<table>
<thead>
<tr>
<th>Report</th>
<th>Sponsor and Subject</th>
<th>Reviewing Entity</th>
<th>Recommended Position</th>
<th>Final Section Position</th>
</tr>
</thead>
<tbody>
<tr>
<td>10A</td>
<td>NEW YORK STATE BAR ASSOCIATION</td>
<td>Diversity and Inclusion Business and Corporate Litigation</td>
<td>Supports</td>
<td>Supports</td>
</tr>
<tr>
<td></td>
<td>Encourages law firms to develop initiatives to provide women lawyers with opportunities to gain trial and courtroom experience.</td>
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<tr>
<td>100</td>
<td>SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR</td>
<td>Business Law Education</td>
<td>Supports</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Concurs in the action of the Council of the Section of Legal Education and Admissions to the Bar in adopting amendments dated February 2018 to Standard 106 (Separate Locations and Branch Campuses) of the ABA Standards and Rules of Procedure for Approval of Law Schools.</td>
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<tr>
<td>101A</td>
<td>SECTION OF INTELLECTUAL PROPERTY LAW SECTION OF LITIGATION</td>
<td>Business and Corporate Litigation Intellectual Property Professional Responsibility</td>
<td>Supports w/concerns No position No position</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Urges courts and legislative bodies to adopt rules or enact legislation to establish an evidentiary privilege applicable only to clients of patent agents who are registered with the U.S. Patent &amp; Trademark Office (PTO).</td>
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<tr>
<td>101B</td>
<td>SECTION OF INTELLECTUAL PROPERTY LAW</td>
<td>Intellectual Property</td>
<td>TBD</td>
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<tr>
<td></td>
<td>Supports efforts in Congress and federal courts to allow the filing of a copyright infringement once a proper application for registration of a copyright has been delivered to the Copyright Office.</td>
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<tr>
<td>103A</td>
<td>STANDING COMMITTEE ON SPECIALIZATION</td>
<td>Consumer Financial Services</td>
<td>Oppose</td>
<td></td>
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<tr>
<td></td>
<td>Grants accreditation to the Privacy Law program of the International Association of Privacy Professionals of Portsmouth, New Hampshire for a 5-year term as a designated specialty certification program for lawyers.</td>
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<tr>
<td>107</td>
<td>YOUNG LAWYERS DIVISION</td>
<td>Pro Bono Business and Corporate Litigation</td>
<td>No position No position</td>
<td></td>
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<tr>
<td></td>
<td>Urges federal courts to adopt pro bono panels for civil litigants guided by a uniform set of guidelines</td>
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<tr>
<td>Section</td>
<td>General Comments</td>
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<tr>
<td><strong>108A</strong></td>
<td><strong>CRIMINAL JUSTICE SECTION</strong> <strong>COMMISSION ON DISABILITY RIGHTS</strong>&lt;br&gt;Urges legislative bodies and governmental agencies to enact laws and adopt policies regarding the use of solitary confinement for detainees.</td>
<td>Business and Corporate Litigation&lt;br&gt;White Collar Crime&lt;br&gt;No position&lt;br&gt;TBD</td>
<td></td>
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<tr>
<td><strong>108B</strong></td>
<td><strong>CRIMINAL JUSTICE SECTION</strong>&lt;br&gt;Urges legislatures to enact legislation creating a substantive right and procedures for individuals to challenge their convictions by demonstrating that forensic evidence used to obtain their conviction has subsequently been undermined or discredited.</td>
<td>Business and Corporate Litigation&lt;br&gt;White Collar Crime&lt;br&gt;No position&lt;br&gt;TBD</td>
<td></td>
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<tr>
<td><strong>108C</strong></td>
<td><strong>CRIMINAL JUSTICE SECTION</strong> <strong>MASSACHUSETTS BAR ASSOCIATION</strong>&lt;br&gt;Urges the Department of Justice to restore prosecutorial discretion in choosing the charges s/he wishes to pursue and reserve mandatory minimum sentencing to only the most serious drug traffickers and prohibit its use to secure plea agreements.</td>
<td>Business and Corporate Litigation&lt;br&gt;White Collar Crime&lt;br&gt;No position&lt;br&gt;TBD</td>
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<tr>
<td><strong>110</strong></td>
<td><strong>SECTION OF INTERNATIONAL LAW</strong> <strong>SECTION OF SCIENCE &amp; TECHNOLOGY LAW</strong>&lt;br&gt;Adopts the Model Provisions on Electronic Commerce for International Trade Agreements, dated February 2018, and recommends the Model Provisions as a template for international trade agreements.</td>
<td>Cyberspace Law&lt;br&gt;International Business Law&lt;br&gt;Uniform Commercial Code&lt;br&gt;Supports&lt;br&gt;TBD&lt;br&gt;No position</td>
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<tr>
<td><strong>112A</strong></td>
<td><strong>NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS</strong>&lt;br&gt;Approves the Revised Uniform Unclaimed Property Act, promulgated by the National Conference of Commissioners on Uniform State Laws (Uniform Law Commission), as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.</td>
<td>Section Officers&lt;br&gt;Taxation&lt;br&gt;TBD</td>
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<tr>
<td><strong>112B</strong></td>
<td><strong>NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS</strong>&lt;br&gt;Approves the Uniform Directed Trust Act, promulgated by the National Conference of Commissioners on Uniform State Laws (Uniform Law Commission), as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.</td>
<td>Trust Indentures and Indenture Trustees&lt;br&gt;No position</td>
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<tr>
<td><strong>112E</strong></td>
<td><strong>NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS</strong>&lt;br&gt;Supports</td>
<td>LLCs, Partnerships and Unincorporated Entities&lt;br&gt;Taxation&lt;br&gt;Supports</td>
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<tr>
<td>Section Number</td>
<td>Committee/Commission</td>
<td>Action Type</td>
<td>Action Details</td>
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<tr>
<td>112F</td>
<td>NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS</td>
<td>Approves</td>
<td>Approves the Uniform Protected Series Act, promulgated by the National Conference of Commissioners on Uniform State Laws (Uniform Law Commission), as an appropriate act for those states desiring to adopt the specific substantive law suggested therein.</td>
<td></td>
</tr>
<tr>
<td>115A</td>
<td>SECTION OF FAMILY LAW</td>
<td>Urges</td>
<td>Urges governments to adopt or preserve tax code provisions that allow alimony deduction for payors and treats alimony as taxable income to payees.</td>
<td></td>
</tr>
<tr>
<td>115B</td>
<td>SECTION OF FAMILY LAW</td>
<td>Adopts</td>
<td>Adopts the Model Act Governing Assisted Reproductive Technology dated February 2018 to replace the Model Act that was adopted in 2008, and urges adoption by appropriate governmental agencies.</td>
<td></td>
</tr>
<tr>
<td>116A</td>
<td>SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE</td>
<td>Supports</td>
<td>Supports an interpretation of Title VII of the Civil Rights Act of 1964 that defines sex discrimination by covered employers to include discrimination on the basis of sexual orientation and gender identity.</td>
<td></td>
</tr>
<tr>
<td>116B</td>
<td>SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE</td>
<td>Urges</td>
<td>Urges the Congress and governments to enact legislation or regulations that provide more effective remedies, procedures, and protections to those subjected to environmental harm due to acts or omissions of government officials or actors, and to alleviate the barriers blocking relief to injured plaintiffs.</td>
<td></td>
</tr>
<tr>
<td>117</td>
<td>COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY</td>
<td>Urges</td>
<td>Urges Courts to recognize that service in the United States Armed Forces should not be restricted and that individuals should not be discriminated against on the basis of sexual orientation or gender identity.</td>
<td></td>
</tr>
</tbody>
</table>
RESOLVED, That the American Bar Association encourages law firms to develop initiatives to provide women lawyers with opportunities to gain trial and courtroom experience;

FURTHER RESOLVED, That the American Bar Association encourages members of the judiciary to take steps to ensure that women lawyers have equal opportunities to participate in the courtroom;

FURTHER RESOLVED, That the American Bar Association encourages corporate clients to work with outside counsel to ensure that women lawyers have equal opportunities to participate in all aspects of litigation;

FURTHER RESOLVED, That the American Bar Association encourages corporate counsel, together with outside counsel, to work with alternative dispute resolution providers and professionals to encourage the selection of women lawyers as neutrals.
REPORT

I. Introduction

During the last two decades, much has been written and discussed about whether women attorneys appear in court with the frequency expected given their numbers in the legal profession. The Commercial and Federal Litigation Section of the New York State Bar Association is a preeminent bar group focused on complex commercial state and federal litigation. The Section counts among its former chairs a substantial number of prominent women litigators from both upstate and downstate, prosecutor and an attorney in private practice, a former President of the New York State Bar Association who is recognized as one of New York’s top female commercial litigators and also serves as a mediator and arbitrator of commercial disputes, a former federal and state prosecutor who now is a partner in a large global law firm, an in-house counsel at a large non-profit corporation, and senior partners in large and mid-size private law firms located both upstate and downstate. With the full support and commitment of the Section’s leadership, these women alumnae Section chairs met and formed an ad hoc task force devoted to the issue of women of the apparent dearth of women who serve as arbitrators and mediators in complex commercial and international arbitrations and mediations (collectively referred to herein as Alternative Dispute Resolution (“ADR”)).

The task force sought to ascertain whether there was, in fact, a disparity in the number of women attorneys versus male attorneys who appear in speaking roles in federal and state courts throughout New York. Toward that end, the task force devised and distributed a survey to state and federal judges throughout the State and then compiled the survey results. As discussed below, based on the survey results, the task force found continued disparity and gender imbalance in the courtroom. This report first details recent studies and research on the issue of gender disparity in the legal profession, then discusses how the court survey was conducted, including methodology and findings, and concludes with recommendations for addressing the disparity and ensuring that women attorneys obtain their rightful equal place in the courtroom. This report further details the task force’s findings with respect to the gender gap in the ADR context.

Even before the Report was adopted by the New York State Bar Association on November 4, 2017, it received resounding approval and support from both Bench and Bar nationwide. For example Judge Jack Weinstein of the Eastern District Federal Court has issued a Court rule urging a more substantive role for women attorneys on cases he is hearing. “A Judge Wants A Bigger Role for Female Lawyers. So He Made a Rule,” New York Times, August 23, 2017; Chief Judge Dora L. Irizarry of the Eastern District is in the process of amending her rules in a similar fashion, and Judge Henry J. Nowak of the Erie County Supreme Court implemented rules in his courtroom designed to allow multiple attorneys to argue different points in cases he hears. “Rule Changes Underway in Eastern District to Support

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2 For example Judge Jack Weinstein of the Eastern District Federal Court has issued a Court rule urging a more substantive role for women attorneys on cases he is hearing. “A Judge Wants A Bigger Role for Female Lawyers. So He Made a Rule,” New York Times, August 23, 2017; Chief Judge Dora L. Irizarry of the Eastern District is in the process of amending her rules in a similar fashion, and Judge Henry J. Nowak of the Erie County Supreme Court implemented rules in his courtroom designed to allow multiple attorneys to argue different points in cases he hears. “Rule Changes Underway in Eastern District to Support
II. Survey: Methodology and Finding

The task force’s survey began with the creation of two questionnaires drafted by the task force. The first questionnaire was directed to federal and state judges throughout New York. This questionnaire was designed to be an observational study that asked judges to record the presence of speaking counsel by gender in all matters in their courtrooms occurring between approximately September 1, 2016 and December 31, 2016. The second questionnaire was directed to various ADR providers asking them to record by gender both the appearance of counsel in each proceeding and the gender of the neutral conducting the proceeding.

The study surveyed proceedings in New York State at each level of court—trial, intermediate, and court of last resort—in both state and federal courts. Approximately 2,800 questionnaires were completed and returned and included New York’s Court of Appeals, all four Appellate Divisions, and Commercial Divisions in Supreme Courts in counties from Suffolk, Onondaga and Erie. The United States Court of Appeals for the Second Circuit compiled publicly available statistics, and survey responses were provided by nine Southern District Judges (including the Chief Judge) and Magistrate Judges and District and Magistrate Judges from the Western and Northern Districts of New York.

The results of the survey are striking:

- Women attorneys represented just 25.2% of the attorneys appearing in commercial and criminal cases in courtrooms across New York.
- Women attorneys accounted for 24.9% of lead counsel roles and 27.6% of additional counsel roles.
- The most striking disparity in women’s participation appeared in complex commercial cases: women’s representation as lead counsel shrank from 31.6% in one-party cases to 26.4% in two-party cases to 24.8% in three-to-four-party cases and to 19.5% in cases involving five or more parties. In short, the more complex the case, the less likely that a woman appeared as lead counsel.
- The percentage of women attorneys appearing in court was nearly identical at the trial level (24.7%) and at the appellate level (25.2%).


The statistics are slightly worse downstate (24.8%) than upstate (26.2%).

- In New York federal courts, women attorneys made up 24.4% of all attorneys who appeared in court, with 23.1% holding the position of lead counsel. In New York State courts, women made up 26.9% of attorneys appearing in court and 26.8% of attorneys in the position of lead counsel.

- One bright spot is public interest law (including criminal matters), where women lawyers accounted for 38.2% of lead counsel and 30.9% of attorneys overall.

- However, in private practice (including both civil and criminal matters), women lawyers only accounted for 19.4% of lead counsel.

In sum, the low percentage of women attorneys appearing in a speaking role in courts was found at every level and in every type of court: upstate and downstate, federal and state, trial and appellate, criminal and civil, ex parte applications and multi-party matters. Set forth below is the breakout in all courtrooms—state, federal, regional, and civil/criminal:

A. Women Litigators in New York State Courts

The view from the New York Court of Appeals is particularly interesting. The statistics collected from that Court showed real progress—perhaps as a result of female leadership of that court, now headed by Chief Judge Janet DiFiore and past Chief Judge Judith S. Kaye, as well as the fact that the Court has had a majority of women judges for more than ten years. Of a total of 137 attorneys appearing in that Court, female attorneys made up 39.4%. This percentage held whether the women were lead or second chair counsels. In cases in which at least one party was represented by a public sector office, women attorneys were in the majority at 51.3%. Of the appearances in civil cases, 30% were by women attorneys. The figure in criminal cases was even higher—women attorneys made up 46.8% of all attorneys appearing in those cases.

Similarly, women attorneys in the public sector were well represented in the Appellate Divisions, approaching the 50% mark in the Second Department. The picture was not as strong in the upstate Appellate Divisions, where, even in cases involving a public entity, women were less well represented (32.6% in the Third Department and 35.3% in the Fourth Department). Women in the private sector in Third Department

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5 The task force recognizes that the statistics reported herein may have been affected by which Judges agreed to participate in the survey and other selection bias inherent in any such type of survey. Thus, it is possible that there is a wider gap between the numbers of women versus men who have speaking roles in courtrooms throughout New York State than the gap demonstrated by the task force’s study.
cases fared worst of all, where they represented 18% of attorneys in the lead and only 12.5% of attorneys in any capacity versus 36.18% of private sector attorneys in the First Department (for civil cases).

While not studied in every court, the First Department further broke down its statistics for commercial cases and the results are not encouraging. Of the 148 civil cases heard by the First Department during the survey period for which a woman argued or was lead counsel, only 22 of those cases were commercial disputes, which means that women attorneys argued or were lead counsel in only 5.37% of commercial appeals compared to 36.18% for all civil appeals. Such disparity suggests that women are not appearing as lead counsel for commercial cases, which often involve high stakes business-related issues and large dollar amounts.

B. Women Litigators in Federal Courts in New York

Women are not as well represented in the United States Court of Appeals for the Second Circuit as they are in the New York Court of Appeals. Of the 568 attorneys appearing before the Second Circuit during the survey period, 20.6% were female—again, this number held regardless of whether the women were in the lead or in supporting roles.

The Southern District of New York’s percentages largely mirrored the sample overall, with women representing 26.1% of the 1627 attorneys appearing in the courtrooms of judges who participated in the survey—24.7% in the role of lead counsel.

