the legal remedy of an award of actual damages is inadequate or non-existent.

D. A Circuit-By-Circuit Breakdown of the Issue

1. Courts Holding that Willfulness is Not Required

Third Circuit

In the Third Circuit, willfulness is just one of many factors which should be considered in deciding whether or not a prevailing plaintiff is entitled to recover the defendant’s profits in
cases other than those involving findings of likely dilution under Section 43(c). In *Gucci Am. Inc. v. Daffy’s Inc.*, 354 F.3d 228 (3d Cir. 2003), the Third Circuit considered whether a district court erred when it refused to order the disgorgement of a defendant’s profits to a plaintiff. The court adopted the approach of the Fifth Circuit, which applies the six factors outlined in *Pebble Beach Co. v. Tour 18 I Ltd.*, 155 F.3d 526 (5th Cir. 1998): (1) whether the defendant had the intent to confuse or deceive (i.e., willfulness), (2) whether sales have been diverted, (3) the adequacy of other remedies, (4) any reasonable delay by the plaintiff in asserting his rights, (5) the public interest in making the misconduct unprofitable, and (6) whether it is a case of palming off. Based on these factors, the Third Circuit concluded that the district court did not err in denying an accounting of the defendant’s profits. The Third Circuit again considered the issue of whether willfulness is required for an accounting of profits in *Banjo Buddies, Inc. v. Renosky*, 399 F.3d 168 (3d Cir. 2005). In that case, the Third Circuit cited the *Pebble Beach* factors as the proper test for assessing whether the propriety of an accounting in a trademark infringement case, finding that “[t]he 1999 amendment replaced ‘or a violation under section 43(a)’ with ‘a violation under section 43(a), or a willful violation under section 43(c)’ . . . The plain language of the amendment indicates that Congress intended to condition monetary awards for § 43(c) violations, but not § 43(a) violations, on a showing of willfulness.” The Third Circuit in *Banjo Buddies* thus held that willfulness is just one of several factors to be considered in deciding whether or not a plaintiff is entitled to recover the defendant’s profits.

**Fourth Circuit**

The Fourth Circuit has ruled that willfulness is not required for an accounting of profits, and instead, follows the Third and Fifth Circuits in analyzing six factors. See *Synergistic Int’l, LLC v. Korman*, 470 F.3d 162, 175 (4th Cir. 2006) (citing *Banjo Buddies, Inc. v. Renosky*, 399 F.3d 168, 175 (3d Cir. 2005); *Quick Techs., Inc. v. Sage Grp.*, 313 F.3d 338, 349 (5th Cir. 2002)). These factors are: “(1) whether the defendant had the intent to confuse or deceive, (2) whether sales have been diverted, (3) the adequacy of other remedies, (4) any unreasonable delay by the plaintiff in asserting his rights, (5) the public interest in making the misconduct unprofitable, and (6) whether it is a case of palming off.” *Id.* The first factor concerns whether there has been any willful infringement or if the defendant acted in bad faith, and the Fourth Circuit advised that “willfulness is a proper and important factor in an assessment of whether to make a damages award, [but] it is not an essential predicate thereto.” *Id.* Instead, the trial courts should be addressing all the factors and explaining the reasoning and impact of each relevant factor. *Id.* at 176. Therefore, the Fourth Circuit requires a thorough analysis of all six factors listed above in determining whether a plaintiff is entitled to an accounting of a defendant’s profits, and willfulness is merely one of these factors.

**Fifth Circuit**

The Fifth Circuit does not require willfulness as a prerequisite for an accounting. In *Quick Technologies, Inc. v. Sage Group PLC*, 313 F.3d 338 (5th Cir. 2002), the court established factors to consider when determining whether an accounting of profits is appropriate: “(1) whether the defendant had the intent to confuse or deceive, (2) whether sales have been diverted, (3) the adequacy of other remedies, (4) any unreasonable delay by the plaintiff in asserting his rights, (5) the public interest in making the misconduct unprofitable, and (6) whether it is a case of palming off.” *Id.* at 349 (citing *Pebble Beach Co. v. Tour 18 Ltd.*, 155 F. 3d 526, 554 (5th Cir.
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1998)). The Fifth Circuit went on to state that willful infringement is a significant factor when deciding whether an accounting of profits is warranted; however, it would not adopt a bright-line rule requiring willfulness to be a prerequisite. Id. In sum, the Fifth Circuit employs a case-by-case analysis using a set of factors, and willfulness is not a prerequisite.

Sixth Circuit

In La Quinta Corp. v. Heartland Properties LLC, 603 F.3d 327 (6th Cir. 2010), the Sixth Circuit affirmed that willfulness is not a prerequisite to an accounting of profits, and a case-by-case analysis should be applied when making such determinations. The Sixth Circuit advised that because there is little guidance in the Lanham Act regarding the equitable principles that should be applied when assessing monetary relief, a case-by-case analysis is needed. Id. at 343. The court noted there are a variety of factors that should be examined when deducing if an accounting is appropriate, including “the defendant’s intent to deceive, whether sales were diverted, the adequacy of other remedies, any unreasonable delay by the plaintiff in asserting its rights, the public interest in making the misconduct unprofitable, and ‘palming off,’ i.e., whether the defendant used its infringement of the plaintiff’s mark to sell its own products to the public through misrepresentation.” Id. (citing Synergistic Int’l, LLC v. Korman, 470 F.3d 162, 175-76 (4th Cir. 2006)). In sum, the Sixth Circuit uses a case-by-case approach and considers a range of factors.

Seventh Circuit

Even prior to the 1999 amendment to Section 35(a) of the U.S. Trademark Act, the Seventh Circuit held that willfulness is not a requirement to recover an infringer’s profits: “The U.S. Trademark Act specifically provides for awarding of profits in the discretion of the judge subject only to principles of equity . . . . Other than general equitable considerations, there is no express requirement that the parties be in direct competition or that the infringer willfully infringed the trade dress to justify an award of profits.” Roulo v. Russ Berrie & Co., 886 F.2d 931, 940 (7th Cir. 1989).

Eleventh Circuit

A showing of willfulness is not required for an accounting of profits in the Eleventh Circuit, but it can be a factor in the final decision. In Optimum Technologies, Inc. v. Home Depot U.S.A., Inc., 217 F. App’x 899 (11th Cir. 2007), the Eleventh Circuit held that “an accounting of a defendant’s profits is appropriate where (1) the defendant’s conduct was willful and deliberate, (2) the defendant was unjustly enriched, or (3) it is necessary to deter future conduct.” Id. at 902.

2. Courts Holding that Willfulness Is Required

Second Circuit

Under Second Circuit law, a trademark owner can recover the profits of defendant under Sections 32, 43(a), or 43(d) of the Lanham Act only in cases presenting willful misconduct. In George Basch Co. v. Blue Coral, Inc., 968 F.2d 1532 (2d Cir. 1992), the Second Circuit held that under the U.S. Trademark Act, a plaintiff must prove that a trademark infringer acted with “willful deception” to recover profits. Following the 1999 U.S. Trademark Act amendments, in
Merck Eprova AG v. Gnosis SpA, 760 F.3d 247 (2d Cir. 2014), the Second Circuit reaffirmed that willfulness is required to recover the profits of an infringer in the context of a false advertising claim under the U.S. Trademark Act. Then, in Romag Fasteners, Inc. v. Fossil, Inc., 817 F.3d 782 (Fed. Cir. 2016), cert. granted and vacated on other grounds, No. 16-202, 2017 WL 1114951 (U.S. Mar. 27, 2017), on appeal from the District of Connecticut, the Federal Circuit specifically held the 1999 amendments to the U.S. Trademark Act did not change the Second Circuit law, which requires willfulness to recover profits of an infringer.

**Eighth Circuit**

The Eighth Circuit requires willfulness for an accounting of profits. See, e.g., Minn. Pet Breeders, Inc. v. Schell & Kampeter, Inc., 41 F.3d 1242, 1247 (8th Cir. 1994) (holding an accounting of profits is available if “a registered owner proves willful, deliberate infringement or deception”). This willfulness requirement has been reiterated by the Eighth Circuit following the 1999 statutory amendments. See Masters v. UHC of Del., Inc., 631 F.3d 464 (8th Cir. 2011) (recognizing an accounting of profits may be awarded upon proof of willful infringement and holding actual confusion was not required to recover an infringer’s profits).

**Ninth Circuit**

The Ninth Circuit requires a finding of willfulness for an accounting of profits. In Fifty-Six Hope Road Music, Ltd. v. A.V.E.L.A., Inc., the Ninth Circuit held that “[a]warding profits ‘is proper only where the defendant is attempting to gain the value of an established name of another.’ Willful infringement carries a connotation of deliberate intent to deceive.” 778 F.3d 1059, 1073-74 (9th Cir. 2015) (quoting Lindy Pen Co. v. Bic Pen Corp., 982 F.2d 1400, 1406 (9th Cir. 1993)), cert. denied, 136 S.Ct. 410 (2015).

**Tenth Circuit**

The Tenth Circuit requires a plaintiff to establish willfulness as a prerequisite for an accounting of profits under Section 35(a). In Western Diversified Services, Inc. v. Hyundai Motor America, Inc., 427 F.3d 1269 (10th Cir. 2005), the Tenth Circuit held that because of the punitive nature of an accounting, along with the potential windfall to the plaintiff in the absence of actual damages, the court “require[s] a showing that [a] defendant’s actions were willful to support an award of profits under [Section 35(a) of the Lanham Act].” Id. at 1272-73.

**D.C. Circuit**

The District of Columbia Circuit requires a showing of willfulness for an accounting of profits. In ALPO Pet Foods, Inc. v. Ralston Purina Co., 913 F.2d 958, 968 (D.C. Cir. 1990), the court specifically held that “an award based on a defendant’s profits requires proof that the defendant acted willfully or in bad faith.” The District of Columbia Circuit has not addressed accountings of profits since the 1999 amendments.

3. Courts Holding That Willfulness Must be Shown If the Parties Are Not Competitors (Hybrid Approach)
First Circuit

The First Circuit requires willfulness to obtain an accounting of a defendant’s profits only in certain situations. The leading First Circuit case is Tamko Roofing Products, Inc. v. Ideal Roofing Co., Ltd., which emphasized the Circuit’s three justifications for ordering an accounting of a defendant’s profits: “(1) as a rough measure of the harm to plaintiff; (2) to avoid unjust enrichment of the defendant; or (3) if necessary to protect the plaintiff by deterring a willful infringer from further infringement.” 282 F.3d 23, 36 (1st Cir. 2002). Although willfulness is clearly required in the third justification, it is unclear whether it is necessary in the other two justifications. In Tamko, the First Circuit held that if the products directly compete, fraud, bad faith, or palming off is not required to obtain an accounting of an infringing defendant’s profits. Id. at 35-36. This case did not specifically reach the issue of whether “willfulness” is a prerequisite because the jury made a finding of willfulness. The court did note though that “when the rationale for an award of defendant’s profits is to deter some egregious conduct, willfulness is required.” Id. at 36 n.11.

In evaluating the three justifications, the district court in Fishman Transducers, Inc. v. Paul, noted that the first justification for an accounting of a defendant’s profits requires direct competition (which does not require willfulness) and the third justification requires willfulness, but that the First Circuit had not directly ruled on whether the second justification requires willfulness. Fishman, No. 07-10071-GAO, 2011 WL 1157529, at *1 (D. Mass. Mar. 29, 2011). On appeal, the First Circuit wrote that “our cases usually require willfulness (one primary exception involving direct competition . . .) to allow . . . a recovery of the defendant’s profits,” and that the plaintiff’s “remaining hope was to recover the defendant’s profits, but this required a showing of willfulness.” Fishman, 684 F.3d 187, 191 (1st Cir. 2012). Therefore, the First Circuit requires willfulness for an accounting of profits unless there is direct competition between the parties.

E. Conclusion

A significant split exists among the circuits on whether a prevailing plaintiff must demonstrate a defendant’s willful infringement, unfair competition, or cyber-piracy before recovering the defendant’s profits as a deterrent to potential future infringements or to remedy unjust enrichment.

From a public policy perspective, recognizing willfulness as only one of the factors in the analysis, but not a requirement, enables aggrieved trademark owners to separate a defendant from its ill-gotten gains resulting from its unlawful actions, and also deters additional unlawful behavior. If implemented by the Supreme Court or Congress, the position recommended by this Report would allow a prevailing trademark plaintiff to recover the defendant’s profits following a finding of infringement, unfair competition, or cyber-piracy, even when the defendant’s conduct, while not blameless, does not rise to the level of willfulness or maliciousness, both of which can be difficult to prove. Moreover, since courts may use their equitable power to order the disgorgement of a defendant’s profits (i.e., its ill-gotten gains resulting from its infringing
conduct) to a prevailing plaintiff who has demonstrated infringement, unfair competition, or cyber-piracy, such disgorgement should be subject to as few bright-line rules as possible.

Respectfully submitted,

Donna P. Suchy, Chair
Section of Intellectual Property Law
August 2017
1. **Summary of Resolution**

The resolution calls for the Association to adopt policy addressing a split among the circuits and supporting the view that proof of willfulness should not be a requirement for an accounting of a defendant’s profits in trademark infringement, unfair competition, or cyber-piracy cases under Sections 32, 43(a), and 43(d) of the federal Lanham Act, 15 U.S.C. §§ 1114, 1125(a) and 1125(d). An important purpose is to discourage forum shopping by plaintiffs seeking to recover a defendant’s profits to remedy proven infringement, which has and will continue to result from a three-way split among the circuits. Secondarily, principles of statutory construction require that willfulness be only one of several factors properly considered by courts in the accounting inquiry, instead of a bright-line prerequisite. Finally, courts ordering equitable remedies such as a disgorgement of profits should not be bound by unnecessarily rigid requirements but rather should be given wide berth to exercise discretion in crafting equitable relief.

2. **Approval by Submitting Entity**

The Intellectual Property Law Section Council approved the resolution on April 4, 2017.

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

No.

4. **What existing association policies are relevant to this Resolution and 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 Association support for legislation or an Association *amicus* brief in any case addressing the issue. One possible opportunity would be *Romag Fasteners, Inc. v. Fossil, Inc.*, 817 F.3d 782 (Fed. Cir. 2016), *cert. granted and vacated on other grounds*, No. 16-202, 2017 WL 1114951 (U.S. Mar. 27, 2017), if either party petitions the Supreme Court and certiorari is granted for a second time.

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 regarding this recommendation.

10. **Referrals**

This recommendation will be distributed to each of the Sections, Divisions, Forums, and Standing Committees of the Association in the version accepted and numbered for the agenda by the Rules and Calendar Committee. An earlier version was shared with several sections.

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

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EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   The Resolution calls for the Association to adopt policy in support of an interpretation of Section 35(a) of the Lanham Act, 15 U.S.C. §1117(a), that proof of willfulness is not required, but may be taken into account as among the equitable considerations, for a prevailing plaintiff to recover a defendant’s profits in actions involving trademark infringement, unfair competition and/or cyber-piracy.

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

   In an action for trademark infringement, unfair competition or cyber-piracy under the Lanham Act, a prevailing plaintiff may be entitled to a disgorgement of defendant’s profits, as an equitable remedy. However, there is a split among the Circuits as to whether the prevailing plaintiff must establish a defendant’s willfulness to be awarded a disgorgement of defendant’s profits or whether a showing of willfulness is simply a factor considered by the court in fashioning such an equitable remedy. This Resolution seeks to resolve the Circuit split and establish a uniform rule that is based on statutory construction and does not undermine a court’s inherent and broad discretion when ordering the equitable remedy of an accounting.

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

   The Resolution calls for the adoption of policy which supports an interpretation of the statute that willfulness is not required but may be considered by a court when determining whether a disgorgement of defendant’s profits is an appropriate equitable remedy. This Resolution would support an Association amicus brief with the Supreme Court of the United States in *Romag Fasteners, Inc. v. Fossil, Inc.*, 817 F.3d 782 (Fed. Cir. 2016), *cert. granted and vacated on other grounds*, No. 16-202, 2017 WL 1114951 (U.S. Mar. 27, 2017) if either party in the case petitions the Supreme Court for additional review, or in a similar case raising this issue in light of the existing circuit split.

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

   This Resolution is consistent with the approach adopted by the Third, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits. The Second Circuit has adopted a different view, namely that willfulness is a mandatory prerequisite to obtain the equitable remedy of disgorgement of defendant’s profits. This position has also been adopted by the Eighth, Ninth, Tenth and D.C. Circuits. The First Circuit has adopted a blended approach that requires a plaintiff to prove the defendant willfully violated the plaintiff’s rights only if the parties are not direct competitors.
RESOLVED, That the American Bar Association supports an interpretation of the novelty requirement of Section 102(a)(1) of the Patent Act such that only sales or offers to sell that make the invention accessible to the public prior to the filing of a patent application could prevent an inventor or patent owner from obtaining or maintaining a patent on that invention.
This report concerns whether an invention incorporated in a sale or an offer to sell a product or service must be “available to the public” and, thereby, known to the public, in order for that sale or offer to sell to invalidate claims of a patent to that invention under 35 U.S.C. § 102(a)(1). This Resolution asks the ABA House of Delegates to approve policy supporting an interpretation of 35 U.S.C. § 102(a)(1) that construes language added by Congress and limits invalidating sales or offers for sale to those which make the claimed invention available to the public. Uncertainty regarding interpretation of § 102(a)(1) presents a dilemma for lawyers and applicants with disclosure duties to the PTO because they must choose between compliance with differing and inconsistent duties depending on two different interpretations, or attempt to forecast the interpretation of future on sale bar cases.

In 2011, through the enactment of the America Invents Act (“AIA”), the United States took the dramatic step of switching from a system that awarded patents to the “first-to-invent,” subject to certain conditions, to a system that awarded patents to the “first-to-file” a patent application, also subject to conditions. In making the switch, Congress modified certain conditions to patentability to account for the change in how priority is now determined. These conditions were changed in part because of the recognition that the incentives to promptly file patent applications under a first to file system are different than the incentives that existed under a first to invent system, and also because of a desire to make U.S. and foreign law more consistent.

One such modification redefined the nature of the inventor’s own pre-filing activities that would prevent the inventor from being granted a patent. Before the switch, an inventor could be denied a patent based on disclosures or activity both known to the public and those unknown to the public. This included a sale or offer to sell the product or service, public or private, more than a year prior to the date on which the inventor filed a patent application. Invalidating disclosures unknown to the public were referred to as “secret prior art.” Advocates believed that rejecting patents based on secret prior art would encourage inventors to file patent applications quickly, thereby expediting disclosure of the invention and its eventual dedication to the public. The sale created a bar even if it did not publicly disclose the details of the claimed invention.

In switching to a first to file patent system, however, Congress created a new, stronger incentive for inventors to quickly file a patent application—the complete loss of patent rights to another who files a patent application first—and no longer needed to rely on secret prior art to encourage quick filing. As a result, the AIA introduced a new requirement that only disclosures or other activities that were available to the public could invalidate claims. Specifically, Congress added the language “otherwise available to the public” to the novelty requirement found in the statute, 35 U.S.C. § 102(a)(1). In addition to the literal change to the statute by which the language otherwise available to the public was inserted, the AIA’s legislative history shows that Congress intended the new language to apply to all forms of invalidating disclosures or activities, including sales and offers to sell. Accordingly, under the new post AIA novelty system, any information relied on to deny an inventor a patent or to invalidate a claim of an issued patent must have publicly disclosed the details of the claimed invention. A sale or offer to sell would only prevent the inventor from obtaining a patent if the sale or offer made the claimed invention known to the public. The change brought the on-sale doctrine into conformity with the
public nature of the other prior art items listed in the statute, including patents, printed publications, and public uses.

On May 1, 2017, in Helsinn Healthcare S.A. v. Teva Pharmaceuticals USA, Inc., No. 2016-1284, -1787, 2017 WL 1541518, ___ F.3d ___ (Fed. Cir. May 1, 2017), a three judge panel of the Federal Circuit held that an invention is made available to the public when there is a publicly disclosed commercial offer or contract to sell a product embodying the invention, regardless of whether members of the public were aware that the product sold actually embodies the claimed invention. Slip Op. at *23-*25. Without articulating an application of statutory construction principles to the language Congress added to the statute, the court ruled that pre-AIA law still applied so that a sale occurs under the statute even if members of the public could not ascertain the claimed invention. Id.

This Resolution asks the ABA House of Delegates to approve policy supporting an interpretation of 35 U.S.C. § 102(a)(1) to limit invalidating sales or offers for sale to those which make the claimed invention publicly accessible. This interpretation promotes predictability, simplicity and transparency in the application of patent laws, consistency in the application of novelty law, and also serves the public by encouraging collaboration and information sharing between different organizations (e.g., hospitals, research organizations, etc,) to facilitate the research and development necessary to invent so many of our life-saving and life-altering inventions. This added predictability will provide lawyers with clarifications needed to help them comply with their duties of candor and professional responsibility.

The Section of Intellectual Property Law requests the ABA House of Delegates to approve this Resolution, which would provide the basis for either Association support of legislation to clarify 35 U.S.C. § 102(a)(1) or an Association amicus curiae brief in the U.S. Supreme Court should the petition for certiorari be granted in a relevant case. If a petition is granted in Helsinn Healthcare S.A. v. Teva Pharmaceuticals USA, Inc., Fed. Cir. 2016-1284, the deadline for filing an amicus curiae brief on the merits in the Supreme Court will likely be reached before the next meeting of the House of Delegates.

A. The On-Sale Bar Doctrine Sought to Encourage Inventors to File Patent Applications Without Delay

Under the Patent Act, an inventor is entitled to a patent unless, among other things, the invention is not “novel.” For hundreds of years prior to enactment of the AIA, an inventor could be denied a patent based on activity that was both known and unknown to the public. Those included any sale of or offer to sell the product or service, public or private, more than a year prior to the date on which the inventor filed a patent application. This is better known as the “on-sale bar doctrine,” or common law forfeiture doctrine.¹

¹ In Metallizing Engineering Co. v. Kenyon Bearing & Auto Parts, Co., 153 F.2d 516, 520 (2d. Cir. 1946), Judge Learned Hand described the doctrine as barring an inventor from patenting an invention if the inventor attempted to profit from commercial use of the invention beyond the grace period, even if wholly in secret and inaccessible by the public. In its brief before the Federal Circuit, the United States notes that the doctrine was recognized by the U.S. Supreme Court even earlier stating, “the Supreme Court in Pennock v. Dialogue recognized that an inventor loses his right to a patent “if he suffers the thing invented to go into public use, or to be publicly
The doctrine had been incorporated into the Patent Act as early as 1836, and its inclusion continued through the enactment of the 1952 Act, as found in the pre-AIA novelty provision, 35 U.S.C. § 102(b). Section 102(b) prohibited the patenting of any invention “on sale in this country, more than one year prior to the date of application for patent in the United States.”

Note that in the pre-AIA novelty provision, no language requiring that those sales be “available to the public” or equivalent to that language was included anywhere in the statute.

At the time, it was thought that this development in the law was necessary to encourage early disclosures of inventions by encouraging an applicant to file a patent application without delay. In *Woodland Trust v. Flowertree Nursery, Inc.*, 148 F.3d 1368, 1370, (Fed. Cir. 1998), the Federal Circuit noted that [the novelty requirement found in] Section 102(b)…is primarily concerned with the policy that encourages an inventor to enter the patent system promptly,” and the inventor’s failure to file promptly forces the court to treat the inventor’s own prior commercial use as a bar, even if kept secret. *Id.* at 1370; *see also*, 157 Cong. Rec. S1371 (daily ed. Mar. 8, 2011). When Congress enacted the AIA, it made a significant change in the time for filing patent applications by switching the United States from a first to invent system to a first to file system in conformity with the system in place in all major developed countries. This significant change in turn obviated the need for reliance on any secret activities, including secret sales which do not make the claimed invention known to the public, to serve as invalidating prior art. The necessary incentive for inventors to promptly file their patent applications now resides in a new paradigm rather than the historical system that existed for more than one hundred years in the United States.

**B. Congressional Enactment of the Section 102(a)(1) Novelty Requirement: Dispensing with Reliance on Non-Public Sales or Offers to Sell**

An inventor will not be granted a patent if, among other things, the invention is not new. In accordance with AIA § 102(a)(1), an invention is not new if “the claimed invention was patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention.” In amending the novelty requirement of § 102(a)(1), Congress has shifted the focus of the novelty test to whether the invention had been put into the public domain prior to the inventor filing a patent application.

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Two significant differences exist between the pre-AIA § 102(b) novelty requirement, discussed in the previous section, and the new § 102(a)(1) novelty requirement. First, consistent with the new first-to-file system, the AIA dispensed with the one-year grace period by which an inventor could wait to file his or her application before a statutory novelty bar is triggered (in other words, a U.S. patent application was still timely even though a novelty defeating even might have occurred during a one year window). Second, new § 102(a)(1) includes the language “or otherwise available to the public,” not found in pre-AIA § 102(b). Until the AIA became law, sales unavailable to the public, “secret sales,” could be used to invalidate a patent claim.

The plain language of AIA Section 102(a)(1) indicates Congress’ intent to do away with reliance on sales that fail to describe the invention by requiring sales to make the invention “accessible to the public” to be invalidating. It provides that an applicant is entitled to a patent unless “the claim invention was . . . in public use, on sale, or otherwise available to the public” before the inventor filed his or her patent application. Use of the phrase “otherwise available to the public” to conclude the series of statutory bars in Section 102(a)(1) limits the on-sale bar to sales and offers for sale that make the invention available to the public. For “[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.” *Paroline v. United States*, 134 S. Ct. 1710, 1720-21 (2014).

Similarly, the common meaning of the word “otherwise,” also supports a public availability requirement. Otherwise means “in a different way or manner.” Merriam-Webster’s Collegiate Dictionary, at 823 (10th Ed. 1998). For the last category to be available to the public “in a different way or manner” [per the definition of “otherwise”] the prior categories, including “on sale,” must also be fully available to the public. *See Strom v. Goldman, Sachs & Co.*, 202 F.3d 138, 146-47 (2nd Cir. 1999) (“The position of the phrase ‘or any other equitable relief; in the sentence in which it appears indicates that it modifies one or both of the two specific remedies referred to just before it in the same sentence.’”); *see also, Finisar Corp. v. DirecTV Group, Inc.*, 523 F.3d 1323 (Fed. Cir. 2008), (“when a modifier is set off from a series of antecedents by a comma, the modifier should be read to apply to each of those antecedents.”) *Id.* at 1336-37 (citation omitted). For these reasons, the term “on sale” must be read in light of the phrase “otherwise available to the public,” which modifies it. On its face, the new language added to Section 102(a)(1) eliminates non-public sales and uses as prior art.

In addition to statutory construction of the “otherwise available to the public” language, the foregoing interpretation of AIA Section 102(a)(1) is consistent with the Act’s legislative history. The House Judiciary Committee Report declared that:

[The AIA] modifies the prior-art sections of the patent law. Prior art will be measured from the filing date of the application and will typically include all art that publicly exists prior to the filing date, other than disclosures by the inventor within 1 year of filing .... [A]nd the phrase “available to the public” is added to clarify the broad scope of relevant prior art, as well as to emphasize the fact that it must be publicly accessible.

[T]he 102(a) bar with respect to an invention … [can only be triggered] by a disclosure that is … made available to the public …. If a disclosure … is not made available to the public, then such a disclosure would not constitute patent-defeating prior art under 102(a) in the first place.


[S]ubsection 102(a) was drafted in part to do away with precedent under current law that private offers for sale or private uses or secret processes practiced in the United States that result in a product or service that is then made public may be deemed patent-defeating prior art. That will no longer be the case. In effect, the new paragraph 102(a)(1) imposes an overarching requirement for availability to the public, that is a public disclosure, which will limit paragraph 102(a)(1) prior art to subject matter meeting the public accessibility standard that is well-settled in current law, especially case law of the Federal Circuit.

157 Cong. Rec. at S1496 (statement of Sen. Patrick Leahy). Representative Lamar Smith explained during the House debate that “current precedent,” i.e., pre-AIA precedent on the forfeiture doctrine, was contrary to the new 102(a) provisions:

[C]ontrary to current precedent, in order to trigger the bar in the new 102(a) in our legislation, an action must make the patented subject matter ‘available to the public’ before the effective filing date.