The figures from the Western District of New York fell somewhat below those from the Southern District of New York, again mirroring the slightly lower percentages of women attorneys’ participation upstate in state courts as well: 22.9% of the attorneys appearing in the participating Western District of New York cases were women, and 20.8% of the lead attorneys were women.

C. Women Litigators: Criminal & Civil; Private and Public

As has been noted in other areas, women attorneys are better represented among lawyers in criminal cases (30.9%) than in civil cases (23.2%), regardless of trial or appellate court or state or federal court. Similarly, women made up 39.6% of the attorneys representing public entities—such as the state or federal government but just 18.5% of lawyers representing private parties in civil litigation.

All these survey findings point to the same conclusion: women attorneys in speaking roles in court account for just about a quarter of counsel who appear in state and federal courts in New York. The lack of women attorneys with speaking roles in court is widespread across different types of cases, varying locations, and at all levels of courts.6

6 The survey did not include family or housing courts. Accordingly, the percentage of women in speaking
D. Women in Alternative Dispute Resolution

The view from the world of ADR is slightly more favorable to women, although more progress is needed. Two leading ADR providers gathered statistics on the proceedings conducted by their neutrals. In a sample size of 589 cases, women were selected as arbitrators 26.8% of the time and selected as mediators about half the time (50.2%). In a small sample size of two cases, women provided 50% of the neutral analyses but they were not chosen as court referees in either of those two cases.

III. Going Forward: Suggested Solutions

The first step in correcting a problem is to identify it. To do so, as noted by this report and the ALM Intelligence study referenced above in its “Gender Diversity Best Practices Checklist”—the metrics component—firms need data. Suggesting solutions, such as insisting within law firms that women have significant roles on trial teams or empowering women attorneys to seek out advancement opportunities for themselves, is easy to do. Implementing these solutions is more challenging.

A. Women’s Initiatives

Many law firms have started Women’s Initiatives designed to provide women attorneys with the tools they need to cultivate and obtain opportunities for themselves and to place themselves in a position within their firms to gain trial and courtroom experience.

One suggestion is that leaders in law firms—whether male or female—take on two different roles. The first is to mentor women attorneys with an emphasis on the mentor discussing various ways in which the woman attorney can gain courtroom experience and eventually become a leader in the firm. The second is to provide “hands on” roles who appear in those courts may be higher, especially in family court as that area of the law tends to have a greater percentage of women practitioners. See Vivia Chen, Do Women Really Choose the Pink Ghetto?: Are women opting for those lower-paying practices or is there an invisible hand that steers them there?, The American Lawyer (Apr. 26, 2017) http://www.americanlawyer.com/id=1202784558726.

7 A 2014 Study indicated that for cases with between one and 10 million dollars at issue, 82% of neutrals and 89% of arbitrators were men. “Gender Difference in Dispute Resolution Practice Report or the ABA Section of Dispute Resolution Practice Snapshot Survey(Jan. 2014) . A 2017 article examining gender difference in dispute resolution practice put it “the more high-stakes the case, the lower the odds that a woman would be involved.” Noah J. Hanft, Making Diversity Happen in ADR: No More Lip Service. 257 N.Y.L.J. 56 (Mar. 20, 2017)

8 Daniella Isaacson, ALM Intelligence, Where Do We Go From Here?: BigLaw’s Struggle With Recruiting and Retaining Female Talent (Apr. 2017) at 12; see also Meghan Tribe, Study Shows Gender Diversity Varies Widely Across Practice Areas. The Am Law Daily (Apr. 17, 2017) http://www.americanlawyer.com/id=1202783889472/Study-Show-Gender-Diversity-Varies-Widely-Across-Practice-Areas.

9 A summary of the suggestions contained in the report are attached hereto as Appendix C. Many of the suggestions for law firms contained in this report may be more applicable to large firms than small or mid-size firms but hopefully are sufficiently broad based to provide guidance for all law firms.
experience to the women attorneys at the firm by assigning them to work with a partner who will not only see that they go to court, but that they also participate in the courtroom proceedings. Women attorneys should have the opportunity early in their careers to conduct a deposition—not just prepare the outline for a partner. The same is true of defending a deposition.

It is important that more experienced attorneys help women attorneys learn how to put themselves in a position to obtain courtroom opportunities. This can be accomplished, at least in part, in two ways. First, women attorneys from within and outside the firm should be recruited to speak to female attorneys and explain how the woman attorney should put herself in a position to obtain opportunities to appear in court. Second, women from the business world should also be invited to speak at Women’s Initiative meetings and explain how they have achieved success in their worlds and how they obtained opportunities.

B. Formal Programs Focused on Lead Roles in Court and Discovery

Another suggestion is that law firms establish a formal program through which management or heads of litigation departments seek out junior women associates on a quarterly or semi-annual basis and provide them with the opportunity to participate in a program that enables them to obtain the courtroom and pre-trial experiences outlined above. The establishment of a formal program sends an important signal within a firm that management is committed to providing women with substantive courtroom experience early in their careers.

Management and firm leaders should be encouraged to identify, hire, and retain women attorneys within their firms. Needless to say, promoting women to department heads and firm management is one way to achieve these goals. Women are now significantly underrepresented in both capacities.10

C. Efforts to Provide Other Speaking Opportunities for Women

In addition to law firms assigning women litigators to internal and external speaking opportunities, such as educational programs in the litigation department or speaking at a client continuing legal education program, firms should encourage involvement with bar associations and other civic or industry groups that regularly provide speaking opportunities.11

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11 It is noteworthy that, as of January 1, 2017, women comprise nearly 36% of the New York State Bar Association’s membership but comprise only 24% of the Commercial and Federal Litigation Section’s membership.
D. Sponsorship

Although law firms talk a lot about the importance of mentoring and how to make busy partners better at it, they spend very little time discussing the importance of, and need for, sponsors:

Mentors are counselors who give career advice and provide suggestions on how to navigate certain situations. Sponsors can do everything that mentors do but also have the stature and gravitas to affect whether associates make partner. They wield their influence to further junior lawyers’ careers by calling in favors, bring attention to the associates’ successes and help them cultivate important relationships with other influential lawyers and clients—all of which are absolutely essential in law firms. Every sponsor can be a mentor, but not every mentor can be a sponsor.

As Sylvia Ann Hewlett, founding president of the Center for Talent Innovation (formerly Center for Work-Life Policy), explained in a 2011 Harvard Business Review article “sponsors may advise or steer [their sponsorees] but their chief role is to develop [them] as leader[s]” and “use[] chips on behalf of protégés’ and ‘advocate for promotions.’”

E. Efforts by the Judiciary

Members of the judiciary also must be committed to ensuring that women attorneys have equal opportunities to participate in the courtroom. When a judge notices that a woman lawyer who has prepared the papers and is most familiar with the case is not arguing the motion, that judge should consider addressing questions to the woman.

All judges, regardless of gender, should be encouraged to appoint more women as lead counsel in class actions, and as special masters, referees, receivers, or mediators. Some judges have insisted that they will not appoint a firm to a plaintiffs’ management committee unless there is at least one woman on the team. Other judges have issued orders, referred to earlier in this report, that if a woman, minority, or junior associate is likely to argue a motion, the court may be more likely to grant a request for oral argument of that motion. Judges should be encouraged to amend their individual rules to encourage attorneys to take advantage of these courtroom opportunities. All judges should be encouraged to promote and support women in obtaining speaking and leadership roles in the courtroom.

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F. Efforts by Clients

Clients also can combat the gender disparity in courtrooms. Insistence on diverse litigation teams is a growing trend across corporate America. Why should corporate clients push for diverse trial teams? Because it is to their advantage to do so. After all, their employees and their customers are likely to be half female.

Additionally, the context surrounding a trial—including the venue, case type, and courtroom environment—can affect how jurors perceive attorneys and ultimately influence the jury’s verdict. Consciously or not, jurors assess attorney “[p]ersonality, attractiveness, emotionality, and presentation style” when deciding whether they like the attorney, will take him or her seriously, or can relate to his or her persona and arguments. Because women stereotypically convey different attributes than men, a woman attorney actively involved in a trial may win over a juror who was unable to connect with male attorneys on the same litigation team. Many corporate clients often directly state that they expect their matters will be handled by both men and women.

For example, in 2017, the General Counsel for HP, Inc. implemented a policy requiring “at least one diverse firm relationship partner, regularly engaged with HP on billing and staffing issues” or “at least one woman and one racially/ethnically diverse attorney, each performing or managing at least 10% of the billable hours worked on HP matters.” The policy reserves for HP the right to withhold up to ten percent of all amounts invoiced to firms failing to meet these diverse staffing requirements.

G. Alternative Dispute Resolution Context

The dialogue that has begun amongst ADR providers and professionals involved in the ADR process is encouraging. One important step that has been undertaken is the Equal Representation in Arbitration pledge—attested to by a broad group of ADR stakeholders, including counsel, arbitrators, corporate representatives, academics, and others—to encourage the development and selection of qualified female arbitrators. This pledge outlines simple measures including having a fair representation of women on lists of potential arbitrators and tribunal chairs.

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15 Id. at 5.
16 Id.
18 Id.
20 Id.
IV. Conclusion

Unfortunately, the gender gap in the courtroom and in ADR has persisted even decades after women comprised half of law school graduates. The federal and state courts in New York are not exempt from this phenomenon. There is much more that law firms, corporate counsel, and judges can do to help close the gap.

The active dialogue that continues today is a promising step in the right direction. It is the task force’s hope that this dialogue—and the efforts of all stakeholders in the legal process—will help change the quantitative and qualitative role of women lawyers.

Respectfully submitted,

Sharon Stern Gerstman
President, New York State Bar Association
February 2018
1. **Summary of Resolution.**

The resolution encourages law firms, members of the judiciary, corporate clients, and alternative dispute resolution providers to provide women lawyers with opportunities to gain trial experience, participate in the courtroom and all aspects of litigation, and be selected as neutrals.

2. **Approval by Submitting Entity.**

This report was approved by the New York State Bar Association House of Delegates on November 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?**

February 1995: Oppose bias and discrimination based on race and gender that prevent multicultural women from gaining full and fair participation in the legal profession, and actively support efforts to eradicate such bias and discrimination.

88A121: Recognize that persistence of overt and subtle barriers denies women the opportunity to achieve full integration and equal participation in the work, responsibilities and rewards of the legal profession; affirm the fundamental principle that there is no place in the profession for barriers that prevent the full integration and equal participation of women in all aspects of the legal profession; and call upon members of the legal profession to eliminate such barriers.

Neither policy would be affected by adoption of this proposal.

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:**

   It is anticipated that the report would be disseminated widely and promoted to law firms, the judiciary, corporate counsel, and ADR providers.

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

   None.

9. **Disclosure of Interest.**

   N/A

10. **Referrals.**

    Business Law Section  
    Commission on Women in the Profession  
    Conference of Chief Justices  
    Judicial Division  
    Law Student Division  
    National Association of Bar Executives  
    National Conference of Bar Presidents  
    National Judicial Conference  
    Section of Dispute Resolution  
    Section of Litigation  
    Solo, Small Firm and General Practice Division  
    Young Lawyers Division

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

    Sharon Stern Gerstman, Esq.  
    President, New York State Bar Association  
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    ((716) 856-3500 x227 (Phone) | ((716) 856-3390 (Fax)  
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12. **Contact Name and Address Information. (Who will present the report to the House.)**

Sharon Stern Gerstman, Esq.
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1. **Summary of the Resolution.**

The resolution encourages law firms, members of the judiciary, corporate clients, and alternative dispute resolution providers to provide women lawyers with opportunities to gain trial experience, participate in the courtroom and all aspects of litigation, and be selected as neutrals.

2. **Summary of the issue which the Resolution addresses.**

Even after several decades in which women comprise approximately 50% of law school graduates, there is a serious gender gap among lawyers in the courtroom and in ADR settings.

3. **Explanation of how the proposed policy position will address the issue.**

This policy is needed for the ABA to undertake efforts to encourage law firms, the judiciary, clients, and ADR providers to address gender disparity in the courtroom and in ADR settings.

4. **Summary of any minority views or opposition internal and/or external to the ABA which have been identified.**

No minority or opposing views have been identified.
RESOLVED, That the American Bar Association House of Delegates concurs in the action of
the Council of the Section of Legal Education and Admissions to the Bar in adopting the
amendments dated February 2018 to Standard 106 (Separate Locations and Branch Campuses) of
the ABA Standards and Rules of Procedure for Approval of Law Schools.
Standard 106. SEPARATE LOCATIONS AND BRANCH CAMPUS

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

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

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

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

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

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

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

(1) Establish a reliable plan that demonstrates that the branch campus has achieved substantial compliance with the Standards and is reasonably likely to achieve full compliance with each of the Standards within three years of the effective date of acquiescence as required by Rule 30;

(2) Comply with instructional requirements and responsibilities as required by Standard 403(a) and Standard 404(a); and

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

(c) A law school is not eligible to establish a separate location until at least four years after the law school is granted initial full approval.
Interpretation 106-1

A law school with more than one location may have one dean for all locations.
The Council of the Section of Legal Education and Admissions to the Bar (Council) submits to the House of Delegates (HOD) for its concurrence, the attached changes to the *ABA Standards and Rules of Procedure for Approval of Law Schools*.

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the Council of the Section of Legal Education and Admissions to the Bar files a resolution to the House seeking concurrence of the House in any actions of the Council to adopt, revise, or repeal the *ABA Standards and Rules of Procedures for Approval of Law Schools*. The House may either concur with the Council’s decision or refer the decision back to the Council for further consideration. A decision by the Council is subject to a maximum of two referrals back to the Council by the House. The decision of the Council following the second referral shall be final.

The amendments were approved by the Council for Notice and Comment during its meeting held on August 11, 2017. A public hearing was held on September 28, 2017. The Council received no written comments on the proposed change and no one testified at the public hearing. The Council approved the amendments at its meeting on November 3-4, 2017.

The revision seeks to resolve an inconsistency between Standard 106(b)(1) and Rule 30(b)(1) regarding acquiescence and branch campuses.

Standard 106(b) addresses the requirements with which a law school must meet if the law school operates a branch campus. Standard 106(b)(1) states that a branch campus must:

(1) Establish a reliable plan that demonstrates that the branch campus is reasonably likely to be in substantial compliance with each of the Standards within three years of the effective date of acquiescence as required by Rule 30;

Rule 30(b)(1) states that the reliable plan in connection with the establishment of a branch campus shall contain information sufficient to allow the Accreditation Committee and the Council to determine that:

(1) The proposed branch campus has achieved substantial compliance with the Standards and is reasonably likely to achieve full compliance with each of the Standards within three years of the effective date of acquiescence;

The language in Standard 106(b)(1) and Rule 30(b)(1), which apply to the same situation, is inconsistent. The former requires only “substantial compliance” within three years, rather than “substantial compliance at the time of acquiescence and full compliance within three years.” This inconsistency was identified in the Council’s ongoing review of the Standards and Rules.

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1 “2017-2018 ABA Standards and Rules of Procedure for Approval of Law Schools,”
http://www.americanbar.org/groups/legal_education/resources/standards.html
The Council determined that Rule 30(b)(1) states the appropriate requirements and has consistently reviewed any applications for a branch campus in accordance with the requirements of Rule 30.

Accordingly, the proposed revision matches the language of Standard 106(b)(1) to the corresponding language in Rule 30(b)(1).

Respectfully submitted,

Maureen A. O’Rourke
Dean, Boston University School of Law
Chair, Council of the Section of Legal Education and Admissions to the Bar
February 2018
GENERAL INFORMATION FORM

Submitting Entity: American Bar Association
Section of Legal Education and Admissions to the Bar

Submitted By: Dean Maureen A. O’Rourke, Chair

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

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the resolution seeks concurrence in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated February 2018 to Standard 106 (Separate Locations and Branch Campuses) of the *ABA Standards and Rules of Procedure for Approval of Law Schools.*

2. **Approval by Submitting Entity.**

Yes. The amendments were approved by the Council for Notice and Comment during its meeting held on August 11, 2017. A public hearing was held on September 28, 2017. The Council approved the amendments at its meeting on November 3-4, 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 amendments modify the existing *ABA Standards and Rules of Procedure for Approval of Law Schools.*

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

Not applicable.