One of the law’s sponsors, Senator Kyl, advised that new Section 102(a)(1) alters “the definition of non-patent prior art” because “it limits all-non-patent prior art to that which is available to the public.”157 Cong. Rec. S1370 (daily ed. Mar. 8, 2011). Senator Kyle noted that “[t]he word ‘otherwise’ makes clear that the preceding clauses describe things that are of the same quality and nature as the final clause—that is, although different categories of prior art are listed, all of them are limited to that which makes the invention ‘available to the public.’” Id. Senator Kyl further explained that continuing to allow sales which do not make the claimed invention known to the public to establish a bar to patentability would disrupt the newly created PTAB invalidity proceedings. He argued that, “the bill’s new post-grant review, in which any validity challenge can be raised, would be utterly unmanageable if the validity of all patents subject to review under the new system continued to depend on discovery-intensive searches for secret offers for sale and non-disclosing uses by third parties.” 157 Cong. Rec. at S1371 (emphasis added).
C. The Federal Circuit’s Decision in Helsinn Does Not Reflect Congress’s Decision to Revise the Law

For the reasons set forth above, Section 102(a)(1), when properly interpreted, expressly requires public accessibility of the invention in order to invalidate patent claims based on a sale. Well established statutory construction principles require such an interpretation even without resort to the legislative history. However, if the legislative history is considered, it is wholly consistent with a construction that requires public accessibility of the invention for the on sale and offer to sell bars to apply. Congress expressed its intent to place the on-sale doctrine on par with the public nature requirements of the other prior art items listed in the statute, including patents, printed publications, and public uses.

The opinion of a three judge panel of the Federal Circuit does not address interpretation of the plain language Congress added to the statute. Instead, with no discussion of statutory construction principles, the panel applied its own pre-AIA case law, which allowed for secret prior art to invalidate patents under the on sale novelty bar. The panel discounted committee reports and floor statements by the bill’s authors.

D. Helsinn Illustrates Why Agreements That Do Not Make the Invention Known to the Public Should Not Act as a Bar

The Federal Circuit’s decision produces a result that is prejudicial to small companies, such as Helsinn that, unlike their much larger counterparts, need to rely on third parties for distribution and manufacturing of products.

The case involved patents to a drug that successfully treats chemotherapy induced nausea and vomiting. Before Helsinn applied for its patents or obtained FDA approval, Helsinn entered into confidential agreements with suppliers to create sufficient quantities of the drug for use in Phase III clinical studies, and to file a New Drug Application specifying how and where the drug products would be manufactured and packaged for commercial distribution. Helsinn Healthcare S.A. v. Dr. Reddy's Labs. Ltd., No. CV 11-3962 (MLC), 2016 WL 832089, at *1 *14, *24-*26 (D.N.J. Mar. 3, 2016). Helsinn also entered into a confidential licensing and supply agreement with a third company to assist in the later stage development and eventual sale of the drug. Id. at *27-*29.

The district court concluded that the new language found in the AIA requires that the on-sale bar apply only to public sales, and not to secret sales or sales that do not make the public fully aware of the claimed invention. Id. at *45. It found that interpretation consistent with: 1) the plain language of the amended statute; 2) the PTO’s interpretation of that language; 3) the AIA’s legislative history; and 4) a weighing of the relevant public policy considerations. Id. On the issue of public policy, the court concluded that the first-inventor-to-file system adequately incentivizes an inventor to promptly apply for a patent, rendering reliance on secret sales to invalidate a patent on the invention unnecessary. Id.
The district court found that Helsinn’s agreements with its suppliers were not “sales” because they did not contemplate a commercial sale, but were entered into for the purpose of pursuing FDA approval. Id. at *48. It also found that those agreements were not “public” because they were entirely subject to and performed under confidentiality restrictions. Id. at *49. The court found that even the licensing agreement did not constitute an invalidating sale because the sale did not make the claimed invention available to the public. Id. at *51. It noted that it is not sufficient that a sale or offer for sale merely occur, but to act as a bar the sale of the claimed invention itself must be public. Id. The court further found that the defendant had failed to show that press releases, announcing that Helsinn and its licensee had reached some agreement, disclosed the claimed invention or otherwise made the claimed formulation available to the public. Id. at *52. To rule otherwise would discourage the collaboration and information sharing between organizations that facilitate the research and development necessary to invent this and countless other life-saving inventions.

However, in Helsinn Healthcare S.A. v. Teva Pharmaceuticals USA, Inc., No. 2016-1284, -1787, 2017 WL 1541518,___ F.3d ___ (Fed. Cir. May 1, 2017), a three judge panel of the Federal Circuit held that an invention is made available to the public when there is a publicly disclosed commercial offer or contract to sell a product embodying the invention, regardless of whether members of the public were aware that the product sold actually embodies the claimed invention. Slip Op. at *23-*25.

E. Public Policy Favors A Public Availability Requirement

To further promote predictability, simplicity and transparency, as well as consistency in the application of novelty requirements, Congress revised Section 102(a)(1) to introduce the new statutory requirement of “public availability” for the sale of an invention before the application filing date. The change brought the on-sale doctrine into conformity with the public nature of the other prior art items listed in the statute, including patents, printed publications, and public use.

The United States Constitution gives Congress the power to grant patents “to promote the progress of science and useful arts.” Art. I, Section 8. Many of the world’s most important inventions, including many lifesaving medications, can only be developed through partnerships between scientists employed by different organizations (e.g., hospitals, contract research organizations, etc.). The forfeiture doctrine discouraged inventors and their employers from entering the agreements that allow these partnerships to form, and scientific collaborations to

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4 Addressing the issue of what constitutes a sale, in The Medicines Co. v. Hospira, Inc., 827 F.3d 1363 (Fed. Cir. 2016) (en banc), the Federal Circuit sitting en banc unanimously held that merely hiring a contract supplier to manufacture a patent product for the inventor does not constitute a “commercial sale.” In that case, The Medicines Company lacked in-house manufacturing capacity and had hired Ben Venue to prepare a stock pile of its patented anticoagulant products using the claimed method, while its supplier was not authorized to sell the manufactured product to others. Id. at 1373-74. The Federal Circuit held that to be “on sale” the transaction must be one in which the product is “commercially marketed.” Id. It explained that this preparation of the patented product was not a sale because: “(1) only manufacturing services were sold to the inventor—the invention was not; (2) the inventor maintained control of the invention, as shown by the retention of title to the embodiments and the absence of any authorization to Ben Venue to sell the product to others; and (3) ‘stockpiling,’ standing alone, does not trigger the on-sale bar.” Id.
take place. Revised Section 102(a)(1)’s public accessibility requirement reduces the risk of forfeiture, and would advance the public policy expressly set for in the Constitution.

The AIA provides ample incentive for inventors to enter the patent system promptly that was not present under the Pre-AIA first-to-invent system. Under the AIA’s first-to-file system, an inventor who sells his invention in secret would risk that another inventor could secure patent rights and subsequently remove his product from the market. Finally, one of the AIA’s main purposes was to harmonize the U.S. patent system with international practice. The major foreign jurisdictions do not disqualify inventions from patenting because of prior secret offers of sale or uses, presumably because they present little risk under first-inventor-to-file systems. Accordingly, public policy favors affirming the public availability requirement.

F. Clarity Is Needed to Enable Attorneys and Others to Comply with Their Duties of Candor and Professional Responsibility

Patent applicants, their attorneys, and others involved in the preparation and filing of patent applications owe a duty of candor and good faith to the PTO. They are obligated to disclose “all information known to that individual to be material to patentability” of the claims in patent applications filed in the PTO. 37 CFR § 1.56 “Duty to disclose information material to patentability.” This duty includes a requirement that these individuals provide to the PTO any information that would render a patent invalid under the proper statutory interpretation of the on sale bar. 37 CFR § 1.56(b)(1), see also Paragon Podiatry Lab., Inc. v. KLM Labs., Inc., 984 F.2d 1182, 1193 (Fed. Cir. 1993) (attorney’s knowing failure to disclose sales of the patented device to the PTO rendered the patent unenforceable); Brasseler, U.S.A. I, L.P. v. Stryker Sales Corp., 267 F.3d 1370, 1381 (Fed. Cir. 2001) (awarding attorneys fees after the patent was held unenforceable because the patent attorneys and their clients had committed misconduct before the PTO for failing to disclose the existence of a sale of the patented product). Until the proper interpretation of the Helsinn on sale bar is clarified, or finally decided, applicants cannot determine what sales information is within the scope of their duty to disclose. This case presents a dilemma for those with disclosure duties to the PTO because they must choose between compliance with differing and inconsistent duties depending on two different interpretations, or attempt to forecast the interpretation of future on sale bar cases.

Finally, the uncertainty of the proper interpretation of the on sale bar under Helsinn creates ethical and professional responsibility issues for attorneys who assist clients in filing and prosecuting patents before the PTO. Such attorneys are individually under the same duty of disclosure to the PTO as patent applicants and inventors. 37 CFR 1.56(c). The difference is that lawyers advising clients in filing and prosecuting patent applications put themselves at risk to possible ethical or disciplinary repercussions depending on how they advise clients based on their forecast of case law developments regarding the future interpretation of the on sale bar after the recent decision in Helsinn on May 1, 2017.
For these reasons, the Section of Intellectual Property Law believes its recommendation is consistent with the law and represents sound public policy, and therefore, urges its adoption by the ABA House of Delegates.

Respectfully submitted,

Donna P. Suchy, Chair
Section of Intellectual Property Law
August 2017
1. **Summary of Resolution**

The Resolution calls for the Association to adopt policy in support of a clarification of the patent laws and to support an interpretation of those laws such that a sale or an offer to sell a product or service embodying an invention must have been “available to the public” and made the invention known to the public to invalidate claims directed to that invention.

2. **Approval by Submitting Entity**

The Intellectual Property Law Section Council approved the resolution on February 4, 2017.

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

No.

4. **What existing Association policies are relevant to this Resolution and 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.**

Not applicable at present, but a future legislative solution may be necessary.

7. **Plans for implementation of the policy, if adopted by the House of Delegates**

The policy would support submission of an amicus curiae brief on behalf of the ABA relating to a petition for writ of certiorari or on the merits before the U.S. Supreme Court or in the Court of Appeals for the Federal Circuit. That opportunity may be presented in the case of *Helsinn Healthcare S.A. v. Teva Pharmaceuticals USA, Inc.*, or another case presenting the same or similar issues regarding the scope of “on sale” prior art. This
policy also would support submission of comments to Congress in the event a legislative solution is proposed.

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

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

9. **Disclosure of Interest**

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

10. **Referrals**

    This recommendation will be distributed to each of the Sections, Divisions, Forums, and Standing Committees of the Association in the version accepted and numbered for the agenda by the Rules and Calendar Committee. An earlier version was shared with several sections.

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

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution calls for the Association to adopt policy in support of a clarification of the patent laws and to support an interpretation of those laws such that a sale or an offer to sell a product or service embodying an invention must have made the invention “available to the public” to invalidate claims of a patent directed to that invention.

2. Summary of the Issue that the Resolution Addresses

Prior to the enactment of the America Invents Act (AIA) in 2011, an inventor’s attempts to sell a product or service more than a year before the inventor filed a patent application would prevent the inventor from obtaining a patent, even if the inventor’s efforts to sell the product were made in secret and even if the sale did not make the invention known to others. When Congress enacted the AIA, it changed the U.S. patent system from one that based priority on which inventor was the first to invent, to one that based priority on which inventor filed first. Because the new priority system encouraged inventors to file quickly, Congress appears to have eliminated reliance on disclosures or activities not fully known to the public to invalidate claims of a patent or application—only public sales or offers to sell could be used to invalidate claims directed to an invention. But there is currently litigation over whether, in amending 35 U.S.C. § 102(a)(1) to include the language “otherwise available to the public,” Congress intended to limit reliance on sales and offers to sell to only those that were fully public or whether it intended to maintain the status quo.

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

The policy would provide authority for the ABA to express views to any appropriate and relevant policy-making body (judicial, legislative, or executive) in support of an interpretation of the patent laws that an invention is “on sale” under 35 U.S.C. § 102(a)(1) only when such sale or offer for sale was directed to an invention which was available to the public.

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

There are two views on interpretation of § 102(a)(1) with the “or otherwise available to the public” language added by Congress: the view expressed in the resolution and the approach taken by a three judge panel of the Federal Circuit, which held that an invention is made available to the public when there is a publicly disclosed commercial offer or contract to sell a product embodying the invention, regardless of whether members of the public were aware that the product sold actually embodies the claimed invention.
RESOLVED, That the American Bar Association supports, in a post issuance proceeding at the U.S. Patent and Trademark Office in which a previously issued patent is challenged by a petitioner, applying the statutory requirement that the petitioner asserting the unpatentability of a patent “shall have the burden of proving unpatentability by a preponderance of the evidence” on both the challenged claims and any amendment of the claims proposed by the patent owner during the proceeding.
REPORT

This report concerns the allocation of the burden of persuasion between a patent owner and a third party petitioner in proving the unpatentability of patent claims in a post-issuance proceeding pursued by the petitioner before the Patent Trial and Appeal Board (PTAB) of the U.S. Patent Trademark Office (USPTO). In establishing post-issuance proceedings when it adopted the so-called America Invents Act (the “AIA”) in 2011, Congress imposed on third party petitioners who challenge patents “the burden of proving a proposition of unpatentability by a preponderance of the evidence.” 35 U.S.C. §§ 316(e) and 326(e). The question addressed in this report is whether the statute should be interpreted to impose the same allocation of the burden of persuasion with respect to patent claims found in the original patent and patent claims added by amendment during the course of the post-issuance proceedings. Uncertainty regarding the answer affects both petitioners and owners. This Resolution asks the ABA House of Delegates to approve policy that follows the plain language of the statute (which includes no limitation to original claims and specifies no distinction between original and amended claims) and therefore urges the courts to interpret the statute to apply the same statutory burden of persuasion in post-issuance proceedings to original and amended claims.

The AIA brought about a number of significant changes in U.S. patent law. One of those changes was the creation of post-issuance proceedings in which a third party may challenge the validity of one or more claims of an issued patent in an inter partes trial proceeding before the PTAB. The AIA created three types of post-issuance proceedings: inter partes review (IPR), post-grant review (PGR) and covered business method (CBM) review (collectively referred to as “post-issuance proceedings”). 35 U.S.C. §§ 311(a) and 321(a); AIA § 18(a).

Congress created the post-issuance proceedings as a relatively expedient, cost-effective option for parties seeking to contest the validity of issued patents. In establishing these proceedings, Congress implicitly acknowledged as it must that patents, once issued by the USPTO, confer property rights on a patent owner that should not be negated without applying an appropriate degree of due process. Post-issuance proceedings have limited discovery in comparison to district court litigation, and the PTAB is required to issue a final written decision within one year of institution of trial. 35 U.S.C. §§ 316(a)(11) and 326(a)(11). The PTAB institutes trial if it determines that the petitioner (third party challenger) has met a threshold burden of demonstrating a reasonable likelihood that at least one of the issued claims in a patent is unpatentable. 35 U.S.C. §§ 314(a) and 324(a).

If the PTAB institutes trial, the patent owner has a statutory right to pursue a motion to amend, in which the patent owner can propose substantive amendments to the issued claims of the patent to overcome the grounds of unpatentability asserted by the petitioner. 35 U.S.C. §§ 316(d)(1) and 326(d)(2).

In post-issuance proceedings, petitioners “have the burden of proving a proposition of unpatentability by a preponderance of the evidence.” 35 U.S.C. §§ 316(e) and 326(e). However, the PTAB has not applied the above statutory provision to amended or substitute claims even though that statutory provision draws no distinction between original and amended claims. Instead, the PTAB has placed the ultimate burden of persuasion on patent owners to prove that
proposed amended or substitute claims submitted with a motion to amend are not unpatentable in post-issuance proceedings.

This Resolution asks the ABA House of Delegates to approve policy that urges the courts to reject the PTAB’s reading of the statute and instead clarify the statutory burden of persuasion in post-issuance proceedings without drawing a distinction between original and amended claims because the statute itself draws no such distinction. This Resolution supports the allocation of the burden of persuasion on petitioners who challenge patents to prove unpatentability of both the challenged original claims in the issued patent and any proposed amended or substitute claims presented by the patent owner, consistent with the statutory requirements of 35 U.S.C. §§ 316(e) and 326(e).

A. The Federal Circuit Grants En Banc Rehearing to Address Interpretation of the Statute

On August 12, 2016, the Federal Circuit granted Appellant’s petition for en banc rehearing in In re Aqua Products, Inc. 833 F.3d 1335 (2016), of the PTAB’s denial of Appellant’s motion to amend during an IPR proceeding. The Federal Circuit requested briefing on the following questions:

(a) When the patent owner moves to amend its claims under 35 U.S.C. § 316(d), may the PTO require the patent owner to bear the burden of persuasion, or a burden of production, regarding patentability of the amended claims as a condition of allowing them? Which burdens are permitted under 35 U.S.C. § 316(e)?

(b) When the petitioner does not challenge the patentability of a proposed amended claim, or the Board thinks the challenge is inadequate, may the Board sua sponte raise patentability challenges to such a claim? If so, where would the burden of persuasion, or a burden of production, lie?

After briefing by the parties, the USPTO and amici, the Federal Circuit conducted an oral hearing on December 9, 2016. An en banc rehearing decision is expected by the summer of 2017. If a petition for certiorari is filed at the U.S. Supreme Court by either party in Aqua Products or another case, this case would provide an opportunity for ABA to urge the Court to provide certainty and clarify the appropriate burden of persuasion in the case of amended or substitute claims.

B. Statutory Framework for Motions to Amend

During a post-issuance proceeding (IPR, PGR or CBM proceedings), a patent owner may file a motion to amend one or more of the claims challenged in the proceeding. See 35 U.S.C. §§ 316(d)(1) and 326(d)(1). Congress specified only three limitations on motions to amend. First, a patent owner may only file one motion to amend as a matter of right. Id. Second, the patent owner may only propose a reasonable number of substitute claims for each challenged claim. 35 U.S.C. §§ 316(d)(1)(B) and 326(d)(1)(B). Third, the patent owner’s proposed substitute claims
“may not enlarge the scope of the claims of the patent or introduce new matter.” 35 U.S.C. §§ 316(d)(3) and 326(d)(3). Thus, Congress intended patent owners to have a meaningful opportunity to amend their claims during IPR, CBM or PGR proceedings.

Congress also specified that the petitioner in an IPR, CBM or PGR proceeding “shall have the burden of proving a proposition of unpatentability by a preponderance of the evidence.” 35 U.S.C. §§ 316(e) and 326(e). However, contrary to the plain language of 35 U.S.C. §§ 316(e) and 326(e), which on their face do not differentiate or make an exception for amended or substitute claims, the USPTO and the PTAB require patent owners to bear the burden of persuasion to prove patentability of proposed substitute claims presented with a motion to amend in post-issuance proceedings. Rather than accepting the plain language, this alternative interpretation requires an assumption that “§ 316(a)(9)’s requirement that the patent owner has some obligation to provide “information in support of any amendment,” indicates that the patent owner carries an affirmative duty to justify why newly drafted claims—which, unlike the issued claims, had never been evaluated by the PTO—should be entered into the proceeding.” Nike, Inc. v. Adidas AG, 812 F.3d 1326, 1333–34 (Fed. Cir. 2016). So that “[t]he evidentiary standard of § 316(e), when read together with § 316(a)(9), therefore does not necessarily apply to claims that were not in existence at the time a petition is filed, such as newly offered substitute claims proposed by a patent owner in a motion to amend filed as part of an already-instituted IPR proceeding.” Id.

The resolution favors a more straightforward interpretation based on the plain meaning of the express provisions §§ 316(e) and 326(e): “the petitioner shall have the burden of proving a proposition of unpatentability by a preponderance of the evidence.” §§ 316(e) and 326(e) do not draw a distinction between the issued claims of a patent or proposed amended or substitute claims submitted with a patent owner’s motion to amend. If Congress had intended to impose different burdens of persuasion for original claims of a patent and amended or substitute claims presented with a motion to amend, Congress could have specified such a requirement. See Bates v. United States, 522 U.S. 23, 29 (1997) (“[W]e ordinarily resist reading words or elements into a statute that do not appear on its face.”). The fact that §§ 316(e) and 326(e) immediately follow the motion to amend provisions of §§ 316(d) and 326(d) reinforce the interpretation that Congress did not intend to impose separate burdens of persuasion for original claims of a challenged patent and amended or substitute claims presented with a motion to amend.

When Congress intended to draw distinctions between original claims of a challenged patent and amended or substitute claims presented with a motion to amend, Congress made that distinction clear. For example, §§ 316(a)(9) and 326(a)(9) distinctly refer to “a challenged claim” and “substitute claims.” Further, in §§ 316(d)(1)(B) and 326(d)(1)(B), Congress distinctly referred to a “challenged claim” and “substitute claims.” Moreover, in §§ 318(a) and 328(a), Congress distinctly referred to “any patent claim challenged” and “any new claim added under section 316(d) [or 326(d)]]. Thus, when Congress intended to draw a distinction between original claims of a challenged patent and amended or substitute claims presented with a motion to amend, Congress made that distinction explicit. See Rusello v. United States, 464 U.S. 16, 23 (1983) (explaining that where Congress included a phrase in one section of a statute that it omitted in another section of the statute, it should be presumed that Congress acted intentionally in the disparate inclusion or exclusion of phrases in the statute). Since Congress did not draw a
distinction between original claims of a challenged patent or amended or substitute claims presented with a motion to amend when allocating the burden of persuasion on petitioners in §§ 316(e) and 326(e), it is clear that Congress intended for petitioners to have the burden of persuasion in proving a proposition of unpatentability for both original patent claims as well as any proposed claims presented in a motion to amend.

C. Initial Burden of Production of Patent Owners

35 U.S.C. §§ 316(a)(9) and 326(a)(9) provide that the Director of the USPTO shall prescribe regulations “setting forth standards and procedures for allowing the patent owner to move to amend the patent” under 35 U.S.C. §§ 316(d)(1) and 326(d)(1).

In accordance with these provisions, the PTAB reasonably imposes an initial burden of production on the patent owner. In particular, the PTAB’s regulations provide that “[a] motion to amend may be denied where: (i) [t]he amendment does not respond to a ground of unpatentability involved in the trial; or [t]he amendment seeks to enlarge the scope of the claims of the patent or introduce new subject matter.” 37 C.F.R. §§ 42.121(a)(2) and 42.221(a)(2). The PTAB’s regulations also require a motion to amend to “set forth (1) [t]he support in the original disclosure of the patent for each claim that is added or amended; and (2) [t]he support in an earlier-filed disclosure for each claim for which benefit of the filing date of the earlier filed disclosure is sought.” 37 C.F.R. §§ 42.121(b) and 42.221(b).

Consistent with the requirements of 35 U.S.C. §§ 316(a)(9) and 326(a)(9), the above-identified regulations of the PTAB set forth a reasonable initial burden of production on the patent owner to demonstrate (i) that the proposed amendments are supported by the original disclosure of the patent as a whole, (ii) that the proposed amendments overcome the ground of unpatentability asserted by the petitioner, and (iii) that the proposed amendment does not enlarge the scope of the claims of the patent or introduce new subject matter.

However, the PTAB has gone much further by requiring patent owners to prove patentability of proposed substitute claims over (1) the prior art of record (i.e., the prior art relied upon by petitioner) and (2) prior art known to the patent owner. Idle Free Systems, Inc. v. Bergstrom, Inc., IPR2012-00027, Paper 26 (PTAB June 11, 2013) (informative). In MasterImage 3D, Inc. v. RealD Inc., the PTAB clarified the meaning of (1) “the prior art of record” and (2) “prior art known to the patent owner” as used in Idle Free. The PTAB indicated that (1) “the prior art of record” includes a) any material art in the prosecution history of the patent, b) any material art of record in the current proceeding, including art asserted in grounds not instituted by the Board, and c) any material art of record in any other proceeding before the PTO involving the patent. In addition, the Board indicated that (2) “prior art known to the patent owner” includes “no more than the material prior art that Patent Owner makes of record in the current proceeding pursuant to its duty of candor and good faith to the Office under 37 C.F.R. § 42.11, in light of a Motion to Amend.” MasterImage 3D, IPR2015-00040, Paper 42 at 2-3 (PTAB July 15, 2015) (precedential).

The USPTO rules likewise impose the burden of persuasion on patent owners to prove the patentability of proposed substitute claims over “the prior art of record” and “prior art known
to the patent owner” based on its interpretation that the patent owner, as the proponent for a motion to amend, “has the burden of proof to establish that it is entitled to the relief requested.” 37 C.F.R. § 42.20(c). As noted above, Congress required the petitioner in a post-issuance proceeding to “have the burden of proving a proposition of unpatentability by a preponderance of the evidence.” 35 U.S.C. §§ 319(e) and 326(e). Since the statute draws no distinction between original and amended claims, the petitioner’s burden of persuasion to establish unpatentability by a preponderance of the evidence that applies for the original claims of the patent should also apply to any proposed substitute claim(s) submitted with a motion to amend under 35 U.S.C. § 316(d)(1) or § 326(d)(1).

Accordingly, once a patent owner satisfies its initial burden of production in demonstrating that (1) the proposed substitute claims are patentable over the prior art relied upon by the petitioner in the petition (37 C.F.R. §§ 42.121(a)(2)(i) and 42.221(a)(2)(i)), (2) the proposed substitute claims do not “enlarge the scope of the claims of the patent or introduce new subject matter” (37 C.F.R. §§ 42.121(a)(2)(ii) and 42.221(a)(2)(ii)), and (3) the proposed substitute claims are supported by the original disclosure of the patent (37 C.F.R. §§ 42.121(b) and 42.221(b)), the burden of production should then shift to the petitioner, and then the petitioner should bear the ultimate burden of persuasion.

In summary, it is appropriate for the patent owner to have the initial burden of production limited to (a) presenting argument or evidence of patentability of the proposed substitute claim(s) over the prior art relied upon by the petitioner in the petition, including prior art asserted in non-instituted grounds of challenge, (b) presenting argument or evidence that the proposed amendments are supported by the original disclosure of the patent as a whole, (c) presenting argument or evidence that the proposed amendments overcome the ground(s) of unpatentability instituted in the proceeding, and (d) presenting argument or evidence that the proposed amendment does not enlarge the scope of the claims of the patent. But once the patent owner satisfies its initial burden of production, the burden of production then should shift to the petitioner. While the PTAB has recognized this shift in the burden of production, see, e.g., MasterImage 3D, IPR2015-00040, Paper 42 at 3 (“With respect to a motion to amend, once Patent Owner has set forth a prima facie case of patentability of narrower substitute claims over the prior art of record, the burden of production shifts to Petitioner.”), the petitioner should always bear the ultimate burden of persuasion with respect to both the original patent claims and any amended or substitute patent claims.

For these reasons, the Section of Intellectual Property Law believes this resolution is facially consistent with the law as adopted by Congress and represents sound public policy. Accordingly, the Section urges its adoption by the ABA House of Delegates.

Respectfully submitted,

Donna P. Suchy, Chair
Section of Intellectual Property Law
August 2017
1. Summary of Resolution

The Resolution calls for the Association to adopt policy in support of a clarification of the patent laws and to support an interpretation of those laws such that in a post-issuance proceeding at the U.S. Patent and Trademark Office (PTO) in which a previously issued patent is challenged by a third party, the PTO may not, as a condition of accepting new claims, require the patent owner to first demonstrate the patentability of the new claims over the prior art of record.

2. Approval by Submitting Entity

The Intellectual Property Law Section Council approved the resolution on April 4, 2017.

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

No.

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

None.

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

N/A


Not applicable.

7. Plans for implementation of the policy, if adopted by the House of Delegates

The policy would provide the basis for either Association support of legislation to clarify 35 U.S.C. §§ 316(d)(1) and 326(d)(1) or an Association amicus curiae brief relating to a petition for writ of certiorari or on the merits before the U.S. Supreme Court in the case of *In re Aqua Products, Inc.*, 823 F.3d 1369 (Fed. Cir.), reh’g en banc granted, opinion vacated, 833 F.3d 1335 (Fed. Cir. 2016), now pending before the Court of Appeals for
the Federal Circuit which heard the case sitting en banc, or another judicial proceeding presenting the same or similar issues regarding the allocation of the burden of proving the unpatentability of newly proposed patent claims in a proceeding to challenge a patent brought before the PTO.

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

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

9. Disclosure of Interest

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

10. Referrals

This recommendation will be distributed to each of the Sections and Divisions and Standing Committees of the Association in the version accepted and numbered for the agenda by the Rules and Calendar Committee. An earlier version was shared with several sections.

11. Contact Person (prior to meeting)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution calls for the Association to adopt policy in support of a clarification of the patent laws and to support an interpretation of those laws such that in a post-issuance proceeding at the U.S. Patent and Trademark Office (PTO) in which a previously issued patent is challenged by a third party, the PTO may not, as a condition of accepting new claims, require the patent owner to first demonstrate the patentability of the new claims.

2. Summary of the Issue that the Resolution Addresses

When Congress enacted the America Invents Act (AIA), it unequivocally specified that the petitioner, not the patent owner, “shall have the burden of proving a proposition of unpatentability by a preponderance of the evidence.” 35 U.S.C. §§ 316(e) and 326(e). Congress also chose to allow patent owners one opportunity to replace claims in their patent, as a matter of right, subject to three conditions none of which involved shifting the burden of persuasion on the issue of validity onto the patent owner. 35 U.S.C. §§ 316(d) and 326(d). Contrary to the plain language of §§ 316(e) and 326(e), the PTO established rules that require the patent owner to prove the patentability of proposed substitute claims presented with a motion to amend. The resolution is intended to address uncertainty and urge clarification of the appropriate burden of persuasion in the case of amended claims.