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

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

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

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

None.

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

Not applicable.

10. **Referrals.**

The amendments were posted on the Section’s website and circulated for Notice and Comment to the following interested persons and entities: ABA Standing and Special Committees, Task Forces, and Commission Chairs; ABA Section Directors and Delegates; Conference of Chief Justices; National Conference of Bar Presidents; National Association of Bar Executives; Law Student Division; SBA Presidents; National Conference of Bar Examiners; University Presidents; Deans and Associate Deans; and Section Affiliated Organizations, including AccessLex Institute, American Association of Law Libraries, Association of American Law Schools, Association of Legal Writing Directors, Clinical Legal Education Association, Law School Admission Council, National Association for Law Placement, and Society of American Law Teachers.

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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The Honorable Solomon Oliver, Jr.  
Chief Judge  
U.S. District Court for the Northern District of Ohio  
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EXECUTIVE SUMMARY

1. Summary of the Resolution

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the resolution seeks concurrence in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated February 2018 to Standard 106 (Separate Locations and Branch Campuses) of the ABA Standards and Rules of Procedure for Approval of Law Schools.

2. Summary of the Issue that the Resolution Addresses

The language in Standard 106(b)(1) and Rule 30(b)(1), which apply to the same situation, is inconsistent. The former requires only “substantial compliance” within three years, rather than “substantial compliance at the time of acquiescence and full compliance within three years.” This inconsistency was identified in the Council’s ongoing review of the Standards and Rules, in accordance with Internal Operating Practice 8.

The Council determined that Rule 30(b)(1) states the appropriate requirements and has consistently reviewed any applications for a branch campus in accordance with the requirements of Rule 30. Accordingly, the proposed revision matches the language of Standard 106(b)(1) to the corresponding language in Rule 30(b)(1).

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

The proposals amend the 2017-2018 ABA Standards and Rules of Procedure for Approval of Law Schools.

4. Summary of Minority Views

None of which the Council is aware. No comments were received and no one testified at the hearing held on September 28, 2017.
RESOLVED, That the American Bar Association urges federal, state, territorial and tribal courts and legislative bodies to adopt rules or enact legislation to establish an evidentiary privilege by courts for confidential communications between a client and a patent agent reasonably necessary and incidental to certain limited activities authorized by the Patent Act, 35 U.S.C. § 2(b)(2)(D), and U.S. Patent & Trademark Office regulations, 37 C.F.R. § 11.5(b)(1).
I. Introduction

This Resolution urges federal, state, territorial, and tribal courts and legislative bodies to adopt rules or enact legislation to establish a narrow evidentiary privilege applicable by courts only to clients of patent agents who are registered with the U.S. Patent & Trademark Office (PTO), and limited to confidential communications between a client and a patent agent necessary and incidental to certain patent application-related activities authorized by the Patent Act and regulated by the PTO, including the drafting, filing, and prosecution of a patent application. The Resolution is modeled after and closely related to Resolution 106 that passed the House of Delegates in August 2016. Resolution 106 urges tribunals and legislative bodies to establish an evidentiary privilege for lawyer referral services and demonstrates that the ABA recognizes the need for extending evidentiary privileges when justified.\(^1\)

In 35 U.S.C. § 2(b)(2)(D), Congress authorized the PTO to allow both patent agents and lawyers to represent inventors and other patent applicants before the agency, subject to certain requirements. In accordance with 37 C.F.R. § 11.7(b)(1), patent agents and attorneys must not only submit an application demonstrating that they are of good moral character and have the legal and scientific qualifications necessary to prosecute patent applications, they must also pass a lengthy bar-style examination.\(^2\) Patent agents are not only subject to stringent authorization procedures to practice before the PTO, but that they are also regulated\(^3\) and held accountable for misconduct when representing their clients.\(^4\)

37 C.F.R. § 11.5(b)(1) enumerates a list of limited activities that, once authorized, patent attorneys and patent agents registered to prosecute patent applications before the USPTO may undertake. Such authorized activities include, but are not limited to, consulting with inventors as

\(^1\) House of Delegates Resolution 106, adopted by the House of Delegates at the 2016 Annual Meeting, states: “RESOLVED, That the American Bar Association urges federal, state, tribal, and territorial courts and legislative bodies to adopt rules or enact legislation to establish an evidentiary privilege for lawyer referral services and their clients (‘LRS clients’) for confidential communications between an LRS client and a lawyer referral service, when an LRS client consults a lawyer referral service for the purpose of retaining a lawyer or obtaining legal advice from a lawyer.” Resolution 16A106; Cf., Resolution 498BOG adopted by the Executive Committee of the Board of Governors in March 1989, which opposes unjustified extension of the attorney-client privilege to accountants.  
\(^2\) The test is a rigorous one, as is evidenced by the fact that even with the assistance of preparatory bar courses, the pass rate for the PTO bar examination has ranged between only 43% and 60% since 2004. https://www.uspto.gov/learning-and-resources/patent-and-trademark-practitioners/registration-exam-results-and-statistics.html 
\(^3\) The recent PTO regulation of patent agents, effective December 7, 2017, includes identifying a privilege applicable in PTO proceedings with respect to communications between applicants and their patent agents. [37 C.F.R § 42.57]. The new PTO privilege is entirely consistent with the language and purpose of this resolution. Moreover, the PTO lacks authority to create or limit a privilege that would be applicable in court. In re Queen’s University at Kingston, 820 F.3d 1287, 1302. (Fed. Cir. 2016). This resolution addresses the patent agent privilege applicable in court,  
\(^4\) 35 U.S.C. § 32 (“The Director may…suspend or exclude…from further practice before the Patent and Trademark Office, any person, agent, or attorney shown to be incompetent or disreputable, or guilty of gross misconduct, or who does not comply with the regulations established under this section 2(b)(2)(D)...”); 37 C.F.R. 11.20 (Disciplinary sanctions; Transfer to disability inactive status); In re George Reardon (USPTO D12-19) (patent agent excluded for misappropriation of non-profit organization’s funds).
part of the processes required for drafting a patent application, disclosing material prior art, drafting an amendment or reply to a communication from the Office, drafting a petition, or drafting an appeal to the Patent Trial and Appeal Board, and more. In the course of this relationship, the inventor typically and necessarily discloses a great deal of confidential and proprietary information to the patent agent.

Unfortunately, it can be difficult for individual inventors to find law firms that are willing to represent them in preparing and prosecuting patent applications at costs they can afford. Some patent lawyers have little or no interest in directly representing individual inventors, and some patent firms have policies against it.\(^5\) Other firms are willing to represent individual inventors and address cost concerns by using patent agents to serve those cash strapped clients at a greatly reduced rate, but in many instances individual inventors and others must directly employ patent agents to help them with their patent applications. Thus, patent agents are necessary for those applicants who cannot find a lawyer willing to represent them or those applicants who can only afford representation at a significantly reduced rate. Indeed, the Federal Circuit has recognized “the very purpose of Congress’s design: namely, to afford clients the freedom to choose between an attorney and a patent agent for representation before the Patent Office.” *Queen’s University*, 820 F.3d at 1298.

Shielding communications between inventors and patent agents is necessary to enable inventors and other patent applicants to continue to use patent agents to file and prosecute patent applications before the PTO while enabling the inventor to share all information necessary and without fear that their confidential information will be disclosed. Without this evidentiary privilege, clients are more likely to withhold critical information, including relevant prior art that if disclosed to the PTO would prevent the PTO from issuing a broader patent than to which the inventor is entitled. This Resolution therefore urges the ABA to adopt a limited evidentiary based client privilege—similar to the evidentiary privilege that under Resolution 106 the ABA urges all tribunals to adopt for communications between lawyer referral services and their clients—except in this case limited to communications between the client and the patent agent related to the prosecution of patent applications before the PTO. This evidentiary privilege, which is strictly limited in scope to the statutory and regulatory authorization provided by the PTO for patent agents, should provide that a person or entity who consults a patent agent for the purpose of prosecuting a patent application before the PTO may refuse to disclose the substance of that consultation and may prevent the patent agent from disclosing that information as well. The evidentiary privilege would belong to the patent agent’s client, and the client would have the authority to waive the privilege. In addition, each jurisdiction may wish to apply to this evidentiary privilege certain of the recognized exceptions to the attorney-client privilege, including, for example: a) the crime/fraud exception (see, e.g., Cal. Evid. Code § 956 (crime/fraud exception to the attorney-client privilege; Cal. Evid. Code § 968(a) (crime/fraud exception to the lawyer referral service-client privilege)); b) the fiduciary exception (see, e.g., Restatement (Second) of Trusts § 173, cmt. b; Garner v. Wolfinbarger, 430, F.2d 1093 (5th Cir. 1970), but note that a number of states do not recognize this exception); and/or c) any overriding public policy exceptions.

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\(^5\) “A number of law firms now have policies against representing individuals (except for the very wealthy).” Individual Inventors: Who Will Represent You Now? Dennis Crouch June 21, 2007
II. **Patent Agents Have Been Authorized to Represent Inventors Before the PTO for More than 150 Years**

The use of patent agents to prepare and prosecute patent applications is not new. In *Sperry v. State of Florida*, 373 U.S. 379 (1963), the Supreme Court found that the authority to prosecute patent applications was conferred on patent agents by federal law. *Id.* at. 385 (*citing* 1952 Patent Act (35 U.S.C. § 2(b)(2)(D)). In that opinion, the Supreme Court observed that in 1952, Congress expressly authorized the PTO Commissioner to promulgate regulations confirming earlier-defined requirements for patent agents to prosecute applications before the Patent Office. *Id.* at 390-96.

But even before that, as explained in the Federal Circuit’s decision in *In re Queen’s University at Kingston*, 820 F.3d 1287, 1298. (Fed. Cir. 2016), the PTO’s acknowledgement of patent agents to prosecute patent applications traces back to 1861 when Congress first provided that the Commissioner of Patents may refuse to recognize any person as a patent agent for particular conduct. Later, the 1869 Rules provided a requirement for “intelligence and good moral character.” *Id.* at 1296-1298. In 1899, to avoid an emerging problem of deceptive advertising by some patent agents, the Commissioner required registration of all of those who practice before it. Then, in 1922, the patent statute was amended to expressly authorize the Commissioner to prescribe regulations for the recognition of both agents and attorneys, “to provide for the creation of a patent bar, and to require a higher standard of qualifications for registry.” *Id.* at 1297.


Only those deemed by the PTO qualified to prosecute patent applications are officially “registered” by the PTO and can legally hold themselves out as Congressionally authorized and PTO approved patent agents. In *Queen’s University*, the Federal Circuit noted that like their attorney counterparts, patent agents must meet minimum qualifications to be authorized to practice before the PTO, including passing an extensive examination on patent laws and PTO regulations and demonstrating a sufficient technical or scientific background. *Id.* at 1300. Patent agents are also subject to the same ethical code as attorneys registered to practice before the PTO. While acknowledging that patent agents do not have the ethical obligations imposed on attorneys under state bar requirements, the Court noted that “the Patent Office has promulgated the ‘USPTO Rules of Professional Conduct,’ which conforms to the ABA’s Model Rules of Professional Conduct. *See*, 37 C.F.R. Section 11.100 et seq.” *Id.* at 1301. Those patent agents failing to maintain the level of professionalism required by the PTO rules, may be subject to revocation of their PTO registration and thereby prohibited from further practicing before the PTO.

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6 37 CFR § 11.5 (Register of attorneys and agents in patent matters.) “A register of attorneys and agents is kept in the Office on which are entered the names of all individuals recognized as entitled to represent applicants having prospective or immediate business before the Office in the preparation and prosecution of patent applications. Registration in the Office under the provisions of this Part shall entitle the individuals so registered to practice before the Office only in patent matters.”
IV. **Patent Agent Services: Patent Prosecution Before the PTO**

A patent confers on the patentee valuable property rights including “the right to exclude others from making, using, offering for sale, or selling” the invention in the United States or importing the invention into the United States. 35 U.S.C. §§ 154, 271. Absent patent protection, products may be reverse engineered and their unique aspects copied freely. In § 2(b)(2)(D), Congress authorized the PTO to allow agents and attorneys to assist inventors to secure a patent. Patent agents work with inventors and companies to draft, file, and prosecute patent applications with the hope that the PTO will award the invention a patent. In addition to providing an important service to the public by offering patent prosecution services that might not otherwise be available to them, patent agents provide an important service for attorneys by often allowing attorneys to focus on representation of clients that file more complex or multiple patent applications in the same technology area, to avoid potential client conflicts and malpractice claims, or when serving in a supporting role by providing patent prosecution services to their clients at a reduced rate. Open communication between the inventor and his or her patent agent are necessary for patent agents to effectively draft, file, and prosecute patent applications on the inventor’s behalf.

The patent application drafting and prosecution process begins when the inventor contacts the patent agent, usually by phone, or increasingly by email or over the Internet, to express interest in filing a patent application with the PTO covering their invention. The inventor discloses often confidential information regarding the invention—including how it is made, works, and is used, when it was first used publicly or described in a publication, how similar products are made, work, and are used, who uses similar technologies, prior art that must be disclosed to the examiner, and much more. For the agent to draft a proper patent application, it is essential that the inventor communicate fully and freely with the patent agent.

The patent agent uses that information to draft a patent application which the inventor typically reviews before the patent agent submits the application to the PTO. Until that information is publicly disclosed, the information describing the invention will remain protected as a trade secret. But if an inventor decides to file a patent application, the information contained in the patent application will be disclosed to the public in the form of a published patent application and any rights in the trade secrets will be surrendered. Based on consultations with his or her patent agent, the inventor may choose to include less than all of the information he or she has shared with their patent agent in the patent application. Also, patent applicants and their representatives are under a duty to disclose to the PTO all information known to them that appears to establish the unpatentability of their invention.7

Applications for patent are examined by a patent examiner to determine if the applicants are entitled to a patent. The back-and-forth negotiations between an inventor and a patent examiner begin when the examiner first reviews the patent application to see if the claims are

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7 “A patent by its very nature is affected with a public interest. The public interest is best served, and the most effective patent examination occurs when, at the time an application is being examined, the Office is aware of and evaluates the teachings of all information material to patentability. Each individual associated with the filing and prosecution of a patent application has a duty of candor and good faith in dealing with the Office, which includes a duty to disclose to the Office all information known to that individual to be material to patentability as defined in this section…” 37 CFR 1.56 (a) (Duty to disclose information material to patentability).
patentable. If not, the examiner will reject the application claims and the patent agent will typically consult with the inventor to draft a response, which may take the form of an amendment to the claims or a recitation of arguments challenging the examiner’s position. The relationship and consultations between the inventor and patent agent continues as additional actions are required of the inventor by the PTO in an effort to secure the patent, which may include drafting additional replies to the examiner, drafting a petition, drafting an appeal to the Patent Trial and Appeal Board, and more. The unbridled flow of information between the inventor and patent agent remains essential throughout this process.

In the course of all of these interactions, confidential information regarding the invention—including how it is made, works, and is used, any sales or disclosures of the invention, how the technology cited by the examiner is made, works, and is used, relevant prior art—is provided by the inventor to the patent agent as needed. Without this detailed client information, the patent agent could not draft or file the inventor’s patent application, respond to the examiner’s arguments or meet their obligation to disclose material information to the PTO.

V. The Problem and the Solution

As the Federal Circuit appreciated in Queen’s University, an inventor client has a reasonable expectation that all communications relating to preparing, filing, and prosecuting a patent application will be kept privileged. Id. at 1298. To hold otherwise, the Court acknowledged “would frustrate the very purpose of Congress’s design: namely, to afford clients the freedom to choose between an attorney and a patent agent for representation before the Patent Office.” Id. The lack of an evidentiary privilege for the benefit of the inventor client would hinder communications between patent agents and their clients, “undermining the real choice Congress and the Commissioner have concluded clients should have between hiring patent attorneys and hiring non-attorney patent agents.” Id. at 1300. But, consistent with any reasonable expectations of the inventor, application of the evidentiary privilege must be limited to the specific activities for which the patent agent is authorized by the Patent Act and PTO to engage on behalf of an inventor. Id. at 1301. “Communications that are not reasonably necessary and incident to the prosecution of patents before the Patent Office fall outside the scope of the patent-agent privilege.” Id.