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

The policy would provide authority for the ABA to express views to any appropriate and relevant policy-making body (judicial, legislative, or executive) in support of an interpretation of the provisions of the AIA that authorizes patent owners one opportunity to replace claims in their patent, as a matter of right, subject to conditions that do not involve shifting the burden of persuasion on the issue of validity onto the patent owner.

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

The PTO’s view is that 35 U.S.C. §§ 316(a)(9) and 326(a)(9) Congress vests the PTO with the authority to prescribe regulations “setting forth standards and procedures for allowing the patent owner to move to amend the patent” in a post-issuance proceeding before the PTAB and, thereby, expressly authorized the PTO to require that the patent owner prove patentability of any proposed substitute claims presented.
AMERICAN BAR ASSOCIATION

SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
SECTION OF STATE AND LOCAL GOVERNMENT LAW
COMMISSION ON HOMELESSNESS AND POVERTY
COMMISSION ON VETERANS LEGAL SERVICES

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association urges federal, state, local, tribal, and territorial governments to enact legislation prohibiting discrimination in housing on the basis of lawful source of income.
REPORT

The American Bar Association has a long tradition of actively opposing discrimination on the basis of classifications including race, gender, national origin, disability, age, sexual orientation, and gender identity and expression. The Association has adopted policies calling upon local, state, and federal lawmakers to prohibit such discrimination in housing, as well as in public accommodations, credit, education, and public funding and has sought to eliminate such discrimination in all aspects of the legal profession.¹ The ABA’s fundamental position condemning such discrimination is based on its underlying commitment to the ideal of equal opportunity and advancement of human rights.² These two principles united in August 2013, when the ABA adopted policy to urge governments to “promote the human right to adequate housing for all” and to “prevent infringement of that right.”³

A common form of discrimination in housing is the denial of housing based on a housing applicant’s lawful source of income. As a threshold matter, lawful source of income includes income from: 1) a lawful profession, occupation or job; 2) any government or private assistance, grant, loan or rental assistance program, including low-income housing assistance certificates and vouchers issued under the United States Housing Act of 1937; 3) a gift, an inheritance, a pension, an annuity, alimony, child support, or other consideration or benefit; or 4) the sale or pledge of property or an interest in property. Lawful source of income does not prevent a property owner from determining, in a commercially reasonable and non-discriminatory manner, the ability of a housing applicant to afford to purchase or rent the property.

Every year, families are rejected from housing of their choice because their income, albeit lawful and sufficient in amount, is not accepted by a property owner. Often the denial of housing will serve as a pretext for a prohibited form of discrimination. For example, a property owner who does not want to rent to elderly persons will simply deny a housing application claiming that retirement benefits are not a sufficient source of income. A property owner who does not wish to rent to persons with disabilities will tell an applicant on Supplemental Security Income (SSI) that government benefits are not an acceptable source of income.

The most common form of source of income discrimination is the denial of housing to families who rely on government-funded rental assistance, such as the federally-funded Housing Choice Voucher Program.

¹ See, e.g., resolutions adopted 8/65 (addressing race, color, creed, national origin); 8/78 (race); 8/72, 2/74, 2/78, 8/74, 8/75, 8/80, 8/84 (gender); 8/86 (race and gender); 2/72 (sex, religion, race, national origin); 8/77 (“handicap”); 8/87 (condemning hate crimes related to race, religion, sexual orientation, or minority status); 8/89 (urging prohibition of sexual orientation discrimination in employment, housing and public accommodation); 9/91 (urging study and elimination of judicial bias based on race, ethnicity, gender, age, sexual orientation and disability); 2/92 (opposing penalization of schools that prohibit on-campus recruiting by employers discriminating on the basis of sexual orientation); 8/94 (requiring law schools to provide equal educational and employment opportunities regardless of race, color, religion, national origin, sex or sexual orientation); 8/06 (addressing gender identity and expression).
³ Resolution adopted 8/2013.
The Housing Choice Voucher Program (HCVP), also known as “Section 8,” is the largest subsidized housing program in the United States. The HCVP provides participating low-income families with a housing subsidy that covers a percentage of private market housing costs. The HCVP serves elderly persons, persons with disabilities, veterans, families and other vulnerable populations through eight population-specific sub-programs and is administered locally by Public Housing Agencies (PHA). In 2015, the Program served approximately 2.2 million families comprised of 5 million people.

Low-income households wait years to receive HCVP vouchers, but not every voucher household succeeds in finding a housing unit. Those who receive vouchers typically must find a housing unit and a landlord willing to accept the voucher within two months. This search can prove to be prohibitive for many households.

Discrimination against Voucher Holders

A 2001 national study on voucher usage found that households had less than a 50% chance to use their vouchers in some jurisdictions. Furthermore, despite the HCVP’s stated goal to enable low-income families to relocate to communities of lower poverty or minority concentration, a recent study of voucher holders found that 41% are more likely to live in more impoverished and more racially segregated neighborhoods than non-voucher renters. This segregation of voucher holders restraints positive health outcomes for low-income women, educational progress for children, and

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5 Regulations governing the Housing Choice Voucher Program at found at 24 C.F.R. Part 982.
6 HCVs for veterans are known as HUD-VASH (Veterans Affairs Supportive Housing). The HUD-VASH program has provided vouchers and supportive services to 79,000 veterans since 2008 and is the primary reason that the United States has reduced veteran homelessness to just over 47,000 veterans, a 35% decline since 2009. See National Alliance to End Homelessness, Veterans – Overview, available at http://www.endhomelessness.org/pages/veterans_overview (last visited Apr. 10, 2017).
12 Supra Note 10, at C-6.
15 Jens Ludwig, Ph.D, et al., Neighborhoods, Obesity, and Diabetes – A Randomized Social Experiment, The New England Journal of Medicine (Oct. 20, 2011) (finding that female heads of voucher households able to relocate to lower poverty communities reduced their risk for extreme obesity by 19% and reduced their risk of diabetes by 21%).
employment achievements that come from relocation to lower poverty and racially segregated communities.\textsuperscript{16}

A primary cause of this segregation is landlord discrimination against voucher holders. A 2002 Chicago study found that voucher holders were denied access to 70\% of the rental housing in the City because of landlord refusal or equivocation to accept households with vouchers.\textsuperscript{17} A recent HCVP participant summarized her experience as follows, “They [the owners] had the stigma about everybody that’s on Section 8 are nasty, the children tear up the house, that type of thing. So I ran into a lot of issues with that.”\textsuperscript{18} For veterans utilizing the Veterans Affairs Supportive Housing (VASH) vouchers, a sub-set of HCVP vouchers, the U.S. Department of Housing and Urban Development reports that landlord unwillingness to accept vouchers is a “primary challenge” in the administration of the program.\textsuperscript{19} In 2017, a veteran of the U.S. Coast Guard testified before the Maryland General Assembly about difficulties using her VASH voucher because of landlord discrimination. “I was only able to use my voucher after a housing specialist from the VA told me about properties in [a particular area] that take Section 8. Let me be clear, this is not where I want to live. But . . . I was at the point where my voucher was about to expire. I am a U.S. veteran – I signed on the line to protect my fellow citizens and I did so honorably. I have no Criminal Record. Yet . . . the same landlords that wanted me to sacrifice my life to protect them won’t even let me live in their buildings.”\textsuperscript{20}

Source of Income Non-discrimination Laws

To address discrimination against voucher holders and other persons with lawful source of income, state and local governments have enacted laws prohibiting discrimination based on lawful source of income. Currently, 12 states and the District of Columbia, including Utah, Oklahoma, and nearly 40 cities and counties including New York City, Chicago, Philadelphia, Boston, and Seattle, prohibit discrimination based on source of income.\textsuperscript{21}

\begin{flushleft}
\textsuperscript{17} Lawyers’ Committee for Better Housing, Locked Out: Barriers to Choice for Housing Voucher Holders, 2002 at 11, available at \url{http://lcbh.org/sites/default/files/resources/2002-lcbh-housing-voucher-barriers-report.pdf}.
\textsuperscript{20} Testimony of Jill Williams before Maryland House Environment and Transportation Committee, Feb. 7, 2017.
\end{flushleft}
Laws prohibiting discrimination based on source of income have increased the ability of voucher holders to use vouchers and decreased concentrations of voucher holders. Indeed, source of income laws increase the number of voucher holders moving from high to low-poverty areas.

**Laws Prohibiting Housing Discrimination are supported by International Human Rights Principles**

The international community has long recognized the United States’ failure to adequately fight against tenant discrimination. The U.S. has also already ratified the International Covenant on Civil and Political Rights and the International Covenant on the Elimination of All Forms of Racial Discrimination (both with endorsement from the ABA), both of which recognize the right to be free from discrimination, including in housing.

In 2006, the UN Human Rights Committee expressed concern about the disparate racial impact of homelessness in the U.S. and called for “adequate and adequately implemented policies, to ensure the cessation of this form of racial discrimination.” In 2008, the UN Committee on the Elimination of Racial Discrimination again recognized racial disparities in housing and ongoing segregation in the U.S.

**Conclusion**

This policy will reaffirm the ABA’s commitment to ensuring that decisions about housing are made on the basis of bona fide qualification rather than stereotypes or prejudices. By adopting this Resolution, the ABA can assist the work of housing advocates, lawmakers, and litigators that have tirelessly worked to end the cycle of poverty and right the long effects of racial and economic housing segregation in the United States.

Respectfully submitted,

Kirke Kickingbird
Chair, Section of Civil Rights and Social Justice
August 2017

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22 Supra Note 10 at 3-17 (“enrollees in programs that are in jurisdictions with laws that bar discrimination based on source of income (with or without Section 8) had a statistically significantly higher probability of success of over 12 percentage points”).

23 Supra Note 14 at 556.


GENERAL INFORMATION FORM

Submitting Entity: Section of Civil Rights and Social Justice

Submitted By: Kirke Kickingbird, Chair, Section of Civil Rights and Social Justice

1. Summary of Resolution(s). The resolution urges federal, state, local, and territorial governments to enact legislation prohibiting discrimination in housing on the basis of lawful source of income.


The Council of the Section of State and Local Government Law approved co-sponsorship of the Resolution during its Spring Meeting on Sunday, April 30, 2017.

The Commission on Veterans Legal Services approved co-sponsorship of the Resolution on May 30, 2017.

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 American Bar Association has a long tradition of actively opposing discrimination on the basis of classifications including race, gender, national origin, disability, age, sexual orientation, and gender identity and expression. The Association has adopted policies calling upon local, state, and federal lawmakers to prohibit such discrimination in housing, as well as in public accommodations, credit, education, and public funding and has sought to eliminate such discrimination in all aspects of the legal profession. The ABA’s fundamental position condemning such discrimination is based on its underlying commitment to the ideal of equal opportunity and advancement of human rights. These two principles united in August 2013, when the ABA adopted policy to urge governments to “promote the human right to adequate housing for all” and to “prevent infringement of that right.”

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) Currently, 12 states and the District of Columbia, including Utah, Oklahoma, and nearly 40 cities and counties including New York City, Chicago, Philadelphia, Boston, and Seattle, prohibit discrimination based on lawful source of income. This Resolution will allow the ABA to encourage other jurisdictions to adopt similar laws.
7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** We will work with relevant stakeholders within and outside of the American Bar Association and the Governmental Affairs Office to implement the policy.

8. **Cost to the Association.** (Both direct and indirect costs) Adoption of this proposed resolution would result in only minor indirect costs associated with Section staff time devoted to the policy subject matter as part of the staff members’ overall substantive responsibilities.

9. **Disclosure of Interest.** (If applicable) There are no known conflicts of interest.

10. **Referrals.** The Report with Recommendation will be referred to the following entities in the month of June:

    Section of Administrative Law and Regulatory Practice
    Criminal Justice Section
    General Practice, Solo and Small Firm Section
    Section of Business Law
    Section of Family Law
    Section of Real Property, Trust, and Estate Law
    Section of International Law
    Section of Labor and Employment Law
    Section of Litigation
    Section of State and Local Government Law
    Section of Taxation
    Judicial Division
    Forum on Affordable Housing
    Law Student Division
    Senior Lawyers Division
    Young Lawyers Division
    Center for Racial and Ethnic Diversity
    Commission on Law and Aging
    Commission on Homelessness and Poverty
    Commission on Mental and Physical Disability Law
    Commission on Racial and Ethnic Diversity in the Profession
    Council on Racial and Ethnic Justice
    Commission on Disability Rights
    Commission on Youth at Risk
    Commission on Women in the Profession
    Commission on Domestic and Sexual Violence
    Hispanic National Bar Association
    National Asian Pacific American Bar Association
    National Association of Women Judges
    National Association of Women Lawyers
    National Bar Association Inc.
    National Conference of Women’s Bar Associations
    National Lesbian and Gay Law Association (National LGBT Bar Association)
    Veterans Commission
    National Native American Bar Association
11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution urges federal, state, local, and territorial governments to enact legislation prohibiting discrimination in housing on the basis of lawful source of income.

2. Summary of the Issue that the Resolution Addresses

A common form of discrimination in housing is the denial of housing based on a housing applicant’s lawful source of income. As a threshold matter, lawful source of income includes income from: 1) a lawful profession, occupation or job; 2) any government or private assistance, grant, loan or rental assistance program, including low-income housing assistance certificates and vouchers issued under the United States Housing Act of 1937; 3) a gift, an inheritance, a pension, an annuity, alimony, child support, or other consideration or benefit; or 4) the sale or pledge of property or an interest in property. Lawful source of income does not prevent a property owner from determining, in a commercially reasonable and non-discriminatory manner, the ability of a housing applicant to afford to purchase or rent the property.

Every year, families are rejected from housing of their choice because their income, albeit lawful and sufficient in amount, is not accepted by a property owner. Often the denial of housing will serve as a pretext for a prohibited form of discrimination. For example, a property owner who does not want to rent to elderly persons will simply deny a housing application claiming that retirement benefits are not a sufficient source of income. A property owner who does not wish to rent to persons with disabilities will tell an applicant on Supplemental Security Income (SSI) that government benefits are not an acceptable source of income.

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

This policy will reaffirm the ABA’s commitment to ensuring that decisions about housing are made on the basis of bona fide qualification rather than stereotypes or prejudices. By adopting this Resolution, the ABA can assist the work of housing advocates, lawmakers and litigators that have tirelessly worked to end the cycle of poverty and right the long effects of racial and economic housing segregation in the United States.