What makes patent agents valuable to society and to practicing patent attorneys is their availability to individual inventors either because law firms are unwilling to represent them or because law firms and attorneys are unwilling to provide patent application services at a price individual inventors or small and mid-sized entities can afford. Many law firms, including small firms, have little or no interest in directly representing individual inventors and some openly discourage such inquires by individual inventors. Other law firms have policies against

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8 “Oppedahl Patent Law Firm LLC does not encourage inquiries by individual inventors. Of the many individual inventors that our attorneys have served over the years, only a handful have ever made enough money from their inventions even to cover what we charged them. This does not mean the inventions were not good ones -- indeed we have seen some very clever and promising inventions from individual inventor clients, and we have obtained some patents for individual inventors of which we are very proud from a professional point of view. There
representing individual inventors because they believe that individual inventors will create problems for patent lawyers, the malpractice risk is often greater, that their work takes more time and effort, and the ability to pay is usually less than for a corporation. Thus, patent agents are necessary for those applicants who cannot find a patent lawyer willing to represent them or who can only afford to pay for services at a significantly reduced rate, and who are too overwhelmed by the esoteric and notably complicated patent application process to represent themselves.

By enacting 35 U.S.C. § 2(b)(2)(D), Congress not only authorized attorneys who demonstrate a level of skill and professionalism to prosecute patent applications before the PTO but in that statute Congress also expressly authorized patent agents to prosecute patent applications on behalf of inventors if they too can establish a level of professionalism and skill as defined by the PTO. Relying on the Sperry Court’s characterization of patent agent activities, coupled with the clear intent of Congress to establish a “dual track for patent prosecution by either patent attorneys or non-attorney patent agents,” in Queen’s University the Federal Circuit correctly acknowledged a “professional status” of patent agents that justifies a recognition of the evidentiary privilege when the communications were necessary and incidental to prosecution of the patent application before the PTO. Id. at 1300.

Notwithstanding that 35 U.S.C. § 2(b)(2)(D) unambiguously establishes that patent agents are professionals authorized to prosecute patent applications on behalf of others, and that the majority opinion in Queen’s University holds that this evidentiary privilege applies, uncertainty surrounding the existence of this evidentiary privilege remains. This uncertainty is much in life, however, that depends on luck and being in the right place at the right time, with inventions as with anything else. For every deserving invention that makes money for its inventor, there are probably ninety-nine other very deserving inventions that happen not to fulfill their promise.” Information for individual inventors, Oppedahl Patent Law Firm, LLC http://www.oppedahl.com/individual/.

9 “Individual inventors who are not yet versed in the rules of patent law create problems for patent prosecutors. The work generally takes more time and effort, the malpractice risk is often greater, and the ability to pay is usually less. A number of law firms now have policies against representing individuals (except for the very wealthy).” Individual Inventors: Who Will Represent You Now? Dennis Crouch June 21, 2007 https://patentlyo.com/patent/2007/06/individual-inve.html.

10 The dissenting judge in Queen’s University argued strongly against the majority’s establishment of an evidentiary privilege, disagreeing with the majority’s finding of a public interest or real need to overcome the presumption against creation of a new privilege. For example, where the dissent was satisfied that a client’s communications to its patent agent could be protected by the attorney client privilege if the patent agent is working under the supervision of an attorney, Id. at 1305, the majority found the patent agent privilege is needed and serves public ends because lack of such a privilege would hinder communications between applicants and patent agents and undermine the real choice between hiring lawyers and patent agents that Congress intended to afford clients. Id. at 1300. The majority found that the “Supreme Court’s characterization of the activity in Sperry coupled with the clear intent of Congress to establish a dual track for patent prosecution by either patent attorneys or non-attorney patent agents confers a professional status on patent agents that justifies our recognition of the patent-agent privilege.” Id. at 1300.

11 In addition to the dissenting opinion in Queen’s University, not long after the Federal Circuit handed down that opinion, in In re Silver, 247 S.W. 3d 644 (Tex. 2016), the Texas Court of Appeals affirmed a lower court’s holding that communications between an inventor and a patent agent were not protected because no Texas statute or rule recognizes an evidentiary privilege for client communications with a patent agent. Id. at 647. While the Texas court distinguished Queen’s University on the grounds that the Texas case did not involve issues of federal patent law but involved a claim for breach of contract under Texas law, the case nevertheless casts doubt on the existence of a client-patent agent evidentiary privilege. Id. at 646.
threatens individual inventors and small companies who have come to rely on patent agents to obtain patents and prefer to continue to work with patent agents and those for whom a patent agent may be their only option. The lack of an evidentiary privilege strictly limited to the narrow authority provided by the PTO regulations threatens the open communication necessary for patent agents to effectively draft, file, and prosecute patent applications on behalf of their inventor clients, thereby jeopardizing the quality of the patent application, reducing the likelihood the inventor will obtain a patent, and the ultimate value of a patent should one issue. Clients who cannot afford a patent attorney to advise them may have every expectation that their communications with their patent agent will be protected, and run the greatest risk of disclosing information they would have withheld from their patent agent had they known their communications would not be protected.

Respectfully submitted,

Scott F. Partridge, Chair
Section of Intellectual Property Law
February 2018

Koji Fukumura, Chair
Section of Litigation
February 2018
1. **Summary of Resolution**

The Resolution calls for the Association to adopt policy urging courts and legislative bodies to adopt rules or enact legislation to establish a narrow evidentiary privilege applicable by courts only to clients of patent agents who are registered with the U.S. Patent & Trademark Office (PTO), and limited to confidential communications between a client and a patent agent necessary and incidental to certain patent application-related activities authorized by the Patent Act and regulated by the PTO. An important purpose is to address uncertainty surrounding application of this evidentiary privilege in litigation and to establish a narrow evidentiary privilege necessary to enable inventors and other patent applicants to share with their patent agent all information necessary to file and prosecute patent applications before the PTO without fear that their confidential information will be disclosed. The Resolution also addresses a concern that, absent assurance of this evidentiary privilege, clients are more likely to withhold critical information, including relevant prior art that if disclosed to the PTO would prevent the PTO from issuing a broader patent than to which the inventor is entitled.

2. **Approval by Submitting Entity**

The Section of Intellectual Property Law Council approved the Resolution on September 26, 2017. The Section of Litigation Council approved co-sponsorship of the Resolution on November 10, 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?**

The Resolution is modeled after and closely related to resolution 106 that passed the House of Delegates in August 2016, which urges tribunals and legislative bodies to establish an evidentiary privilege for lawyer referral services. The Resolution differs in object and substance to the privilege addressed in resolution 498B0G adopted by the Executive Committee of the Board of Governors in March 1989, which opposes extension of the attorney-client privilege to accountants.
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.

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

Drafts of the Resolution and Report were distributed and discussed among the Section of Intellectual Property Law, Section of Litigation, Standing Committee on Professional Discipline, and Standing Committee on Ethics and Professional Responsibility. That process resulted in comments and changes reflected and incorporated in the submitted Resolution and Report. The Resolution and Report will be distributed to each of the other Sections, Divisions, Forums, and Standing Committees of the Association in the version accepted and numbered for the agenda by the Rules and Calendar Committee.

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EXECUTIVE SUMMARY

1. **Summary of the Resolution**

The Resolution calls for the Association to adopt policy urging courts and legislative bodies to adopt rules or enact legislation to establish a narrow evidentiary privilege applicable by courts only to clients of patent agents who are registered with the U.S. Patent & Trademark Office (PTO), and limited to confidential communications between a client and a patent agent necessary and incidental to certain patent application-related activities authorized by the Patent Act and regulated by the PTO.

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

Congress authorized the PTO to allow both patent agents and lawyers to represent inventors and other patent applicants before the agency, subject to certain requirements. In order to gain authorization, both patent agents and attorneys must submit to the PTO an application demonstrating that they are of good moral character and have the legal and scientific qualifications necessary to prosecute patent applications, they must also pass a lengthy bar-style examination. Once authorized, patent attorneys and patent agents registered to prosecute patent applications before the PTO may undertake on behalf of their inventor and applicant clients certain patent application-related activities set forth in PTO regulations. Shielding communications between those clients and their patent agents is necessary to enable inventors and other patent applicants to use patent agents to file and prosecute patent applications before the PTO while enabling the inventor to share all information necessary and without fear that their confidential information will be disclosed. Uncertainty surrounding the evidentiary privilege remains -- notwithstanding longstanding statutory authority establishing that patent agents are professionals authorized to prosecute patent applications on behalf of others, the PTO’s authorization and regulation of patent agents, and the Federal Circuit’s majority decision in *In re Queen’s University at Kingston*, 820 F.3d 1287, 1298. (Fed. Cir. 2016) holding that an evidentiary privilege applies to client communications with patent agents.

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

The Resolution addresses this uncertainty by urging establishment of an evidentiary privilege that is strictly limited in scope to the statutory and regulatory authorization provided by the PTO for patent agents, which evidentiary privilege should provide assurance that a person or entity who consults a patent agent for the purpose of prosecuting a patent application before the PTO may refuse to disclose the substance of that consultation and may prevent the patent agent from disclosing that information as well. This evidentiary privilege would belong to the client, the client would have the authority to waive the privilege, and, if recognized in the jurisdiction, exceptions to the attorney-client privilege would apply.
4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

We are aware of no ABA minority view or opposition. This Resolution is consistent with the Federal Circuit’s majority decision in *Queen’s University*. The minority view of one dissenting judge finds an insufficient showing of the public interest or real need required to overcome the presumption against creation of a new privilege.
RESOLUTION

RESOLVED, That the American Bar Association accredits the Privacy Law program of the International Association of Privacy Professionals for a five-year term as a designated specialty certification program for lawyers.
REPORT

Background and Synopsis of the Resolutions

The United States Supreme Court held in *Peel v. Attorney Registration and Disciplinary Comm’n 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(d). It now provides: “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.” 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. 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 accredited as *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, specialist certification programs *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 Specialization Committee 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 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 Specialization Committee has reviewed, and hereby recommends the approval of, an application

¹ Those accreditation requirements are set out as an Appendix to this Report.
submitted by the International Association of Privacy Professionals (“IAPP”) for accreditation of its Privacy Law Specialist certification program. The Specialization Committee has determined that the IAPP is a *bona fide* organization and that its lawyer specialty certification program 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 Specialization Committee 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 Specialization 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 organizations including 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 February 2016, the IAPP submitted a Notice of Intent to apply for accreditation of its Privacy Law Specialist certification program.

The Specialization Committee has determined that the IAPP is a *bona fide* organization with the capacity to administer a lawyer specialization 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 Specialization Committee with a favorable review of the exams.

None of the required exams contains a section covering ethics and professional responsibility, however, which the Specialization Committee noted 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.

The IAPP’s Privacy Law Specialist certification program 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. Applicants must also demonstrate current and ongoing “substantial involvement” in the practice of Privacy Law.

Prior Versions of this Resolution, and Amendment by Addition of a Credential Definition, and Greater Precision in Credential Identification

The Specialization Committee submitted resolutions recommending accreditation of the IAPP program to the House at both the 2017 Midyear Meeting and 2017 Annual Meeting. Both
times the Resolution generated vigorous inquiry, and encountered opposition. The Specialization Committee withdrew both resolutions, and promised interested entities the opportunity to convey the concerns generating their opposition if it should consider submitting a further resolution recommending accreditation.

At an October 28, 2017, business meeting of the Specialization Committee, the Committee received written comments from the Council of the Section of Science and Technology Law (“SciTech”) regarding the application of the IAPP, and led an oral discussion of those comments from committee members and interested visitors to the meeting. Those visitors were Steven Cernak and Paula Martucci, members of the House of Delegates from the Section of Antitrust Law; Thomas Smedinghoff, a member of the ABA Cybersecurity Legal Task Force; Lucy Thomson, past Chair of the Section of Science and Technology Law and its current Liaison to the Cybersecurity Legal Task Force; Kirk Nahra, a member of the Section of Health Law; and Rita Heimes and Douglas Forman, officers of the IAPP.

SciTech’s lead query was whether or not the fact that the IAPP’s members included nonlawyers disqualified it as a certifying organization because Section 4.01 of the Standards, SciTech asserted, requires that an organization “be primarily focused on lawyers.” Ms. Howard pointed out that Section 4.01 of the Standards does not require an organization to have “primary focus on lawyers” but only that an organization “is dedicated to the identification of lawyers who possess an enhanced level of skill and expertise.” Committee Chair Barbara Howard pointed out that the Specialization Committee could not deny recommendation of accreditation to the IAPP based on Section 4.01 because of its “focus,” because that is not an area of inquiry contemplated by the Standards.

Ms. Howard reminded those attending that the authority delegated solely to the Specialization Committee from the House regarding applications for accreditation is to “evaluate those requests in accordance with the Standards and recommend approval by the Association of such requests when it deems the organization has met the requirements as set forth in these Standards.” Standards, ¶7.01(D). (Emphasis added.)

She thus remarked that some of the other comments that the Committee had received, while obviously serious and worthy of the IAPP’s consideration, nevertheless did not describe departures from the express requirements of the Standards, and so could not in good faith be invoked by the Committee as a reason to deny its recommendation for accreditation.

In this category were the comments, e.g., that the IAPP’s membership was comprised of lawyers and non-lawyers (though only licensed lawyers will be certified in the proposed program); that the IAPP proposed to offer the certification conditional on applicants’ passing an examination regime that did not include certain examinations sought by some of SciTech’s membership (e.g., IAPP’s examinations in European privacy law and Asian privacy law); that the IAPP would not offer certification simply on the condition of passage of its examination in U.S. Privacy law and the examination on legal ethics; and that a “task force” be assembled to consider the IAPP’s program, rather than be considered by the Committee alone.
Ms. Heimes and Mr. Forman remarked that the fact that the IAPP offers multiple examinations for professionals with varied backgrounds of legal experience, and that demand among U.S. lawyers was not as great for some examinations as others, dictated the IAPP’s decision to propose certification examinations in select areas. Ms. Heimes remarked that in creating the proposed program, the IAPP had made such choices in light of the ABA Standards, and trusting that, as long as the choices did not transgress express requirements of the Standards, those choices could not be supplanted by other preferences suggested by other ABA entities and members.

Nevertheless, all participants in the meeting did agree that a definition of the practice area understandable to potential consumers who might rely on the certification credential is an express requirement of the Standards, and that the description the IAPP has offered of what comprises “substantial involvement” in the practice may not have that requirement of the Standards. Consequently, the IAPP has proposed, and the Specialization Committee has approved, the addition of the following definition to be included in all descriptions of the program:

A Privacy Law Specialist advises clients regarding the legal issues raised by the collection, storage, sharing, monetization, security, disposal, and permissible uses of information about individuals, businesses, and organizations.

In the course of the discussion, Ms. Thomson suggested, too, that if the IAPP persisted in limiting the bases of the certification only to certain examination areas, the holders of the credentials ought to be required to explicitly identify what those areas are in holding out the credential to consumers. The IAPP has agreed that such a requirement would more precisely describe each certification and will require each certified lawyer to identify in holding out the credential whether the basis is as a Certified Information Professional/Management (CIPM), or Certified Information Professional/Technology (CIPT).

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

In addition to the definition of “Privacy Law Specialist” tendered by the IAPP in November, 2017, the program has always included a definition of “substantial involvement” in the practice that further circumscribes the availability of the credential. According to that definition of “substantial involvement”:

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 specialization.

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 Specialization 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 Specialization 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 Specialization 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 Specialization Committee 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 a member 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,

Barbara Howard, Chair
Standing Committee on Specialization
February 2018
Appendix – ABA Standard for Accreditation of Specialty Certification Programs for Lawyers, Section 4

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 28, 2017, the Standing Committee on Specialization considered the application of the International Association of Privacy Professionals for accreditation and took comment from interested entities. By vote communicated via email on November 13, 2017, it voted to submit a resolution to the House of Delegates for consideration at the 2018 Midyear 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 and at the 2017 Annual 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 Communications Law Section; the Tort Trial and Insurance Practice Section; and the Cybersecurity Legal Task Force; the Health Law Section; the Antitrust Law Section; and the Intellectual Property Law Section.

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

Barbara Howard
Chair, Standing Committee on Specialization
960 Mercantile Center
120 E. Fourth St.
Cincinnati OH 45202
Email: Lawoffice@barbarajhoward.com

Martin Whittaker
Staff Counsel, Standing Committee on Specialization
321 North Clark Street
Chicago IL 60654
Phone: 312-988-5309
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.)

Barbara Howard
Chair, Standing Committee on Specialization
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 review programs that seek accreditation from the House of Delegates to insure that they meet Standards promulgated by the House of Delegates.

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

The recommendation addresses the issue by describing the process by which the Standing Committee has examined the program proposed by the International Association of Privacy Professionals and arrived at the conclusion that it meets the ABA Standards for Specialty Certification Programs for Lawyers.

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

There are no minority views. No opposition to this Resolution has been communicated.

The Section of Science and Technology Law had communicated opposition to prior versions of this resolution, principally because of the composition of the membership of the sponsoring organization, and the inadequacy of the definitions of “Privacy Law” in the program materials. But those reasons for prior opposition have been discussed with interested entities (see pages 4 and 5 of the accompanying Report), and as of the date of the submission of this Resolution and Report no formal opposition to this Resolution has been communicated to the Specialization Committee.
RESOLVED, That the American Bar Association adopts the Model Provisions on Electronic Commerce for International Trade Agreements ("Model Provisions"), dated February 2018;

and

FURTHER RESOLVED, That the American Bar Association recommends the Model Provisions as a template for 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 or 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.

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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, provided a Party notifies other Parties to the extent the above exclusion applies; 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 and on a non-discriminatory basis.

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:

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.
⁴ For greater certainty, transacting parties to commercial arrangements covered by the ECC can continue to enforce rights thereunder directly, separate from government to government dispute provisions common to trade agreements.
(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.

**Article 1.6: Electronic Authentication and Electronic Signatures**

1. Except in circumstances otherwise provided in its law, a Party or person subject to its jurisdiction 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 the signature of a transacting party, or 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 [any applicable Consumer Protection provision in this trade agreement] 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.\(^5\)

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;\(^6\)

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\(^5\) 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.

\(^6\) 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.
(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.

**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, subject to applicable agreements between the Parties, and laws
   and regulations of the Parties.

**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 against suppliers of unsolicited commercial electronic messages that do not comply with the measures adopted or maintained 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 Small and Medium-Sized Enterprises (SMEs), including micro business owners, 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.
1. INTRODUCTION

The existing legal framework for global trade through electronic means remains outdated and inadequate. The ability of companies and consumers to move data has become vital in promoting, fostering, and expanding commerce and services around the globe. Many countries have enacted rules that have the effect of reducing competition and disadvantaging entrepreneurs, by imposing regulatory measures that create barriers to trade or overly restrict the free flow of information. This Resolution supports liberalization and harmonization of the regulation of business data flows from one country to another country by adopting the American Bar Association Model Provisions on Electronic Commerce for International Trade Agreements, dated February 2018, (“the Model Provisions”) as the standard template for guiding countries in negotiating international trade agreements, other relevant international agreements and guidelines, and subject to reasonable safeguards such as the protection of consumer data upon its exportation. Other related purposes include treaties facilitating economic relationships other than trade specific provisions, such as investment treaties; bilateral treaties dealing with "Friendship, commerce and navigation;" general treaties on cross-border e-commerce; intergovernmental organization texts promoting e-commerce; and texts produced by Non-Governmental Organizations (NGOs), such as the International Chamber of Commerce.

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. In addition, the Model Provisions will advantage North American businesses and help to create jobs in those markets.\(^1\)

The Model Provisions are based upon the existing electronic commerce provisions supported by the United States in a recent international trade agreement negotiation,\(^2\) 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.”\(^3\) 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

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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.

An overview of the Model Provisions is contained in Section 2 of this Report and Sections 3 through 8 provide background information regarding the development of e-commerce provisions in international trade agreements.

2. PROPOSED MODEL PROVISIONS ON E-COMMERCE

When negotiating the e-commerce provisions in international trade agreements, relevant agreements and guidelines, and for the related purposes, the United States and other countries 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 large part by setting out how one decides what barriers are necessary and which are not. 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. It has been the experience worldwide in adapting a country legal regime to electronic communications that the existing conceptual framework should be maintained as far as possible. This approach has the benefit of maintaining the known legal principles and policy accommodations of existing law, and of avoiding the need to reinvent rules that already exist and that turn out to work well in any medium. In short, both economy of effort and certainty of effect benefit from this approach. The same is true for the laws of international trade.

The Model Provisions are not intended to require changes to existing conceptual domestic frameworks for electronic communications that are compatible to the Model Provisions. Also the Model Provisions, including Model Articles 1.5 and 1.6, are compatible with the Uniform Electronic Transactions Act (UETA) provisions where they cover similar matters. Article 1.5.1 is consistent with other American Bar Association Resolutions - as reflected as well in the TPP e-commerce chapter – that the parties to trade agreements ratify the UNCITRAL Model Law on Electronic Commerce 1996 or the United Nations Convention on the Use of Electronic Communications in International Contracts (ECC). The ECC embodies exactly that principle, to

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4 Id.
5 Id.
6 Uniform Electronic Transactions Act as promulgated by the National Conference of Commissioners on Uniform State Laws.
7 ABA Resolution 06A303 urging the United States to become a signatory to the United Nations Convention on the Use of Electronic Communications in International Contracts; ABA Resolution 08A100 urging the U.S. Government to ratify the United Nations Convention on the Use of Electronic Communications in International Contracts.; and ABA Resolution 14A114A 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.
accommodate e-communications within existing laws with minimal disruption to the operation of those laws.

The following are highlights of the key Model Provisions that are 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 key differences between the Model Provisions and Chapter 14 are discussed below.8

- **Article 1.3: Customs Duties.** This provision explicitly prohibits the parties from applying customs duties on cross-border data flows (i.e., electronic transmissions). Specifically, it prohibits imposition of customs duties on digital products, to ensure that products distributed electronically, such as software, music, video, e-books, and games are not disadvantaged. While 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 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 when the trading parties are comfortable with them, and consumers want their governments to promote measures concerning 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. The Model Provisions do not contain a definition of “electronic signature” because the ABA has adopted other resolutions supporting legal requirements and definitions related to electronic signatures, including the United Nations Convention on the Use of Electronic Communications in International Contracts (“E-Contracting Convention”).9 Most of the principles and legal rules embodied in the E-Contracting Convention are similarly reflected in the primary U.S. e-commerce legislation (E-SIGN and UETA), including the definition of “electronic signature.”

- **Article 1.8: Personal Information Protection.** This provision is a fundamental, innovative element of the chapter designed to promote better protection of users and digital traders’ 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

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8 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.

9 *Supra* note 7.
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 key elements of the Model Provisions. In obliging 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 to adopt or maintain measures inconsistent with the rules to achieve an allegedly public policy objective. The lack of such an exception is consistent with the intent of the Model Provisions to establish an efficient legal approach to trade agreements as a whole. Parties may negotiate and rely upon general exceptions to a trade agreement but may not establish new provision-specific or medium-specific exceptions. This approach is also 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. Moreover, new provision-specific exceptions would set an undesirable precedent for future agreements; the Model Provisions choose the preferable route of 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 products, 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.

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3. INTERNATIONAL DIGITAL TRADE AND E-COMMERCE

While there is no generally accepted definition of the terms, “digital trade” and “e-commerce” generally describe transactions that involve, or are enabled by, the Internet. The U.S. 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.”11 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.”12 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.”13

The World Trade Organization (WTO) has defined e-commerce as “the production, distribution, marketing, sale or delivery of goods and services by electronic means.”14 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.”15 In order to fall under the definition, the goods or services must be ordered by such methods. E-commerce can involve several forms, including business-to-business transactions,16 business-to-consumer transactions,17 consumer-to-consumer transactions,18 and business-to-government transactions.19 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.

4. 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.”20 A 2014 McKinsey Global Institute study estimated that global transactions via e-commerce amounted to US$8 trillion per year.
year. Internet-based growth has been coupled with global increases in data collection, retention, and analysis, covering a broad array of sectors. 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.” Aided by connectivity and critical marketing information, SMEs benefit by the ability to target customers around the world. As a consequence, cross border data flows can help level the playing field for such entities, and for businesses of any size that are 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.” 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.

A recent study by McKinsey found that cross-border data trade generates greater economic impact than trade in traditional goods. 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 several 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.”

5. 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

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Agreement, which was signed in October 2016,\textsuperscript{28} 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{29} 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.

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{30} 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{31} 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{32} In addition, under the e-commerce chapter of the trade agreement between Chile and Uruguay, which was also signed in October 2016,\textsuperscript{33} the parties agreed to “provisions aimed at maintaining a transborder flow fluid information.”\textsuperscript{34} In short, several agreements that have been completed after the TPP have incorporated the wide-ranging, robust standards provided in that agreement.

6. E-COMMERCE IN THE WORLD TRADE ORGANIZATION

The lack of harmonization of e-commerce laws and standards among most countries makes a global accord unlikely, but the U.S. should promote the Model Provisions in bilateral and regional agreements as a substitute to help standardize to some extent the existing regulatory framework. This Section discusses the complexity of e-commerce provisions in the WTO, and highlights the need for adopting the Model Provisions.

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


\textsuperscript{32} Id. at Chapter 14, Article 13.2.


\textsuperscript{34} 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/
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[.]”

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 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: tasked with examining and reporting 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): tasked with examining and reporting 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.

36 Id.
37 Id.
39 Id.
40 Id., ¶ 2.1.
41 Id., ¶ 3.1.
42 Id., ¶ 4.1.
43 Id., ¶ 5.1.
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 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. Most Members agreed that the WTO should not create any “unnecessary obstacles” to the development of e-commerce.

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. 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 and which services commitments apply.

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45 *Id.* at 2. See also World Trade Organization, *The Work Programme On Electronic Commerce: Background Note by the Secretariat (Services)*, [https://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm](https://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm) (Accessed Sept. 28, 2017);


47 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.


48 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](https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm).

49 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-
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 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{50} 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{51}

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{52} with respect to access to and use of internet services.

7. **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 (in effect in 1994) 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, among other things, that neither Party may impose customs duties, fees, or other charges on or in


\textsuperscript{51} World Trade Organization, GATS Training Module, Ch. 6, \textit{The Challenges Ahead}, available at https://www.wto.org/english/tratop_e/serv_e/cbt_course_e/c6s5p2_e.htm.

\textsuperscript{52} 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, \textit{Explanation of the Annex on Telecommunications}, available at https://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_annex_expl_e.htm.
connection with the importation or exportation of digital products, and they may not accord less favorable treatment to some digital products than it accords to other like digital products on a basis of the factors set forth in the Chapter.53

The KORUS FTA provides that neither Party may accord less favorable treatment to digital products. It 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.” 54 Additionally, the agreement encourages the free flow of digital information across borders, and urges Parties to refrain from imposing or maintaining unnecessary barriers to such data flows.55 Further, KORUS FTA governs the electronic supply of services delivered or performed electronically in separate chapters related to investment, cross-border trade in services, and financial services.

8. RECENT HISTORY OF KEY U.S. TRADE NEGOTIATIONS

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

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)56 that represent nearly 70 percent of the world’s $55 trillion services market in 2014.57 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.”58 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

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53 KORUS FTA, Art. 15.3. Footnotes omitted.
54 KORUS FTA, Art. 15.4.
56 https://ustr.gov/tisa/participant-list.
57 https://ustr.gov/TiSA.
consumer protection and spam, net neutrality, and source code.\textsuperscript{59} Accordingly, the United States, “tabled an ambitious proposal to address restrictions on cross-border data flows and the troubling trend toward localization requirements.”\textsuperscript{60} In addition, the United States tabled a proposal to limit liability for online services\textsuperscript{61} and U.S. officials signaled they would pursue a data localization provision that would not exclude financial services data.\textsuperscript{62}

Ministers from TiSA parties last met informally in 2016 to discuss progress and reaffirmed their commitment to conclude an ambitious agreement.\textsuperscript{63} 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{64} 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{65} 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 multilateral opportunity to further expand international rules on digital trade.

\textbf{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{66}

With respect to e-commerce and ICT services, the U.S. has sought “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 discriminate among products delivered electronically; [and to] include provisions that facilitate the movement of cross-border data flows.”\textsuperscript{67} While U.S. negotiators highlighted this area in initial statements, the EU’s negotiating mandate was void of references to data flows, data localization or other covered

\textsuperscript{66} https://www.commerce.gov/news/blog/2016/03/making-difference-worlds-digital-economy-transatlantic-partnership
\textsuperscript{67} https://ustr.gov/trade-agreements/free-trade-agreements/transatlantic-trade-and-investment-partnership-t-tip/t-tip-15
aspects of e-commerce. 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.”

Like TiSA, e-commerce discussions in T-TIP have largely been complicated 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 diminish the likelihood that T-TIP may serve as a vehicle for an ambitious e-commerce chapter.

c. Potential U.S. Trade Negotiation Opportunities

The USTR has released new negotiating objectives for certain existing U.S. FTAs, such as NAFTA, 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 to create a bilateral trade deal between the United States and United Kingdom, as is widely under discussion, it will be a good opportunity for the United States to work toward including data flows, localization, and other e-commerce language in these agreements. Similarly, if negotiations move forward to update other FTAs or launch new FTAs, new disciplines on data flows, localization, and e-commerce 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 among 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.

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70 http://asean.org/?static_post=rcep-regional-comprehensive-economic-partnership
71 Id.
72 Id.
74 Id.
While little is known publicly about the textual proposals RCEP partners are exchanging related to e-commerce disciplines, if any, the elimination of restrictions on server localization would be important for powering both goods and services trade in the region. Business groups are actively encouraging negotiators to promote “rules that enable information flows and prohibit data localization.”75 In particular, private sector proposals currently advocate 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.76 Given the scope and magnitude of RCEP negotiations, outcomes on data flows or server localization measures would be significant. However, 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.”77 Japan is the EU’s second biggest trading partner in Asia after China.78 On July 6, 2017 the EU and Japan reached an agreement in principle on the main elements of the EU-Japan Economic Partnership Agreement. The draft agreement contains a chapter on e-commerce which includes, among other things, brief provisions related to electronic signatures, source codes (neither party can require transfer of or access to source codes), consumer protection, electronic authentication, unsolicited commercial electronic messages, and free flow of data.79

e. Trans-Pacific Partnership (TPP)

The Trans-Pacific Partnership agreement (“TPP”) is currently not on the negotiation table for reasons unrelated to its e-commerce chapter. 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. The brief letter also encourages future discussions on “measures designed to promote more efficient markets and higher levels of economic growth.”80 Currently, the U.S. is not negotiating the TPP, but the TPP agreement has useful provisions related to e-commerce, which have not been the subject of the Administration’s opposition to TPP.

76 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.

Governments, in response to these evolving market and policy dynamics, are attempting to address legitimate public policy objectives, such as security, privacy, and consumer protection. However, many have done so through the application of what appear to be overly blunt policy instruments. Intentionally or not, governments have erected barriers to digital trade and deprived traders and investors of economic opportunities. Examples of such barriers that the Model Provisions address are restrictions on cross-border data flows, data localization requirements, mandates to transfer source code, and the absence of or overly’ high standards for data protection and privacy of personal information.

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. Therefore, the American Bar Association Model Provisions on Electronic Commerce for International Trade Agreements address these localization barriers through specific provisions designed to promote and ensure 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.

Respectfully submitted,

Steven M. Richman
Chair, Section of International Law
February 2018
1. **Summary of Resolution(s).** The Resolution calls for the American Bar Association to adopt the *Model Provisions on Electronic Commerce for International Trade Agreements* (“*Model Provisions*”), dated February 2018, and recommends the Model Provisions as a template for international trade agreements, other relevant international agreements and guidelines.