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.
RESOLVED, That the American Bar Association urges the Administration and the Congress to support review of the processes by which military records are corrected, discharge status petitions are considered, and the character of a veteran’s discharge reviewed, in order to enhance the accessibility, availability, and timeliness of such determinations, including through the recommendations set forth below;

FURTHER RESOLVED, That the American Bar Association urges the U.S. Department of Defense to examine how post-traumatic stress (PTS), traumatic brain injury (TBI), and military sexual trauma (MST) correlate to the specific types of misconduct resulting in less-than-honorable discharges;

FURTHER RESOLVED, That the American Bar Association urges the U.S. Department of Defense to create policies for discharge upgrade petition review that consider: (1) clear standards for establishing proof of a nexus between PTS, TBI, and MST and the resulting discharge status; (2) implementing an evidentiary rule that the initial burden of production by a veteran as to nexus may be satisfied where the veteran is diagnosed with PTS, TBI, or MST, provided that mitigating factors such as distinguished service in the field or aggravating factors such as particularly egregious conduct are considered; and (3) authorizing flexible application of standards in light of a nexus between the misconduct and the medical condition(s);

FURTHER RESOLVED, That the American Bar Association urges the U.S. Department of Defense to establish panels within each of the military services’ boards for correction of military records exclusively to specialize in expeditiously adjudicating discharge upgrade petitions involving PTS, TBI, or MST, comprised of members with appropriate medical expertise to recognize the potential nexus between the misconduct and these conditions, and to provide counsel to assist petitioners in the drafting and presentation of their cases.

FURTHER RESOLVED, That the American Bar Association urges the Office of the President and the U.S. Department of Veterans Affairs to explore whether certain executive powers such as clemency may be exercised consistent with existing discharge
upgrade procedures in order to expedite such procedures for certain veterans utilizing
standards such as categorical eligibility.

FURTHER RESOLVED, That the American Bar Association urges Congress to allocate
new and adequate funding to support the special panels and provision of petitioners’
counsel for the panels and processes described above, as well as identifying new sources
of funding to be administered by the U.S. Department of Veterans Affairs, Legal Services
Corporation, and other relevant entities, to support civil legal aid and pro bono
organizations in the delivery of free legal services to advise and assist petitioners,
particularly those whose cases involve PTS, TBI, MST, and other mental health issues.

FURTHER RESOLVED, That the American Bar Association encourages the U.S.
Departments of Defense and Veterans Affairs, state departments of veterans affairs,
veteran service organizations, and all other stakeholders to undertake programs to
identify veterans who may be eligible for discharge upgrades, notify those veterans and
their caregivers of such opportunities, and to educate them about upgrade availability, the
processes to petition for upgrade, and supportive resources to assist with obtaining such
upgrades and the steps and stages involved.
Since World War II, the wide range of benefits available to our nation’s veterans as provided by the federal government have derived from the Servicemen’s Readjustment Act, otherwise known as the G.I. Bill of Rights. These benefits include medical services, vocational training, disability compensation, rehabilitation, housing, and education benefits. When enacting this statute, Congress gave the U.S. Department of Veterans Affairs (VA) responsibility for determining eligibility for these benefits based on the discharge status of the veteran. When implementing these standards by regulation, the result has been that the VA has rendered a significant proportion of veterans ineligible for benefits due to discharge status. While in many of these cases the ineligibility determination by the VA is consistent with Congress’s intent to deny those “undeserving” of benefits due to misconduct in military service, often the underlying characterization of the veteran’s discharge status may have been imposed without consideration of mitigating factors, including the role that mental traumas such as post-traumatic stress (PTS), traumatic brain injury (TBI), and military sexual assault trauma (MST), may have played in the misconduct. This may be especially true for veterans who served and were discharged in past eras when the role of these types of traumas was not well understood.

A just-released study by the U.S. Governmental Accountability Office (GAO) reviewed U.S. Department of Defense (DoD) data on discharges based on misconduct between 2011 and 2015. It found that a staggering 62 percent of those servicemembers discharged for misconduct had been diagnosed within the 2 years prior to separation with PTS, TBI, or “certain other conditions that could be associated with misconduct.” And of this group of 57,141 veterans, 23 percent (13,283 veterans) received “Other Than Honorable” discharges that often rendered them ineligible for VA benefits. Compounding this problem, the GAO found significant deficiencies among the military services in screening for, and recognizing, the role that such injuries play in misconduct discharges.

While the GAO report makes clear that there are many improvements needed in the separation process to address the role of mental health injuries in the underlying misconduct, this proposed ABA Resolution advocates for examination of ways of improving the processes by which veterans may subsequently petition for, and potentially receive, upgrades to their discharge statuses, particularly in situations where service-connected traumas were a causal factor in the misconduct. By improving these processes, more veterans who may be otherwise deserving of access to federal benefits that have been previously denied due to discharge status will have the chance to have their cases reviewed as a matter of fundamental fairness and due process.

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An Overview of Military Discharge Status

There are five basic types of discharge characterizations that determine eligibility for VA benefits:

**Honorable:** To receive an honorable discharge, a servicemember must have received a rating from good to excellent for his or her service. Servicemembers who meet or exceed the required standards of duty performance and personal conduct, and who complete their tours of duty, normally receive honorable discharges. However, one need not complete a term of service to receive an honorable discharge, provided the reason for involuntary discharge is not due to misconduct. For instance, servicemembers rendered physically or psychologically incapable of performing assigned duties normally have their service characterized as honorable, regardless of whether they incurred the condition or disability in the line of duty, provided they otherwise met or exceeded standards. Similarly, servicemembers selected for involuntary discharge due to a Reduction in Force (RIF) typically receive an honorable discharge, assuming their conduct while on active duty met or exceeded standards.

**General (Under Honorable Conditions):** General discharges are given to servicemembers whose performance is satisfactory but is marked by a considerable departure in duty performance and conduct expected of military members. Reasons for such a characterization of service vary, from medical discharges to misconduct, and are utilized by the unit commander as a means to correct unacceptable behavior prior to initiating discharge action (unless the reason is drug abuse, in which case discharge is mandatory). A commander must disclose the reasons for the discharge action in writing to the servicemember, and must explain reasons for recommending the service be characterized as General (Under Honorable Conditions). The servicemember is normally required to sign a statement acknowledging receipt and understanding of the notification of pending discharge memorandum. The person is also advised of the right to seek counsel and present supporting statements.

**Other Than Honorable (OTH):** An OTH is a form of administrative discharge. This type of discharge represents a departure from the conduct and performance expected of all military members. Recipients of OTH discharges are barred from reenlisting into any component of the Armed Forces including the Reserve and National Guard components.

**Bad Conduct:** A bad conduct discharge (BCD) can only be given by a court-martial (either Special or General) as punishment to an enlisted service-member. Bad conduct discharges are often preceded by a period of confinement in a military prison. The discharge itself is not executed until completion of both confinement and the appellate review process.

**Dishonorable:** A dishonorable discharge (DD) can only be handed down to a servicemember by a general court-martial. Dishonorable discharges are handed down for what the military considers the most reprehensible conduct. This type of discharge may be rendered only by conviction at a general court-martial for serious offenses (e.g., desertion, sexual assault, murder, etc.) that call for dishonorable discharge as part of the sentence.
There is another, much narrower type of discharge known as Clemency Discharge. By Presidential Proclamation 4313, President Ford created a procedure for those military personnel who resisted against the Vietnam War to receive a Presidential Pardon and have their punitive discharges changed to a Clemency Discharge. It also provided a path for those who left the country to return. If the military personnel fulfilled certain requirements of alternative service, they would also receive a Certificate of Completion from the Selective Service System. This type of discharge, and how it may be applied today, is discussed later in this report.

The VA has determined that servicemembers with “Honorable” and “General” discharges are presumptively eligible for benefits, though a general discharge status may result in a narrower range of benefits available. Conversely, those with “Bad Conduct” and “Dishonorable” discharge characterizations are presumptively ineligible for any VA benefits.

Those with OTH discharges face a more complicated situation. An OTH discharge is presumptively ineligible for VA benefits, but a veteran with an OTH discharge may seek a “Character of Service Determination” (CSD) from the VA. If the veteran has either a service-connected injury or illness, at least two years of active-duty service, or has received at least one Honorable discharge, the veteran will be able to enroll in the VA health care system. Based on this, the VA make a character of service determination to decide if the veteran’s service was “Honorable (for VA purposes),” “Honorable (for medical purposes),” or “Dishonorable” (and therefore ineligible for benefits). These veterans with an OTH discharge who qualify for VA healthcare are then eligible to submit claims for disability compensation pay and participation in educational, volunteer, and vocational rehabilitation programs.

It is important to note that the above eligibility determinations are made by the VA pursuant to regulation, in particular 38 CFR § 3.12. When enacting the G.I. Bill of Rights, Congress expressly rejected imposition of a standard requiring an honorable discharge for benefits eligibility and intended only that a dishonorable discharge status may be a bar to benefits. In short, the VA’s implementation of eligibility standards is considerably more restrictive than what Congress intended.

According to the DoD, out of 207,000 servicemembers discharged in 2014, of which, more than 18,000 were issued less-than-honorable discharges, including 4,143 other-than-honorable discharges, 637 bad conduct discharges, and 157 dishonorable discharges. Since 2000, 352,000 veterans received discharges ranging from general discharge to bad conduct and dishonorable discharge.

In a study conducted by the Veterans Legal Clinic of the Legal Services Center of Harvard Law School, along with Swords to Plowshares and the National Veterans Legal Services Program, a number of findings about the degree to which veterans are excluded from benefits by the VA based on ineligible discharge status (also known as “bad paper” discharges) were made:

4 Jim Salter, Some levels of military discharge can mean no benefits for former servicemembers, U.S. NEWS, Dec. 24, 2015.
The VA excludes 6.5 percent of veterans who served since 2001, compared to 2.8 percent of Vietnam era veterans and 1.7 percent of World War II era veterans.

Over 125,000 veterans who served since 2001 are unable to access basic veteran services, even though the VA has never completed an evaluation of their service.

Only 1 percent of servicemembers discharged in 2011 are barred from VA services due to Congress’ criteria. VA regulations cause the exclusion of an additional 5.5 percent of all servicemembers.

Three out of four veterans with bad paper discharges who served in combat and who have PTS are denied eligibility by the Board of Veterans’ Appeals.

In 2013, VA Regional Offices labeled 90 percent of veterans with bad paper discharges as “Dishonorable”—even though the military chose not to dishonorably discharge them.

VA Regional Offices have vast disparities in how they treat veterans with bad paper discharges. In 2013, the Indianapolis Regional Office denied eligibility to each and every such veteran who applied—a denial rate of 100 percent—while the Boston Regional Office denied eligibility to 69 percent.

The VA’s policies cause enormous and unjustified differences depending on branch of service. Marine Corps veterans are nearly 10 times more likely to be ineligible for VA services than Air Force veterans.\(^5\)

In summary, thousands of veterans whose discharge characterizations below honorable are barred from benefits, even though the conduct leading to the discharge may have arisen from a service-connected mental condition, trauma, or injury. For these veterans, their only ability to have their discharges reviewed with consideration given to contributing exculpatory factors and evidence which may result in an upgrade of discharge status, is through a system administered by the DoD. This ABA resolution focuses on improvements to this system to ensure that veterans who have been excluded from VA benefits, especially those whose offenses may be connected to (PTS), (TBI), or MST, have the best possible opportunity to petition for upgrade of their discharge statuses and thereby receive the VA benefits that, in many cases, are desperately needed.

The Process for Upgrading Discharge Characterization

Congress has recognized that errors in discharge status determinations have long-term repercussions, including the above-noted loss of VA and other benefits. Thus following World War II, Congress established the Military Discharge Review Boards (MDRBs) and the Boards for Correction of Military Records (BCMRs). The intent of both boards is to correct any regulatory errors or inequities found in military personnel records, though their composition, authority, and procedures are different. While these boards annually correct or amend thousands of records, a significant majority of applications are denied for two primary reasons: First, petitions are reviewed subject to a presumption in favor of the initial determination of the military based on “regularity in the conduct of government affairs,” and second, former servicemembers often cannot adequately fully develop their cases and issues for review without

\(^5\) Veterans Legal Clinic et al., UNDERSERVED: HOW THE VA WRONGFULLY EXCLUDES VETERANS WITH BAD PAPER (March 2016).
the assistance of counsel or other competent support, which is not provided to them by the boards.

The following describes the structures and standards under the MDRB and BCMR processes:

Military Discharge Review Boards: Authorized under 10 U.S.C. § 1553, the Secretary of the service department concerned (Army, Navy/Marine Corps, Air Force or Coast Guard) has authority to upgrade characterizations of service and correct narrative reasons for discharges of former servicemembers through the each of the services’ MDRBs. The MDRBs are composed of panels consisting of five senior military officers who review the discharge or dismissal of any former servicemember, not sentenced by a general court-martial, applying within 15 years from the date of discharge, and then recommend to the Secretary relief or denial of the application. The relief that may be granted involves upgrade of: Uncharacterized (Entry Level Separation); General (Under Honorable Conditions); Under Other Than Honorable Conditions; and Bad Conduct discharges issued by special court-martial. Further, the MDRBs may amend all incorrect narrative reasons or change them to current regulatory standards so long as the change represents an enhancement of the applicant’s rights.

Matters not within the review authority of MDRBs are:
- applications of former members discharged for more than fifteen years;
- discharges issued by general court-martial (Bad Conduct or Dishonorable);
- applications to change reenlistment codes, separation program designator codes, the narrative reason for discharge from or to physical disability; or
- requests to recall or reinstate former servicemembers to active duty.

Cases involving any or all of these would be handled by the BCMRs, described below.

Boards of Correction of Military Records: Authorized under 10 U.S.C. § 1552, the Secretary of the service department concerned (Army, Navy/Marine Corps, Air Force or Coast Guard) has authority to review and correct military personnel records of currently serving and former servicemembers through the each of the services’ BCMRs. The BCMRs are composed of panels consisting of three senior civil service personnel who make recommendations to the Secretary for relief or denial of the application. The relief that may be granted involves correction of any error or injustice in the service record of active-duty or discharged members, though subject to the following two requirements: Other administrative remedies, including MDRB review if applicable, must first be exhausted, and the application must be filed within three years of the date of discovery of the record for which relief is sought. That said, while the three year rule is to ensure that all pertinent records will be available for the BCMR’s consideration, the Boards are authorized to waive the rule if doing so will advance the interests of justice.