2. **Approval by Submitting Entity.**
   - Approved by the Council of the Section of International Law on October 24, 2017.
   - Approved by the Council of the Section of Technology & Law on October 18, 2017.
   - Approved by the Council of the Section of Intellectual Property Law on December 5, 2017.

3. **Has this or a similar resolution been submitted to the House or Board previously?** This Resolution with Report was submitted and subsequently withdrawn at 2017 Annual Meeting.

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 become a signatory to 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
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, other governments, or international organizations consider new international trade agreements or other types of 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.

8. **Cost to the Association.** None.

9. **Disclosure of Interest.** Not applicable.

10. **Referrals.**
    ABA Cybersecurity Legal Task Force
    Section of Science & Technology Law
    Section of Business Law
    Section of Intellectual Property Law
    Section of Administrative Law
    GPSolo Division

11. **Contact Name and Address Information.**
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EXECUTIVE SUMMARY

1. **Summary of the Resolution**


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

This resolution supports modernization and uniformity of the regulation of electronic commerce, including business data flows from one country to another country. The ability of companies and consumers to move data has become paramount in promoting, fostering, and expanding commerce and services around the globe. It also urges the American Bar Association to adopt the Model Provisions as a template for international trade agreements, and other relevant international agreements and guidelines.

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

The Resolution enables the ABA to urge the United States and other governments 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 and other international agreements and guidelines.

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

None.
AMERICAN BAR ASSOCIATION

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association approves the Revised Uniform
2 Unclaimed Property Act, promulgated by the National Conference of Commissioners on
3 Uniform State Laws (Uniform Law Commission), as an appropriate Act for those states
4 desiring to adopt the specific substantive law suggested therein.
REPORT

Revised Uniform Unclaimed Property Act

Summary

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

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

Like its predecessors, the RUUPA provides rules for determining when property is actually abandoned, and when it is, for determining which state gets it. The most common types of unclaimed property are bank accounts and bank deposits, life insurance proceeds, trust and fiduciary accounts, securities, wages, amounts owed in business to business and consumer transactions, class action proceeds, money orders and travelers checks.

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

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

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

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

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

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

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

Article 10 explains how an administrator may request property reports and how an administrator may examine records to determine if a person has complied with the act.

Article 11 gives holders the right to seek review of determinations made by the administrator about their liability to deliver property or payment to the state.

Article 12 imposes a penalty on a holder that fails to report, pay, or deliver property within the time required by the act. Civil penalties may also apply if the holder enters into a contract to evade an obligation under the act.

Article 13 of the RUUPA governs the enforceability of an agreement between an apparent owner and a “finder” to locate and recover property. The act requires a signed record between the parties to designate the finder as an agent of the owner.

Article 14 explains what information is considered confidential under the act. The Article describes when confidential information may be disclosed under the act, and the steps that an administrator must take in the event of a security breach.
The Revised Uniform Unclaimed Property Act makes a number of improvements to earlier versions of the uniform act in order to keep up with technological changes and new forms of property.

The work of the Drafting Committee is available at www.uniformlaws.org, the website of the Conference. A direct link to the Revised Uniform Unclaimed Property Act is available here.

Respectfully submitted,

Anita Ramasastry, President
Uniform Law Commission
February 2018
1. Summary of Resolution(s).

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

2. Approval by Submitting Entity.

The Uniform Law Commission granted final approval to the Act at its July 2016 Annual Meeting.

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

No.

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

The ABA approved a resolution (96A119) to support the previous version of the Uniform Unclaimed Property Act, which was finalized by the ULC in 1995.

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

Not applicable.

6. Status of Legislation. (If applicable)

The Revised Uniform Unclaimed Property Act has been enacted in four jurisdictions to date (Delaware, Illinois, Tennessee, and Utah).
7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.**

The Uniform Law Commission will present the act to state legislatures for consideration and enactment.

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

None.

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

None.

10. **Referrals.**

Pursuant to the agreement between the ULC and the ABA, all members of the House of Delegates and Chairs of all ABA entities were advised of the drafting project, and those that expressed interest were provided with tentative drafts. The Drafting Committee’s work can be found [here](http://uniformlaws.org/Committee.aspx?title=Revise%20the%20Uniform%20Unclaimed%20Property%20Act).

The following individuals were ABA Advisors to the Uniform Unclaimed Property Act:

**Ethan D. Miller, ABA Advisor;**

**Alexandra Darraby, ABA Section Advisor, ABA Forum on Entertainment and Sports Law;**

**Scott Heyman, ABA Section Advisor, ABA Business Law Section;**

**Charolette Noel, ABA Section Advisor, ABA Business Law Section.**
11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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12. **Contact Name and Address Information.** (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*)

   Anita Ramasastry, President  
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EXECUTIVE SUMMARY

1. Summary of the Resolution

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

2. Summary of the Issue that the Resolution Addresses

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

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

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

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

A variety of views were expressed during the drafting process, and compromises were reached. The ULC has become aware that a subcommittee of the ABA Business Law Section may draft its own model act in the area of unclaimed property.
AMERICAN BAR ASSOCIATION
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association approves the Uniform Protected
Series Act, promulgated by the National Conference of Commissioners on
Uniform State Laws (Uniform Law Commission), as an appropriate act for those
states desiring to adopt the specific substantive law suggested therein.
REPORT

UNIFORM PROTECTED SERIES ACT

- Summary -

In response to the growing popularity of series limited liability companies in the United States, the Uniform Law Commission promulgated the Uniform Protected Series Act (UPSA), which provides a comprehensive framework for the formation and operation of a protected series limited liability company (LLC). The UPSA is drafted as a “module” to be inserted into the enacting state’s existing LLC act and may be adopted whether or not the state’s LLC statute is based on the Uniform Limited Liability Company Act.

Article 1 contains general provisions, such as: definitions, a description of the nature of a protected series, as well as its power, purpose, and duration; how the protected series is governed by the operating agreement of the LLC; and rules for applying certain provisions of the state’s existing LLC act to protected series. The act uses the term “protected series” to highlight the internal liability shields which are a defining characteristic of the act, and to avoid confusion with the term “series,” which is often used to refer to classes of interests in business entities that do not affect liabilities to third parties. If the requirements of the UPSA are satisfied, then assets (referred to as “associated assets”) of one protected series are not available to satisfy claims of creditors of the LLC or of other protected series of the LLC.

Article 2 explains how to establish a protected series. As a default matter, all of the members must consent to establish a protected series. Further, the LLC must deliver a protected series designation to the Secretary of State, signed by the company. Article 2 also provides name, registered agent, and service of process provisions, as well as methods to obtain a certificate of good standing and reporting requirements.

Article 3 includes the record-keeping requirements that must be satisfied for an asset to qualify as an “associated asset” under the act. Unless provided otherwise in the operating agreement, the owner of an asset is responsible for meeting the record-keeping requirements for the asset. These provisions are designed to provide transparency of protected series transactions. Article 3 also provides rules for associating members with the protected series and addresses protected series transferable interests, management, and non-associated members’ rights to information.

Article 4 covers limitations on liability and enforcement of claims. The act provides two different types of liability shields: vertical and horizontal. The traditional vertical shield protects equity holders and managers from status-based liability for an
organization’s obligations. The horizontal shield protects a protected series of a series LLC and its associated assets from liability for the debts, obligations, or other liabilities of the company or another protected series of the company. This article contains provisions for claims seeking to disregard limitation of liability, protected series-level charging orders for judgment creditors, and enforcement of judgments against certain assets of the company. A creditor may enforce a judgment against another protected series of a series LLC by pursuing assets owned by the company or another protected series of the company if the act’s requirements are not satisfied for these other assets (or “non-associated assets”). With respect to foreign LLCs, this act follows the common law approach and applies an enacting state’s jurisprudence on piercing and affiliate liability companies and foreign protected series in carefully and narrowly delineated circumstances.

Article 5 addresses grounds for dissolution and provisions for winding up. Under the act, dissolution of a series LLC immediately dissolves every protected series of the company. Reinstatement of an administratively dissolved protected series or the rescinding of a voluntarily dissolved company has the same retroactive effect at the protected series level.

Article 6 includes restrictions on mergers and other entity transactions involving LLCs and protected series. The article provides additional definitions, and provides that a protected series may not be a party to an entity transaction. A series LLC may be a party to a merger if each other party to the merger is an LLC, and the surviving company is not created in a merger. Furthermore, Article 6 includes provisions dealing with plans, statements that must be filed with appropriate authorities, and effects of mergers. It also provides that a creditor’s right that existed immediately before a merger may be enforced after the merger.

Article 7 addresses foreign protected series. The law of the jurisdiction of formation of a foreign series LLC governs certain aspects of a foreign protected series. Article 7 also provides guidelines for determining whether a foreign series LLC or foreign protected series of the company is doing business in the state. The article also provides registration requirements for foreign protected series and disclosure requirements in cases where a foreign LLC or foreign protected series is a party to a proceeding in the state.

Article 8 contains miscellaneous provisions as well as transition rules for pre-existing series limited liability companies and protected series.

The work of the Drafting Committee is available at www.uniformlaws.org. A direct link to the Uniform Protected Series Act is available here.
Respectfully submitted,

Anita Ramasastry, President
Uniform Law Commission
February 2018
112E

GENERAL INFORMATION FORM

Submitting Entity: National Conference of Commissioners on Uniform State Laws (Uniform Law Commission)

Submitted By: Liza Karsai, Executive Director

1. Summary of Resolution(s).

The National Conference of Commissioner on Uniform State Laws (Uniform Law Commission) requests approval of the Uniform Protected Series Act by the American Bar Association (ABA) House of Delegates.

2. Approval by Submitting Entity.

The Uniform Law Commission granted final approval to the Act at its July 2017 Annual Meeting.

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

No.

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

None.

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

Not applicable.

6. Status of Legislation. (If applicable)

The Uniform Protected Series Act has not yet been enacted in any state legislature.

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

The Uniform Law Commission will present the Act to state legislatures for consideration and enactment.

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

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

None.

10. Referrals.

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

The following individuals were ABA Advisors to the Uniform Protected Series Act:

Allan G. Donn, ABA Advisor;

Elizabeth S. Miller, ABA Section Advisor – ABA Business Law Section;

Norman M. Powell, ABA Section Advisor – ABA Business Law Section;

Greg Ladner, ABA Section Advisor – ABA Business Law Section;

Allen Sparkman, ABA Section Advisor – ABA Business Law Section;

Marla H. Norton, ABA Section Advisor – ABA Business Law Section;

James J. Wheaton, ABA Section Advisor – ABA Business Law Section;

Prof. Sandra K. Miller, ABA Section Advisor – ABA Business Law Section;

Kyung S. Lee, ABA Section Advisor – ABA Business Law Section;

John L. Williams, ABA Section Advisor - ABA Real Property, Trust and Estate Law Section;

Jay D. Adkisson, ABA Section Advisor – ABA Business Law Section;

J. Leigh Griffith, ABA Section Advisor - ABA Section of Taxation;

Marjorie R. Bardwell, ABA Section Advisor – ABA Real Property, Trust and Estate Law Section;

Prof. Carter G. Bishop, ABA Section Advisor – ABA Business Law Section; and

Louis T. Conti, ABA Section Advisor – ABA Business Law Section.
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12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

That the American Bar Association approves the Uniform Protected Series Act promulgated by the National Conference of Commissioners on Uniform State Laws (Uniform Law Commission) in July 2017 as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

2. Summary of the Issue that the Resolution Addresses

The Uniform Protected Series Act provides a comprehensive framework for the formation and operation of a protected series limited liability company. A protected series LLC has both “horizontal” liability shields, as well as the standard “vertical” liability shield. All modern business entities provide the traditional, “vertical” shield – protecting the entity’s owners (and their respective assets) from automatic, vicarious liability for the entity’s debts. A “series” limited liability company provides “horizontal” shields – protecting each protected series (and its assets) from automatic, vicarious liability for the debts of the company and for the debts of any other protected series of the company. A horizontal shield likewise protects the series limited liability company (and its assets) from creditors of any protected series of the company. About 15 jurisdictions have some kind of series statute, but they vary widely. The act integrates into any existing LLC act, whether it is the Uniform Limited Liability Company Act or not.

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

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

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

None known.
AMERICAN BAR ASSOCIATION
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association approves the Uniform Regulation of Virtual-Currency Businesses Act, promulgated by the National Conference of Commissioners on Uniform State Laws (Uniform Law Commission), as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.
The Uniform Regulation of Virtual-Currency Businesses Act (URVCBA) provides a statutory framework for the regulation of companies engaging in “virtual-currency business activity.” Virtual-currency business activity means exchanging, transferring, or storing virtual currency; holding electronic precious metals or certificates of electronic precious metals; or exchanging digital representations of value within online games for virtual currency or legal tender.

Under the URVCBA, “virtual currency” is a digital representation of value that is used as a medium of exchange, unit of account, or store of value and is not legal tender. This technology-neutral definition encompasses as many types of virtual currency as possible. The definition excludes merchants’ rewards programs or equivalent types of values on online game platforms.

The URVCBA is unique because it offers a three-tiered structure. Tier one represents persons that are exempt from regulation under the Act. Tier two is for providers that must register with the state. The registration tier is for providers with virtual-currency business activity levels between $5,000 and $35,000 annually. The registration tier functions as a “regulatory sandbox” because it allows companies to focus on innovation and experimentation while they are in the early stage of business development. Businesses in the registration tier may operate as registrants for up to two years, so long as they remain under the $35,000 threshold. Tier three, the full licensure tier, is for companies with virtual-currency business activity levels greater than $35,000 annually.

An application for a license under the URVCBA must include information such as: (1) a description of the applicant’s current business; (2) a description of the applicant’s business for the previous five years; (3) a list of the money transmission licenses the applicant holds in other states; and (4) lawsuit and bankruptcy history of the applicant and the applicant’s executive officers.

The URVCBA creates two methods for an enacting state to authorize reciprocal licensing under the Act. Either the enacting state can choose to participate in the Nationwide Multistate Licensing System and Registry or the state can authorize reciprocity on a bilateral or multi-lateral basis.

The Act also exempts some forms of businesses already regulated by the federal government or by the states from licensure and supervision under the URVCBA.

The URVCBA is the result of two years of drafting work and collaboration with representatives from the virtual currency industry, state and federal government, trade associations, financial services providers, and academia, among others.
The work of the Drafting Committee is available at www.uniformlaws.org, the website of the Conference. A direct link to the Uniform Regulation of Virtual-Currency Businesses Act is available here.

Respectfully submitted,

Anita Ramasastry, President
Uniform Law Commission
February 2018
1. **Summary of Resolution(s).**

   The National Conference of Commissioners on Uniform State Laws (NCCUSL) requests approval of the Uniform Regulation of Virtual-Currency Businesses Act by the American Bar Association (ABA) House of Delegates.

2. **Approval by Submitting Entity.**

   The Uniform Law Commission granted final approval to the Act at its July 2017 Annual Meeting.

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

   No.

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

   Not applicable.

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

   Not applicable.

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

   The Uniform Regulation of Virtual-Currency Businesses Act has not yet been enacted in any jurisdiction.

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

   NCCUSL will present the Act to state legislatures for consideration and enactment.

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

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

None.

10. Referrals.

Pursuant to the agreement between the ULC and the ABA, all members of the House of Delegates and Chairs of all ABA entities were advised of the drafting project, and those that expressed interest were provided with tentative drafts. The Drafting Committee’s work can be found here, http://uniformlaws.org/Committee.aspx?title=Regulation%20of%20Virtual%20Currency%20Businesses%20Act.

The following individuals were ABA Advisors to the Uniform Regulation of Virtual-Currency Businesses Act:

Stephen Middlebrook, ABA Advisor.

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 Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

That the American Bar Association approves the Uniform Regulation of Virtual-Currency Businesses Act promulgated by the National Conference of Commissioners on Uniform State Laws (Uniform Law Commission) in July 2017 as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

2. Summary of the Issue that the Resolution Addresses

The Uniform Regulation of Virtual-Currency Businesses Act creates a statutory framework for regulating companies engaged in virtual-currency business activity. Currently, legal gray areas exist for companies engaging in virtual-currency business activity and there is no uniformity from one state to the next. The Act provides clarity to both regulators and businesses, encourages innovation, and protects consumers utilizing virtual currencies.