In summary, a veteran whose discharge status has resulted in ineligibility for VA benefits must, in most cases, petition one or both of these boards for review of the conditions under which the discharge was issued. Given the number of affected veterans who may be eligible to petition for such upgrades, several recommendations are made here to improve this process to ensure the

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6 All special court-martials are reviewed for legal errors by the Military Review Courts. Thus, MDRBs, being administrative review boards, are allowed to consider only clemency issues and post-service conduct when reviewing Bad Conduct discharges.
best possible outcomes for them, particularly those for whom service-connected traumas may be causally linked to the conduct for which the discharge status was determined.

**Review of Discharge Upgrade Petitions Must Include Consideration of the Connection Between Mental Traumas and Misconduct**

The discharge upgrade process can be substantially improved by policies creating flexible and deferential standards with respect to certain mental health traumas for which there may be a nexus with the conduct that resulted in the less-than-honorable discharge characteristic. An example can be found in the changes to the way PTS evidence is handled in the discharge review process. Until 1980, PTS was not recognized as a medical diagnosis, but once this was established, some Vietnam-era and other veterans realized that there was a connection between their undiagnosed PTS symptoms and the misconduct resulting in their bad paper discharge. They subsequently applied for discharge upgrades, but their petitions were rejected on a near-categorical basis. Between 1998 and 2013, for example, the Army’s BCMR reviewed 371 upgrade applications from OTH Vietnam veterans whose petitions were based on a PTS diagnosis, and granted upgrades for only 4.6 percent of them.7

Today there is a much better understanding of how PTS contributes to misconduct that might result in a bad paper discharge. It is likely that tens of thousands of veterans had undiagnosed PTS at the time of their discharge. One major study conducted by the VA estimates that 30.9 percent of Vietnam veterans have had PTS in their lifetimes.8 The growing understanding of the role of PTS in military misconduct has led to a growing criticism of the record correction boards’ near-categorical rejection of applications by Vietnam veterans with undiagnosed PTS. In September 2014, in response to the filing of proposed nationwide class-action lawsuit on behalf of Vietnam veterans with PTS who received an OTH, then-Secretary of Defense Chuck Hagel directed the boards to reform their practices with respect to PTS. In his PTS Upgrade Memo (often referred to as the “Hagel Memo”), he ordered the boards to give “liberal consideration” to PTS-based applications for discharge upgrades. The Hagel Memo also requires military boards to create a comprehensive public messaging campaign to inform veterans of this new opportunity. The directives of the Hagel Memo profoundly changed the way PTS-based petitions have been handled by the boards, and a study conducted one year after the issuance of the Hagel Memo at the direction of the Vietnam Veterans of America and National Veterans Council for Legal Redress found that liberalization of PTS policies has resulted in a number of positive changes, though with areas of improvement still noted. Key findings were:

- The overall grant rate for all veterans applying for PTS-based discharge upgrades at the Army Board for the Correction of Military Records (ABCMR) has risen more than twelve-fold from 3.7 percent in 2013 to 45 percent.
- The grant rate for Vietnam veterans applying for PTS-based discharge upgrades at the ABCMR has increased more than ten-fold from 5.6 percent in 2013 to 59 percent.

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7 Sundiata Sidibe and Francisco Unger, UNFINISHED BUSINESS: CORRECTING “BAD PAPER” FOR VETERANS WITH PTSD (2015), at 3.
Vietnam veterans are the most numerous applicants (67 percent) and have a higher grant rate at the ABCMR (59 percent) than veterans of other conflicts.

The ABCMR granted 67 percent of applications by a veteran with a PTS diagnosis (74/110) and 0 percent of applications by a veteran claiming to suffer PTS but without medical records establishing that diagnosis (0/54).

Total PTS upgrade decisions across the military’s record correction boards have increased from approximately 39 per year to approximately five times that number.

Of upgrades awarded by the ABCMR, 97 percent have been to General Under Honorable Conditions (72/74) and 3 percent have been to Honorable (2/74).9

As the Hagel Memo experience demonstrates, policies that recognize a connection between mental health traumas and conduct resulting in a bad paper discharge can greatly improve the ability for those petitioners to obtain the discharge upgrades they seek. This ABA resolution, encourages the DoD to both further enhance existing policies with respect to PTS to reduce the evidentiary burden of production on petitioners by better defining the nexus between the condition and the conduct, as well as considering mitigating factors where appropriate. This ABA resolution further encourages extension of liberalized policies under the Hagel Memo with respect to PTS to other areas of mental health trauma incurred in service, notably TBI and MST.

**Discharge Upgrade Processes and Policies Must Include Flexible Application of Standards, Particularly in Cases Involving Mental Trauma like PTS, and Mitigating Factors like Distinguished Service**

An alarming number of combat veterans, many highly decorated for valor under fire, have been dismissed with OTH status. For their sake in particular, the OTH process needs to be streamlined, made more efficient and user-friendly, and counsel should be provided for any veteran who has received, for example, a Purple Heart or medal for valor in combat. Precedent for this flows from President Gerald Ford’s decision during his last day in office to award clemency to any OTH veteran who was “wounded in combat or who received decorations for valor in combat in Vietnam…”

At the core of our common veneration of honor is the perception that it is embodied most in a person who voluntarily exposes him or herself to enemy fire to protect the unit. It is this volitional response to conditions that would panic many that we deem worthy of respect and commendation. For example, we were never consider awarding the Silver Star to a robot or a nuclear bomb.

Simple justice and national honor demand that anyone who risked his or her life defending others in battle, whose psyche was wounded by PTS, and whose heart broken by the loss of a beloved brethren to battle deserves a very special examination of whether the “misconduct” leading to the OTH owes its genesis to combat PTS, the more so because its potency is incubated within the warrior culture of denial that is calculated to produce the most lethal and resilient fighting machine on the planet. Support for this principle is apparent from the most elementary examination of PTS and recognition of how it disorders one’s proper brain functioning. A

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9 Sidibe, supra note 6, at 2.
disordered brain leads to disordered behavior. Any finding of misconduct assumes that basic norms of expected volitional behavior apply when categorically the nature of this affliction indicates that assumption is fundamentally flawed.

*Combat PTS is a natural, predictable, and often inevitable wound of war that manifests itself in disoriented, erratic and unpredictable behavior.*

Emerging studies on PTS make clear that it is a natural, predictable, and inevitable by-product of war. Its signature effect is to unnerve one’s psyche which translates into disordering ones behavior. We know that a certain high percentage of our service-members will suffer this affliction in varying degrees of intensity. This is recognized in the U.S. Army’s FM 6-22.5 Combat and Operational Stress Control Manual for Leaders and Soldiers, 18 March 2009, recognizing the causal relationship between combat stress and “misconduct stress behaviors”:

“Misconduct stress behavior is a form of COSR (Combat and Operational Stress Reaction) and most likely to occur in poorly trained, undisciplined units. Even so, highly trained, highly cohesive units, and individuals under extreme combat and operational stress may also engage in misconduct.... Excellent combat Soldiers that have exhibited bravery and acts of heroism may also commit misconduct stress behaviors.”

Consider too the honor culture that is bred in military service. From basic training to deployment, our soldiers are taught to embrace a warrior attitude that is dismissive of one’s wounds so that one can continue charging forward unswervingly in battle. Warriors take pride in not heeding their wounds generally, but when it comes to a psychological condition, they are even more reticent about acknowledging that they may suffer from a destabilizing affliction. Combat PTS derives its most toxic effect from being incubated within a warrior’s culture for fear of shame. Indeed this very culture of being “combat resilient,” reinforced with denial and shame, becomes a catalyst for the progression of PTS.

Diagnosis is half the cure, yet our military culture has ingrained an expectation not to applying any diagnostics to one’s potential fallibility while in battle. In sum, we precondition our warriors to live in denial of the onset of this unnerving affliction, heightening the chances it will become progressively more disordering and disorienting, leading to the erratic behavior the military then deems to be “misconduct.”

Examining these factors yields a fundamental question; namely, if we ask our bravest men and women to risk their all in combat knowing that many will end up with their lives profoundly disoriented by PTS, and if we have conditioned a culture of shame and denial that renders the onset of PTS more toxic, and if the predictable result of this chemistry is disoriented and erratic behavior under the throes of PTS, why then are we not exacting greater collective responsibility for the resulting “misconduct”?

*PTS must be evaluated through the lens of our collective responsibility for the collective values we inculcate and most honor*

Consider the foremost goals of our military. The key to developing an effective fighting machine is to train and acculturate the enlistees to adapt to a mindset that focuses upon collective
responsibility, coordination, responsibility, and execution. As a character in the movie about Vietnam, “Platoon,” reflected, “When the machine breaks down, we break down.”

From basic training to battle, our military machine exhorts our troops to forget personal needs and adapt a willingness to sacrifice all for the sake of the team and country. The concept of honor is the binding force and center of gravity for this allegiance to the collective whole and to the principle that “it is better to sacrifice your life for the sake of your brethren and your country than to survive the war.” The core commitment is that when we go into battle, you will “leave no one behind” and your leadership will not leave you behind.

The end game is to create a military that functions with a collective set of values, conscience, commitment, and capacity to be unwaveringly lethal under fire. Desertion is the ultimate betrayal of this collective conscience.

The concept of “honor” provides the neuroplasticity to this collective conscience. It is our nation’s core foundational principle. Our founders pledged to one another “our lives, our liberty and our sacred honour.” Honor is recognized, celebrated and epitomized in the heroics of the most selfless and courageous actions of those whose exploits in battle are worthy of historic reckoning. We have created medals designed to single out and collectively salute the valor of those who embody this honor in battle by showing no regard for their personal safety and complete devotion to the needs of their battle buddies.

Why then, after we have applauded and awarded medals to heroes for their exploits in battle and their proven self-sacrifice in devotion to protect the collective whole, do we so swiftly disavow any collective responsibility when their conduct deteriorates and they act out erratically under the corrosive effects of combat PTS after years of sacrifice?

Is this not the ultimate form of desertion? Consider the repeated scenario that those working with traumatized veterans confront: You have risked your all countless times to protect your country and your battle buddies; you saved lives and protected others from harm. But now that the wounds of war have eroded your capacity to live with ordinary “order,” we will wash our hands of any collective responsibility. Even though we know that this is a natural consequence of the disordering impact of repeated exposure to the unnerving pressures of combat? Even though the evidence is replete with countless soldiers who historically ended up with their lives disordered, disoriented, disaffected and alienated by the toxic effects of combat PTS? Even though we now know that the fundamental character of this uniquely unnerving affliction is to set one’s life, one’s thought processes, one’s social life and one’s psyche into chaos?

**The Reforms Called for in This Resolution Promote National Security Objectives by Reinforcing Collective Loyalty**

Consider the example below of a highly decorated combat veteran whose combat-related PTS directly contributed to his OTH discharge, which has since affected his life post-service:
“I have scars from my 178 firefights but none stab deeper than my feeling disowned and disgraced in receiving an Other Than Honorable discharge.” — U.S. Army combat veteran, Garrett Lee Ferguson.

Garrett Ferguson served in a combat infantry division of the US Army for four years in both Iraq and Afghanistan. During that time, he underwent 178 gruesome firefights, in which he experienced unimaginably horrific situations. Many of his closest friends and fellow soldiers died by his side and in his arms during combat. On his wrist he carries a bracelet bearing the name of a soldier he was mentoring who was killed on his first day of combat by a sniper while under Garrett’s charge. The boy had just turned 18. He rattles off the name of more than a half dozen of dear friends who fought with him who have since committed suicide. His best friend whom he considered the most “ferocious and effective warrior I’ve ever known” is now a chronic alcoholic in the throes of PTS, isolating himself in a stupor in Columbus, Ohio.

Garrett received multiple medals for valor under fire. Following his 170th firefight, his Sergeant Major informed Garrett he was nominating him for the Silver Star. He kept a blog of his repeated narrow escapes from the “valley of death.” After one particularly hellish firefight in which he expended “more than 3000 rounds,” he was decompressing and had taken medication prescribed by Army doctors to help him cope with the pressures of combat. He overheard a friend complaining to his girlfriend about feeling scared “shitless” and chided his buddy for causing his girlfriend stress and told him to ‘f-ing man up!’ The soldier cold-cocked Garrett, who described his reaction thus: “I lost it and actually blacked out. I discovered I had stabbed him in the shoulder.”

The Military Machine responded mercilessly. Garrett was told he would face a court-martial and potentially twenty-five years in Leavenworth Prison unless he agreed to an OTH discharge. Garrett has now been diagnosed with 100 percent disability for combat-connected PTS, but he does not qualify for the GI Bill despite having put his life on the line in nearly 200 battles. Though he personally saved countless lives, his command felt his life was not worth saving from the stigma, disgrace, and shame that the OTH status inflicts. As he stated, “I have scars from my 178 firefights but none stab deeper than my feeling disowned and disgraced in receiving an Other Than Honorable discharge.”

He reflected "I understand now that I snapped because of PTS, but I often wonder if I wouldn't have snapped if I weren't on all the drugs the doctors put me on to help cope with the pressures of combat...”

He shares that due to his discharge he feels no respect for the government or authority and would never encourage a young person to join. “I would die rather than desert my country in battle. I can’t deal with feeling now how my country has deserted me.”

Like Garrett, many OTH combat veterans leave their service embittered and feeling betrayed. Many confess that they would never have served had they known how their country would treat them after the havoc the war wreaked in their lives. Moreover, they admit that not only would they never encourage a young person to join our military, but to the contrary they would aggressively discourage them and warn against it. The magnitude of this problem is underscored
in a recent study from USC, The State of The American Veteran: “One-third of pre-9/11 veterans and 43 percent of post-9/11 veterans with a non-honorable discharge status report they would never encourage someone to join the military. These veterans also report similar negative perceptions from civilians.”

In pondering the merits of this Resolution, consider the overarching impact upon national security of having tens of thousands of combat veterans disavow their loyalty to their country because of their treatment and warning young people not to follow in their footsteps.

The Military Services Should Establish Panels with Specialized Training in Mental Trauma and Provide Counsel for Petitioners

In discussions with the DoD and the Department of Veterans Affairs, the drafters learned that discharge upgrade petitions in cases involving PTS, TBI, and/or MST are accorded no special substantive or procedural treatment. All petitions are adjudicated by each service’s MDRB or BCMR using the same procedures and the same panels as all other cases. None of the panels that adjudicate these cases is purposefully staffed with members who have special competence in or understanding of the nexus between PTS, TBI, or MST and the associated administrative discharges.

Furthermore, neither the MDRBs nor BCMRs have any statutory duty to assist former servicemembers in correctly developing their cases to ensure that the issues are properly formulated. Complicating matters, the presumption of “regularity of government affairs” is applied in all decisions unless there is clear, substantial, creditable evidence presented to rebut the presumption. Thus it is easy to understand how an unrepresented petitioner, particularly one who may have experienced a mental health trauma, when confronted with a process requiring an understanding of complicated procedure combined with a legal evidentiary standard, faces very long odds in obtaining an upgrade that her or she may otherwise achieve if assisted by counsel.