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

Approval of the Uniform Regulation of Virtual-Currency Businesses Act by the American Bar Association House of Delegates would demonstrate to states that the Act is an appropriate approach for addressing the issues described above.

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

None known.
RESOLVED, That the American Bar Association urges federal, state, territorial, and tribal governments to adopt or preserve tax code provisions that allow the alimony deduction for payors and treats alimony as taxable income to payees.
REPORT

I. INTRODUCTION AND SUMMARY

On November 2, 2017, the US House Ways and Means Committee released the Tax Cuts and Jobs Act, which is the House’s proposal to overhaul the federal tax code. The House described the Tax Cuts and Jobs Act as a means to “deliver much-needed tax relief to millions of families, help our workers and job creators compete and win here at home and around the world, and make the tax code simpler and fairer for all Americans.” Among the many tax deductions that the House proposes to eliminate from the federal tax code is the deduction for alimony payments. In promoting the Tax Cuts and Jobs Act, the Joint Committee on Taxation characterized the alimony deduction as a “divorce subsidy” which gives an advantage to divorced couples over married couples and projected that the elimination of the alimony deduction will increase tax revenues by $8.3 billion over 10 years. The Senate passed its version of the Tax Cuts and Jobs Act on December 2, 2017, which did not include the elimination of the alimony deduction. Congressional leaders are now in conference committee to work through the differences in both bills.

This Resolution recommends that Congress not eliminate the alimony deduction available to payors of alimony as part of the Tax Cuts and Jobs Act as it may have a negative effect on divorce settlements and because it does not create a subsidy but, rather, puts divorcing spouses in a disadvantageous position compared to their married counterparts. Quite simply, existing law makes sure that the person using the funds pays the taxes on the funds. Alimony is often relied upon to provide ongoing financial support to the lower income spouse following a divorce. The alimony deduction enables divorced families to be able to support two households on the same income that married couples use to support one household by shifting the income to the spouse who is the one receiving and spending the funds and who may be in a lower tax bracket. Without the alimony deduction, alimony paying spouses would pay taxes on money they do not get to spend, and spouse who receives the alimony and already have difficulty making ends meet would likely receive less in net alimony to spend as a result. Overall, this would mean a larger portion of the income going to the government and a smaller portion of the income to be allocated between two households. Divorcing couples would be treated negatively for income tax purposes compared to married couples, since married couples only pay taxes on money they use themselves in one household and not on money they pay to others.

II. BACKGROUND

In a divorce situation, alimony payments are based upon one party’s need and the other party’s ability to pay. It is well recognized that it is more expensive for families to support two households after a divorce. The alimony deduction has been part of the Internal Revenue Code for the last seventy-five years. It is widely utilized by divorce attorneys to settle cases in a tax advantaged way to both spouses which eases the financial burden on the family. Under the current

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2 Joint Committee on Taxation, Description of the Chairman’s Mark of the “Tax Cuts and Jobs Act” (JCX-51-17) (2017).
Tax Code, alimony and separate maintenance receipts are included in the definition of “Gross Income.” The Internal Revenue Code defines “alimony or separate maintenance payments” as follows:

(1) In general. The term “alimony or separate maintenance payment” means any payment in cash if—

(A) such payment is received by (or on behalf of) a spouse under a divorce or separation instrument,

(B) the divorce or separation instrument does not designate such payment as a payment which is not includible in gross income under this section and not allowable as a deduction under section 215,

(C) in the case of an individual legally separated from his spouse under a decree of divorce or of separate maintenance, the payee spouse and the payor spouse are not members of the same household at the time such payment is made, and

(D) there is no liability to make any such payment for any period after the death of the payee spouse and there is no liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse.

With respect to such alimony or separate maintenance payments, the current Tax Code provides:

In the case of an individual, there shall be allowed as a deduction an amount equal to the alimony or separate maintenance payments paid during such individual’s taxable year.

The Tax Cuts and Jobs Act proposes a repeal of sections 61(a)(8) and 71 of the current Tax Code. The proposal would be effective for any divorce or separation agreements or court orders entered into after December 31, 2017 and for any divorce or separation agreements or court orders entered into before December 31, 2017 that are modified after December 31, 2017. Under the proposal, the party paying alimony will no longer receive a deduction and the party receiving alimony will no longer have to report it as income. The Ways and Means Committee claims that the “intent of the proposal is to follow the rule of the Supreme Court’s holding in Gould v. Gould, in which the Court held that such payments are not income to the recipient.” The Gould decision was based upon the Income Tax Act of October 3, 1913, long before the current law.

III. PURPOSE OF THE RESOLUTION

The purpose of this Resolution is to urge Congress to remove the repeal of the alimony deduction from the proposed Tax Cuts and Jobs Act or any result to come from a conference committee considering the differing versions now under consideration. The Resolution

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7 Committee on Ways and Means, Tax Cuts and Jobs Act, H.R. 1: Section-by-Section Summary, at 61 (2017).
recommends that the current provisions of the Tax Code remain unchanged with respect to the deductibility of alimony payments. Over the last seventy-five years, the ability to deduct alimony payments has made paying alimony more palatable to the higher income spouse, has enabled the dependent spouse to maintain the lifestyle closer to that enjoyed during marriage and has lessened the financial impact of divorce on countless families.

IV. THE IMPORTANCE OF THE ALIMONY DEDUCTION TO DIVORCED FAMILIES

The alimony deduction has been an important tool for family law attorneys since 1942 and has provided many divorced families with the means to maintain the lifestyle closer to that established during marriage. Allowing the higher income spouse to shift part of the tax liability on his/her income to the lower income spouse or spouse’s income that is paid to the payee spouse results is more after-tax income to provide for the two households. Without the alimony tax deduction, there will be less incentive for the higher income spouse to pay alimony at a rate that will enable the lower income spouse to support his/her own household.

Currently, in most cases, after a divorce, the spouse paying the alimony is in a considerably higher tax bracket than spouse receiving the money. The difference between these tax brackets provides a benefit to the spouse paying the alimony and an even greater benefit to the one receiving it. Essentially, the spouse receiving alimony is getting considerably more in actual dollars than the spouse paying it.8

For example, assume the former husband earns $415,000 per year and, if filing married filing separately is in a 33% tax bracket. Former husband agrees to pay $5,000 per month in alimony to former wife which puts her in the 17% tax bracket. After the alimony tax deduction, the $5,000 per month payment costs the former husband $3,350. The tax due on the $5,000 payment to former wife is $850 and nets the former wife $4,150 per month. Under the Tax Cuts and Jobs Act proposal, the elimination of the alimony tax deduction means that former husband will not be willing to pay $5,000 to the former wife as he will have no incentive to do so. The former spouse will want to pay the net amount of $3,350 to the former wife, which leaves her with $800 less funds to support her household. ($4,150 - $3,350 = $800)

If the family were intact, the husband’s tax rate would be 27% as he would be able to file married filing jointly. The same $5,000 would result in a net tax of $3,650. While the married couple nets less than the divorce couple under the current Tax Code, they have one household to support with the same $5,000 that the divorce couple has to use to support two households. Thus, many family law attorneys view the proposed elimination of the alimony tax deduction as a “divorce penalty,” but a “divorce subsidy.”

If alimony is no longer deductible, the ability of an ex-spouse to pay may be limited, due to other fixed expenses, such as child support payments, and education expenses for children. There is only so much juice that can be squeezed from the orange.9


9 Id.
There is a concern among the family law bar that the elimination of the alimony deduction will result in fewer settlements, higher litigation costs and lower support orders for the dependent spouse. The lifestyle of both parties in the divorcing couple will be negatively affected by the elimination of the alimony deduction – the payor spouse will have a greater tax obligation and the payee spouse will not be able to sustain the same lifestyle. There is also concern that the elimination of the alimony deduction will cause some unhappy couples to remain married because they will simply be unable to afford to get divorced.

This Resolution is urging Congress to consider the detrimental effects on divorced families by the elimination of the alimony deduction and to reject the Tax Cuts and Jobs Act efforts to remove the elimination of the alimony deduction.

Respectfully submitted,

Roberta S. Batley
Chair, Family Law Section

February 2018

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GENERAL INFORMATION FORM

Submitting Entity: ABA Section of Family Law
Submitted By: Bobbie Batley, Chair, ABA Section of Family Law

1. **Summary of Resolution(s).** The Resolution urges Congress to remove the elimination of the tax deduction for alimony payments in the proposed Tax Cuts and Jobs Act of 2017 (H.R. 1).

2. **Approval by Submitting Entity.** The ABA Section of Family Law approved submission of this Resolution on November 15, 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?** There is no association policy on this subject so no existing policy would be adversely affected by this Resolution. This resolution strives to give divorcing individuals the same treatments afforded to others and is in harmony with other association policy designed to insure equal protection.

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.** The Tax Cuts and Jobs Act of 2017 passed the House of Representative on November 16, 2017. On December 2, 2017, the Senate passed its own version of the Tax Cuts and Jobs Act, which did not include a provision to eliminate the alimony deduction.

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

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

9. **Disclosure of Interest.** (If applicable). Not Applicable.

10. **Referrals.** The Section of Taxation

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
   The Resolution urges Congress to remove the elimination of the tax deduction for alimony payments in the proposed Tax Cuts and Jobs Act of 2017 (H.R. 1).

2. Summary of the Issue that the Resolution Addresses
   On November 2, 2017, the US House Ways and Means Committee released the Tax Cuts and Jobs Act, which is the House’s proposal to overhaul the federal tax code. Among the many tax deductions that the House proposes to eliminate from the federal tax code is the deduction for alimony payments. Alimony is often relied upon to provide ongoing financial support to the lower income spouse following a divorce. The alimony deduction enables divorced families to be able to support two households on the same income that married couples use to support one household by shifting the income to the spouse in a lower tax bracket. Without the alimony deduction, there will be a larger portion of the income going to the government and a smaller portion of the income to be allocated between two households. There is significant concern amount the family law bar that the elimination of the alimony deduction from the new tax code will have a chilling effect on divorce settlements; will result in lower alimony awards; and will have a negative effect on divorced families.

3. Please Explain How the Proposed Policy Position will address the issue
   This Resolution recommends that Congress not eliminate the alimony deduction as part of the Tax Cuts and Jobs Act as it may have a negative effect on divorce settlements.

4. Summary of Minority Views
   None.
RESOLVED, That the American Bar Association supports an interpretation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), that its prohibition on sex discrimination in employment by covered employers includes discrimination on the bases of sexual orientation and gender identity; and

FURTHER RESOLVED, That the American Bar Association urges the Attorney General of the United States to withdraw the interpretation proposed by the U.S. Department of Justice in October 2017 that Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(a), does not protect transgender citizens against workplace discrimination.
The American Bar Association (“ABA”) adopts this Resolution to support an interpretation of federal employment law prohibiting employment discrimination on the basis of sex to include discrimination on the basis of sexual orientation and gender identity. This report addresses the legal authority supporting this interpretation and the importance of interpreting “sex” discrimination broadly to include all aspects of such discrimination, including discrimination based on sexual orientation and gender identity.

The ABA has adopted several policies that are consistent with this Resolution and that strongly oppose all kinds of discrimination on the bases of sexual orientation and gender identity. The ABA first took such a position against such discrimination nearly 30 years ago when it urged federal, state, and local governments to enact laws prohibiting discrimination on the basis of sexual orientation in employment, housing, and public accommodation. See 1989M8. The ABA re-stated and expanded its opposition to such discrimination in 2006 when it urged federal, state, local, and territorial governments to enact laws prohibiting discrimination on the basis of actual or perceived gender identity or expression in employment, housing, and public accommodations. See 2006A122B. The ABA also urged the EEOC and Congress to provide resources sufficient to enable the EEOC to carry out its duties to investigate, conciliate, and where appropriate, take legal action to enforce laws prohibiting discrimination. See 98M116A.

These existing policies support an interpretation of Title VII in which its prohibition of sex discrimination includes sexual orientation and gender identity, because such an interpretation advances the purpose of existing policy against such discrimination. However, this resolution fully enables the ABA to file amicus curiae briefs in support of parties that take the position that Title VII’s prohibition against sex discrimination includes a prohibition against discrimination on the bases of sexual orientation and gender identity.

Summary

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et. seq., prohibits discrimination in employment “because of [an] individual’s sex.” This provision is designed “to strike at the entire spectrum of disparate treatment of men and women in employment.”

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1 Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 708 n. 13 (1978) (quoting Sprogis v. United Air Lines Inc., 444 F.2d 1194, 1198 (7th Cir.1971)).
Gender Identity

Discrimination based on gender identity or transgender status is sex discrimination because it treats people differently from otherwise similarly situated people based on their transition from one gender to another, because it treats them differently based on sex stereotypes, and because it treats them differently based on gender identity and transgender status. The First, Sixth, Seventh, Ninth, and Eleventh Circuits have found transgender individuals to be protected by Title VII and other federal sex discrimination laws.²

Sexual Orientation

Sexual orientation discrimination is a form of sex discrimination because it treats otherwise similarly situated people differently because of their sex, because it treats them differently based on the sex of the individuals with whom they associate, and because such discrimination is rooted in gender stereotypes. The Seventh Circuit has recently held that Title VII covers discrimination based on sexual orientation.³ The Second Circuit has also recognized that discrimination based on gender stereotypes associated with sexual orientation is prohibited under Title VII.⁴

Since 2015, the Equal Employment Opportunity Commission (“EEOC”) has opined that “[s]exual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee’s sex.”⁵ Numerous federal district courts have agreed.⁶

² Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., No. 16-3522, 2017 WL 2331751, at *9 (7th Cir. May 30, 2017); Chavez v. Credit Nation Auto Sales, LLC, 641 F. App’x 883, 884 (11th Cir. 2016); Chavez v. Credit Nation Auto Sales, LLC, 641 F. App’x 883, 884 (11th Cir. 2016); Barnes v. City of Cincinnati, 401 F.3d 729, 737 (6th Cir. 2005); Smith v. City of Salem, Ohio, 378 F.3d 566, 575 (6th Cir. 2004); Schwenk v. Hartford, 204 F.3d 1187, 1201-02 (9th Cir. 2000); Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 215 (1st Cir. 2000).
³ Hively v. Ivy Tech Cmty. Coll. of Indiana, 853 F.3d 339, 351 (7th Cir. 2017) (“common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex”).
⁴ Christiansen v. Omnicom Grp., Inc., 852 F.3d 195 (2d Cir. 2017).
⁵ Baldwin v. Department of Transportation (Federal Aviation Administration), EEOC Appeal No. 0120133080 (July 15, 2015), 2015 WL 4397641, at 5, 10.
On October 4, 2017, the United States Department of Justice’s ("DOJ") Office of the Attorney General Issued a Memorandum ("DOJ Memorandum") to all United States Attorneys articulating the Department’s interpretation of Title VII of the Civil Rights Act of 1964. The Memorandum explained that the Department had concluded that “Although federal law, including Title VII provides various protections to transgender individuals, Title VII does not prohibit discrimination based upon gender identity per se. This is a conclusion of law, not policy.” This Memorandum contradicts and overrides a December 18, 2014 Memorandum from then-Attorney General Eric Holder determining that “the best reading of Title VII’s prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status.” The first district court opinion to address the issue since the Department issued its October 4 Memorandum denied summary judgment to the employer without mentioning the DOJ Memorandum.

Additionally, on July 26, 2017, the DOJ filed an amicus curiae brief in the Second Circuit arguing that Title VII does not protect employees from sexual orientation discrimination. The DOJ’s brief contradicted a brief filed in the same case by the EEOC, as the primary agency responsible for interpreting and enforcing Title VII, which argued that because such claims necessarily involve impermissible consideration of a plaintiff’s sex, gender-based associational discrimination, and sex stereotyping, discrimination claims based on sexual orientation “fall squarely within Title VII’s prohibition against discrimination on the basis of sex.”