In discussions with DoD and VA attorneys, the drafters were affirmed in the belief that one of the greatest difficulties veterans face when attempting to upgrade their discharges based on PTS, TBI, or MST is establishing a causal relationship between the petitioner’s trauma and the basis for the OTH discharges, due in most cases as much to the complexity of the MDRB/BCMR process and the absence of legal representation as to a lack of evidence. Logically, petitioners could more easily meet the Boards’ evidentiary standards, and thereby establish the requisite causal nexus, if at least one panel member is a mental health professional and if each petitioner has attorney help.

There is ample precedent for affording military respondents both an attorney and an adjudicative body that understands the nexus between mental health and misconduct. Each military service branch has Medical Evaluation Boards (MEBs) that consider whether a military member should be discharged for service-limiting physical or mental conditions. At MEBs, each respondent’s case is considered by a panel that includes medical professionals. Additionally, each respondent not only has a right to counsel, he or she is assigned a “disability counsel” free of charge.
Because discharge upgrade petitions based on PTS, TBI, and MST involve both behavioral and medical issues, they should be adjudicated in a manner appropriately reflecting their hybrid nature. This means that, while they continue to be considered by the MDRBs and BCMRs, they should be assigned to panels consisting of at least one mental health or medical professional who is familiar with the relationship between these forms of trauma and the kinds of misconduct in which they are often manifested. Additionally, because the evidence necessary to demonstrate this relationship is often difficult to establish, a practice similar to that of MEBs where counsel is available, should also be instituted. These changes to the current MDRB/BCMR process would not only provide greater and, therefore, more appropriate due process, but also timelier processing would be a collateral benefit.

Though the benefits of specialized panels and legal counsel are clear, provision of these will require funding from Congress. Expanding the MDRBs and BCMRs to add new panels will necessitate new funds in order to ensure that the work of existing panels will not be undermined by reallocation of existing funds, which would only shift the adjudicatory burdens from one group of veterans to another. Similarly, unlike with MEBs where funding exists to provide counsel through the various services’ judge advocates general (JAG) offices, the MDRB and BCMR processes fall outside the jurisdiction of the JAG programs. Instead, a number of law firms, pro bono programs, and legal aid offices have begun providing discharge upgrade assistance to veterans in different parts of the country, and these projects have proven very effective. New sources of federal funding administered by the VA, Legal Services Corporation, and/or other appropriate entities, are critically necessary to ensure that those who petition for discharge upgrades, particularly those limited by mental health issues, have claims that are fully heard and receive the fullest extent of due process available.

President’s Pardon Power Should Be Considered as an Alternate Means of Upgrading Certain Types of Discharge Characterizations

Article II, Section 2, Clause 1 of the United States Constitution provides that the President of the United States shall have the power to grant reprieves and pardons for offenses against the United States. That Presidential power has been exercised on at least two occasions to address other than honorable discharges from military service. Perhaps the best known instance in which this power was exercised occurred in the 1970s during the Administration of President Gerald Ford.\(^\text{10}\) President Ford issued an executive order on September 16, 1974 by which veterans who received dishonorable discharges for desertion (absences without leave) could have those discharges upgraded to a clemency discharge upon application to a newly created board (the “Presidential

\(^{10}\) President Ford’s clemency program was designed to begin to heal the substantial divisions that existed in the United States over the Vietnam War. It not only addressed veterans who served in the war in the face of domestic strife and strong anti-war sentiments, but it provided a clemency opportunity for those who evaded the draft by not complying with the Selective Service law. At the time the uniqueness of the Vietnam War experience as contrasted with the experience of the country in fighting previous wars (e.g., World War II) called for a solution that held the promise of reunifying the country.
Clemency Board”) provided they complied with certain criteria including completing a period of alternative service set by the Board. Approximately 19,000 veterans applied for clemency.\textsuperscript{11}

The effect of President Ford’s clemency program was generally viewed as limited because a clemency discharge was not equivalent to an honorable discharge, and importantly it did not guarantee entitlement to VA benefits. Instead, the VA was simply not barred from considering the circumstances of a veteran’s initial less than honorable discharge in evaluating whether the veteran would be eligible for VA benefits. This enabled the VA to look beyond the clemency discharge in deciding whether to grant VA benefits to recipients of such a discharge. As a consequence, on his last day in office on January 19, 1977, President Ford exercised his pardon power for a second time by directing the Presidential Clemency Board to grant honorable discharges to veterans “who were wounded in combat or who received decorations for valor in combat in Vietnam and subsequently received [less than honorable] discharges.”\textsuperscript{12} This additional proclamation was intended to put qualifying veterans in the same position they would have been had they initially received honorable discharges.

Two days later, on January 21, 1977, President Jimmy Carter issued his own proclamation that applied to civilians who violated the Military Selective Service Act during the Vietnam War provided that their violations were non-violent and not subject to other exclusions.\textsuperscript{13} Then, two months later in March of 1977, President Carter ordered the creation of a Special Discharge Review Program (SDRP) by the DoD for the purpose of reforming the discharge upgrade process for Vietnam era veterans.\textsuperscript{14} However, later that year, in reaction to President Carter’s proclamation creating the SDRP, Congress passed legislation that effectively required previously existing review boards to review upgrades granted by the SDRP prior to granting VA benefits. This legislation had the effect of making the availability of benefits for veterans whose upgrades came about through an alternative upgrade process like the SDRP subject to a case-by-case review under existing benefits standards.\textsuperscript{15}

While the prospective application of the 1977 legislation has not been tested because no subsequent use of the pardon power for discharge upgrades on a large scale has occurred, the

\begin{itemize}
\item \textsuperscript{12} Memorandum from Gerald R. Ford, President of the United States, to the Secretary of the Army, Secretary of the Air Force, and Secretary of the Navy (Jan. 19, 1977), http://www.presidency.ucsb.edu/ws/?pid=5576 [hereinafter Ford Memorandum].
\item \textsuperscript{14} PRES. JIMMY CARTER, PROCLAMATION 4483, supra note 31; see also Vietnam War Era Pardon Instructions, U.S. DEPT JUSTICE (last updated Mar. 3, 2016), https://www.justice.gov/pardon/vietnam-war-era-pardon-instructions.
\item \textsuperscript{15} Section 5303(e)(l)(A) limits the availability of benefits for veterans who receive discharge upgrades through the discharge review boards under 10 U.S.C. § 1553 by requiring a case-by-case review for benefits eligibility under “published uniform standards” that are “historically consistent with criteria for determining honorable service.” 38 U.S.C. § 5303(e)(l)(A) (2012).
\end{itemize}
legislation still may not apply to a Presidential pardon that directly provides for discharge upgrades because such a pardon does not involve the use of a review board like the SDRP. However, another provision of the legislation requires a case-by-case review for benefits in the event a veteran is “awarded a general or honorable discharge under revised standards for the review of discharges ... implemented subsequent to April 5, 1977” in the event those revised standards are “not made available to all persons administratively discharged” under other than honorable conditions. Whether this provision would apply to future exercises of the pardon power is not entirely clear and would likely depend on how the pardon power is exercised; for example, whether the President directly issues upgrades, sets up a review board, creates “revised standards,” and the like.

The exercise of the pardon power for the purpose of upgrading discharges by Presidents Ford and Carter has not been disputed, but the scope of veterans benefits that follow is dependent on how that power is exercised. A pardon of the type issued by President Ford on his last day of office that directly upgraded discharges to an honorable discharge for a narrow category of Vietnam era veterans is an example of the use of the pardon power in a way that presumably would provide those veterans receiving such a pardon with VA benefits. However, the exercise of the pardon power in a way that sets up an expedited review board for classes of veterans with less than honorable discharges, or which establishes revised standards for review of discharges (such as revised standards based on PTS, TBI and MST) may be subject to the 1977 legislation.

Accordingly, a coordinated effort by the Office of the President, including the Departments of Defense and Veterans Affairs, and Congress would obviate any legal risk with respect to the use of the pardon power, although the President has considerable authority standing alone to address military discharges. This authority is further bolstered by the President’s authority as the Commander-in-Chief. But, if the pardon power is exercised in conjunction with legislative concurrence, any risks can be eliminated. In addition, concurrence by Congress would more directly result in the authorization of the necessary VA budget for expansion of VA benefits to categories of veterans who previously were discharged from the services with other than honorable discharges (e.g., those afflicted with PTS, TBI, and MST).

The objective of this paragraph of the resolution is not to recommend specific parameters for the use of the pardon power, but instead to recommend consideration of its use in a coordinated administrative and legislative effort to expedite the consideration and resolution of discharge upgrades for veterans otherwise caught up in a system that is overloaded with cases, subject to excessive delay, and which often imposes burden and cost to individual veterans. For many veterans, the current procedures and processes present insurmountable obstacles, and their implementation often exacerbates the distress they experience, particularly if those veterans are suffering with PTS, TBI and MST. That distress is potentially heightened when those veterans had exemplary records of service prior to the conduct that resulted in their discharges.

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16 Section 5303(e)(2)(A) requires a case-by-case review for benefit entitlement of persons discharged with an other than honorable discharge who were “awarded a general or honorable discharge under revised standards for the review of discharges ... as implemented subsequent to April 5, 1977,” where these revised standards were “not made applicable to all persons administratively discharged” under OTH conditions. 38 U.S.C. § 5303(e)(2)(A) (2012) (emphasis added).
Most importantly, an appropriate exercise of the pardon power has the potential of providing necessary care and benefits to at least certain categories of veterans, and to do so on an expedited basis. It also has the secondary benefit of materially improving the handling of discharge upgrades and benefit requests by non-qualifying veterans because a significant reduction in the case overload could occur if a significant number of veterans are eliminated from that caseload through the exercise of the pardon power. Lastly, the appropriate use of the pardon power in upgrading discharges would greatly improve the chances for full integration of veterans who receive those upgrades back into their communities and into the employment market because the stigma of their discharge status would be eliminated or significantly diminished.

In summary, the exercise of the pardon power in a coordinated way with other actions would be quintessentially presidential. It will significantly advance access to justice for those who volunteered to risk their lives, their fortunes and—what's more—their “sacred honor” defending our liberty. It will establish greater administrative efficiencies to ensure our heroes receive the healing, help and support they have earned by shedding their blood, having their psyches wounded and their hearts broken with the unspeakable losses and horrors they experienced in combat. And it will promote a collective consciousness that the wounds of service should be judged deferentially to minimize the chances that those who have never put their lives in harm’s way may view combat veterans dismissively because of their OTH discharge status.

Veterans Who May be Eligible for Discharge Upgrades Need to be Identified and Reached with Information and Resources

Hundreds of thousands of veterans are barred from VA benefits due to discharge characterizations that render them presumptively ineligible—approximately 260,000 from the Vietnam War alone, and a significant percentage of these may be able to establish a claim based on PTS. Although the Hagel Memo set out a requirement that the DoD develop a messaging and outreach campaign, early data show that information about the availability of the discharge upgrade process has not yet been widely received. According to a 2015 Senate Armed Services Committee report, only 201 veterans applied to the boards at that point since issuance of the Hagel Memo. This small number of applicants strongly suggests that more needs to be done to identify veterans with bad paper, inform them of the September 2014 directive, or communicate how they apply for discharge upgrades. The ABA encourages the DoD, its component branches, and the VA to engage in significant, coordinated outreach efforts to identify eligible veterans and provide information about the standards for upgrade as well as supportive resources to help them submit applications to the boards.

Respectfully submitted,

Nanette M. DeRenzi and Dwight L. Smith, Co-chairs
ABA Commission on Veterans Legal Services

Steven J. Lepper, Chair
ABA Standing Committee on Legal Assistance for Military Personnel

August 2017
1. **Summary of Resolution(s).**

   Recommending review and improvement of the processes by which military records are corrected, discharge status petitions are considered, and the character of one’s discharge is reviewed.

2. **Approval by Submitting Entity.** Friday, May 12, 2017 (by both entities)

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 reinforces, and is fully consistent with, a number of existing Association policies related to Access to Justice for low-income and/or military-connected individuals and families, including policy adopted at the 2017 Midyear urging the identification and removal of legal barriers between veterans and their due benefits, services, and treatment.

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) No legislation is pending on the specific, broad principles of the resolution, but congressionally-proposed changes to the Servicemembers Civil Relief Act, Uniformed Services Employment and Re-employment Rights Act, proposals to increase funding for homeless veteran service programs that include legal services, and proposals to expand the Department of Veterans Affairs authority to support direct legal services, etc., are each examples of legislation intended to remove barriers for veterans in accessing their rights and benefits.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** Implementation will be undertaken by ABA Governmental Affairs working with the Commission and Standing Committee, as well as other military- and veteran-focused ABA entities, most notably the Standing Committee on Armed Forces Law, GPSolo Military Law Committee, Coordinating Committee on Veterans Benefits and Services, Commission on Homelessness and Poverty, Standing Committee on Legal Aid and Indigent Defendants, and the Center for Pro Bono.
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 such as those identified as member entities of the Military Lawyers Coordinating Committee and the Coordinating Committee on Veterans Benefits and Services.

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

Recommending review and improvement of the processes by which military records are corrected, discharge status petitions are considered, and the character of one’s discharge is reviewed.

2. Summary of the Issue that the Resolution Addresses

Discharge upgrades are necessary for many veterans to ensure that they receive the full range of benefits to which they should otherwise be entitled. Historically, it was not well understood how post-traumatic stress, traumatic brain injury, and sexual assault trauma could give rise to conduct that would subsequently result in less-than-honorable discharge, which has left a large population of veterans without access to benefits due to discharge status arising from these forms of injury.

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

The proposed policy position makes a number of recommendations about how the discharge upgrade process could be improved in order to ease the burden on petitioners whose post-traumatic stress, traumatic brain injury, and/or sexual assault trauma was connected to conduct that resulted in less-than-honorable discharge. These include better recognition of the connection between the injuries and discharge; establishing rebuttable presumptions based on such connection and consideration of mitigating factors; creating specialized panels that deal specifically with petitions based on these conditions; and exploring alternative means, such as clemency, for the affected veteran population. The policy also calls for funding to create specialized panels and support free legal services for petitioners, as well as improving education and outreach to veterans who may be eligible for discharge upgrades but not aware of the process.

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. The proponents have consulted with the offices of general counsel within the Department of Defense and Department of Veterans Affairs to ensure that the proposed policy does not run counter to programs and policies within those agencies to address discharge upgrade process issues.