Evans v. Georgia Regional Hospital

On September 7, 2017, petition for certiorari was filed by the plaintiff in Evans v. Georgia Regional Hospital. S. Ct. Docket No. 17-370. The question presented is “Whether the prohibition in Title VII ... against employment discrimination ‘because of...sex' encompasses discrimination based on an individual’s sexual orientation.”


8 DOJ Memorandum at 1.
Statutory Background

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, provides, inter alia:

It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s … sex…; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s … sex….

The only definition provided regarding the meaning of “sex” in Title VII is as follows:

The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title [section 703(h)] shall be interpreted to permit otherwise….

History

Early in the implementation of Title VII, a number of courts held that federal laws prohibiting sex discrimination should be construed narrowly and therefore did not prohibit discrimination based on sexual orientation or gender identity. This early approach focused on the now discredited view that such laws prohibit only a very narrow spectrum of discrimination based on a person’s biological sex – i.e., discrimination against women because they are women, or against men because they are men. Most of these cases predated a series of Supreme Court decisions which firmly established that Title VII was intended not only to prohibit discrimination against women or men based on their biological sex, but also “to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”

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The Supreme Court

The Supreme Court has not yet addressed whether Title VII prohibits sexual-orientation or gender identity discrimination. However, several Supreme Court cases shed light on how the Court is likely to examine the question of gender identity and sexual orientation discrimination under Title VII. In City of Los Angeles Dep’t of Water & Power v. Manhart, 435 U.S. 702, 711 (1978), the Court set forth a “simple test” for sex discrimination under Title VII: “treatment of a person in a manner which but for that person’s sex would be different.” A decade later the Court held that Title VII prohibits discrimination against workers for their failure to conform to sex-based stereotypes in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

In Oncale v. Sundowner Offshore Services, 523 U.S. 75 (1998), the Court recognized that same-sex sexual harassment can constitute discrimination because of sex and thus violate Title VII. The Court focused on differential treatment of similarly situated men and women, and away from the specific goals of Congress in passing Title VII. Oncale has been read to preclude courts from creating their own exceptions to Title VII coverage based on speculation about the primary intent of Congress in passing the legislation. The Court in Oncale observed that “[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.” According to the Court, whatever evidentiary route a plaintiff chooses, so long as a plaintiff’s claim “meets the statutory requirements” – i.e., is “discrimination because of sex” – the claim is cognizable.

The Lower Courts & Gender Identity

As mentioned above, the First, Sixth, Seventh, Ninth, and Eleventh Circuits have found transgender individuals to be protected by Title VII. Numerous district courts have also held that gender identity discrimination is prohibited by Title VII, either as per se sex discrimination because it is based on sex stereotypes, or because it is based on their

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14 Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (“As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they match the stereotype associated with their group.”)
15 Id. at 79.
16 Id. at 80.
17 Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., No. 16-3522, 2017 WL 2331751, at *9 (7th Cir. May 30, 2017); Chavez v. Credit Nation Auto Sales, LLC, 641 F. App’x 883, 884 (11th Cir. 2016); Chavez v. Credit Nation Auto Sales, LLC, 641 F. App’x 883, 884 (11th Cir. 2016); Barnes v. City of Cincinnati, 401 F.3d 729, 737 (6th Cir. 2005); Smith v. City of Salem, Ohio, 378 F.3d 566, 575 (6th Cir. 2004); Schwenk v. Hartford, 204 F.3d 1187, 1201-02 (9th Cir. 2000); Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 215 (1st Cir. 2000).
gender transition. Numerous agency administrative decisions and regulations have also made clear that “sex” includes gender identity and transgender status.

The Lower Courts & Sexual Orientation

Courts and enforcement agencies have also been reconsidering the interpretation of Title VII in the context of sexual orientation discrimination. The EEOC identified three bases for its finding that “a complaint alleging that an agency took his or her sexual orientation into account in an employment action necessarily alleges that the agency took his or her sex into account.” The EEOC found that sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee’s sex, because it is associational discrimination on the basis of sex, and because it necessarily involves discrimination based on gender stereotypes.

While several circuit courts previously found sexual orientation not to be protected under Title VII, many of these cases were decided before the Supreme Court’s unanimous holding in *Oncale v. Sundown Offshore Services, Inc.* that same-sex sexual harassment

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19 See, e.g., Lusardi v. Dep’t of the Army, 2015 WL 1607756, at *11 (E.E.O.C. Apr. 1, 2015); Macy v. Holder, 2012 WL 1435995, *10 (E.E.O.C. Apr. 20, 2012) (“Thus, we conclude that intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination ‘based on . . . sex,’ and such discrimination therefore violates Title VII.”); U.S. Department of Education - 34 C.F.R. § 270.7 (“Sex desegregation means the assignment of students to public schools … without regard to their sex (including transgender status; gender identity; sex stereotypes, such as treating a person differently because he or she does not conform to sex-role expectations because he or she is attracted to or is in a relationship with a person of the same sex; …)…”); U.S. Department of Health and Human Services - 45 C.F.R. § 92.4 (“On the basis of sex includes, but is not limited to, discrimination on the basis of . . . sex stereotyping, and gender identity.”).

20 Baldwin v. Department of Transportation (Federal Aviation Administration), EEOC Appeal No. 0120133080 (July 15, 2015), 2015 WL 4397641 at *5.

21 Id. at *5-14.
could constitute discrimination because of sex and therefore violate Title VII and that "statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." 22 Recent cases suggest an evolving understanding in keeping with Price Waterhouse, Oncale and the EEOC guidance in Baldwin.

For example, the Second Circuit is currently reconsidering its precedents en banc in Zarda v. Altitude Express (2d Cir. No. 15-3775, oral argument Sept. 26, 2017) under the question of "Does Title VII of the Civil Rights Act of 1964 prohibit discrimination on the basis of sexual orientation through its prohibition of discrimination 'because of . . . sex'?" And on April 4, 2017, the Seventh Circuit became the first federal appellate court to hold that Title VII proscribes sexual-orientation discrimination. Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 341 (7th Cir. 2017) (en banc). The court agreed with each of the coverage arguments in the EEOC’s Baldwin decision. Several district courts have also found sexual orientation covered under Title VII. 23

The arguments of the EEOC in Baldwin and the reasoning of the Seventh Circuit in Hively are persuasive and represent "evolving standards of decency that mark[s] the progress of a maturing society," as Chief Justice Warren famously wrote in Trop v. Dulles.

Conclusion

In order for Title VII of the Civil Rights Act of 1964 “to strike at the entire spectrum of disparate treatment of men and women” in employment, its provisions must be interpreted to take into full account that sexual orientation and gender identity are inseparable from and inescapably linked to sex. 24 In keeping with existing ABA policy and Goals III and IV of the ABA’s Mission, the ABA supports an interpretation of Title VII of the Civil Rights Act of 1964 that prohibits sex discrimination in employment by covered employers on the bases of gender identity and sexual orientation and urges the Attorney General to withdraw DOJ guidance inconsistent with that interpretation.

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24 Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 708 n. 13 (1978) (quoting Sprogis v. United Air Lines Inc., 444 F.2d 1194, 1198 (7th Cir.1971)).
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Respectfully submitted,

Robert Weiner
Chair, Section of Civil Rights and Social Justice
February 2018
GENERAL INFORMATION FORM

Submitting Entities: ABA Section of Civil Rights and Social Justice

Submitted By: Robert N. Weiner, Chair, Section of Civil Rights and Social Justice

1. **Summary of Resolution**

   This Resolution would establish policy in support of an interpretation of Title VII of the Civil Rights Act of 1964 that prohibits discrimination in employment on the bases of (1) sexual orientation and (2) gender identity.

2. **Approval by Submitting Entity**

   The Section of Civil Rights and Social Justice approved this policy resolution on Friday, October 20, 2017 during its Fall Council Meeting.

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

   No.

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

   This resolution is consistent with prior policy supporting laws that prohibit discrimination in employment on the basis of sexual orientation and gender identity in 06A122B, 89M8, and 98M116A.

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**

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

The policy will provide authority for the preparation and filing of an ABA *amicus curiae* brief in the U.S. Supreme Court or other appropriate judicial forum in any case presenting the issues that are addressed in the policy.

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

Adoption of this Resolution would result only in minor indirect costs associated with staff time devoted to the policy subject matter as part of the staff members’ overall substantive responsibilities.

9. Disclosure of Interest

There are no known conflicts of interest to this recommendation.

10. Referrals

By copy of this form, this Resolution will be referred to the following entities:

- Government and Public Sector Lawyers Division
- Law Practice Division
- Judicial Division
- Law Student Division
- Senior Lawyers Division
- Young Lawyers Division
- Section of Business Law
- Section of Dispute Resolution
- Section of International Law
- Section of Labor and Employment Law
- Section of Litigation
- Section of State and Local Government Law
- Section of Tort Trial and Insurance Practice
- Commission on Sexual Orientation and Gender Identity
11. **Contact Persons (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 will establish policy that sex discrimination in employment prohibited by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et. seq., includes discrimination on the bases of (1) sexual orientation and (2) gender identity.

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

The Resolution addresses a split of interpretations on the application of Title VII’s prohibition of sex discrimination to claims of discrimination by (1) lesbian, gay, and bisexual individuals challenging discrimination on the basis of their sexual orientation and (2) transgender individuals challenging discrimination on the basis of their gender identity.

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

The Resolution clarifies and emphasizes the ABA’s position on employment discrimination on the bases of sexual orientation and/or gender identity and more fully enables the ABA Governmental Affairs Office, the ABA President, and the Standing Committee on Amicus Curiae Briefs to act.

4. **Summary of Minority Views**

No opposing views have been expressed by other ABA entities or organizations as of the preparation of this summary. The Section will work with other ABA entities, as necessary, on wording and scope of this Resolution.
RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal courts to recognize that service in the United States Armed Forces should not be restricted and individuals should not be discriminated against on the basis of sexual orientation or gender identity; and

FURTHER RESOLVED, That the American Bar Association urges federal courts to hold that the policies and directives encompassed in President Donald J. Trump's Memorandum for the Secretary of Defense and the Secretary of Homeland Security, dated August 25, 2017, and entitled “Armed Forces Service by Transgender Individuals,” violate the Equal Protection and Due Process clauses of the Fifth Amendment of the United States Constitution.
REPORT

Introduction

The American Bar Association (“ABA”) adopts this Resolution urging federal, state, local, territorial and tribal courts to recognize that service in the United States Armed Forces should not be restricted and that members should not be discriminated against on the basis of sexual orientation or gender identity. This report addresses the legal authority and extensive research supporting this Resolution.

This Resolution is consistent with ABA policy. Previously, the ABA has urged federal, state, local, and territorial governments to enact laws prohibiting discrimination on the basis of actual or perceived gender identity or expression in employment and public accommodations. See 06A122B. Also, the ABA urged federal, state and local governments to enact laws prohibiting discrimination on the basis of sexual orientation. See 89M8.

This Resolution enables the ABA to specifically address any and all discriminatory actions perpetuated by the federal government to bar service in the United States Armed Forces based on one’s sexual orientation or gender identity.

This accompanying report will address three key arguments as follows:

I. Transgender individuals openly serving in the Armed Forces will have an insignificant impact on military readiness.
   a. Transgender individuals openly serving in the Armed Forces will have only a marginal impact on an ability to deploy.
   b. Unit cohesion will not be affected by allowing transgender individuals to serve openly in the Armed Forces.

II. Costs associated with extending health coverage for transgender individuals is negligible.

III. The transgender service ban violates the constitutional guarantees of Equal Protection Clause and Due Process Clause.
   a. The transgender service member ban violates the Equal Protection Clause of the Fifth Amendment to the United States Constitution.
   b. The transgender service member ban violates the Due Process Clause of the Fifth Amendment to the United States Constitution
Background

On June 30, 2016, the United States Department of Defense ("DoD") announced that it would allow transgender people to serve openly in the United States Armed Forces.\(^1\) That policy was the result of a lengthy review process by high-ranking military personnel, who concluded that permitting transgender people to serve would have no adverse effect on military readiness or effectiveness.

As a consequence of that announcement, many service members identified themselves as transgender to their commanding officers.

On July 26, 2017, President Trump reversed course and announced that “the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military.” In the wake of that announcement, transgender service members began to experience a variety of harms, including denial of medical care, reenlistment, promotions, commissions, and deployments.

Shortly thereafter, on June 30, 2017, Defense Secretary Jim Mattis delayed a requirement that military leaders implement policies to enlist incoming transgender service members.\(^2\)

On August 25, 2017, the President issued a memorandum to the Secretary of Defense and the Secretary of Homeland Security banning transgender people from military service.\(^3\) This memo confirmed that, effective March 23, 2018, the Armed Forces would “return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016,” no longer permitting transgender individuals to serve openly in the military, and no longer authorizing the use of the Departments’ resources to fund sex-reassignment surgical procedures, the President’s directive also continued indefinitely DoD’s delay in implementing the June 2016 open service policy on accessions (entry into the military). The President stated, “In my judgment, the previous Administration failed to identify a sufficient basis to conclude that terminating the Departments' [DoD’s] longstanding policy and practice [forbidding service by transgender service members] would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources, and there remain meaningful concerns that further study is needed to ensure that continued implementation of last year’s policy

changes would not have those negative effects.” As a result of that memorandum, transgender people were indefinitely barred from accession (entry into the military), and currently serving transgender service members will no longer be eligible for service as of March 23, 2018.

**Arguments**

I. Transgender individuals openly serving in the Armed Forces will have an insignificant impact on military readiness.

a. Transgender individuals openly serving in the Armed Forces will have only a marginal impact on an ability to deploy

One argument that is relied upon by those who oppose allowing transgender individuals to serve in the Armed Forces is that the medical needs of those members would affect Armed Forces' readiness and deployment. It is axiomatic that the U.S. military requires its members to maintain a certain level of physical fitness and to have the ability to deploy as necessary. However, there is no empirical evidence that supports the argument that transgender people are unfit for service.

Since 2016, active U.S. military members who identify as transgender have been able to seek transition-related care. In that time, there has not been any significant disruption to military operations or deployment. In fact, it is estimated that less than 0.1% of the U.S Armed Forces will seek transition-related care, and with only a slight disruption to deployment. Thus, it is clear that transgender individuals would have a minimal likely impact on the U.S. military's force readiness, a measure that includes factors like unit cohesion and physical ability.

Moreover, ensuring appropriate mental and physical screenings will help minimize any readiness concerns. The argument regarding the medical needs of transgender individuals often hinges on the fact that these individuals may be physically affected by hormone therapy or by undergoing gender re-assignment surgery. However, there is no evidence that a transgender member’s medical care would have any significant, long-

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5 Schaefer, Agnes Gereben, et al. RAND Corporation. 2016, “Assessing the Implications of Allowing Transgender Personnel to Serve Openly.” www.rand.org/pubs/research_reports/RR1530.html. “Our estimates based on private health insurance data ranged from 0.022 to 0.0396 annual claimants per 1,000 individuals. Applied to the AC [Active Component, rather than reserves] population, these estimates led to a lower-bound estimate of 29 AC service members and an upper-bound estimate of 129 AC service members annually utilizing transition-related health care, out of a total AC force of 1,326,273 in FY 2014., Summary xi.
term impact on readiness, unless the member worked in a unique occupation or needed to be available for frequent, unpredicted mobilizations. Even in those instances, however, accommodations can be made to allow the individual to continue to serve.

Nonetheless, the Armed Forces will need to implement certain policies and procedures to accommodate transgender members. For example, while undergoing transition-related medical treatments, it may become necessary to restrict deployment of transitioning individuals to environments where their health care needs cannot be met. Additionally, as expected, there is a post-operative recovery period for individuals who undergo gender re-assignment surgery, and they are unable to work or deploy while recovering from surgery. However, after this short-term leave, a member could resume activity in an operational unit if otherwise qualified. Thus, there is no evidence that transition related medical care will have any long-term effect on a transgender individual’s ability to serve in the Armed Forces.

b. Unit cohesion will not be affected by allowing transgender individuals to serve openly in the Armed Forces.

In explaining President Donald Trump’s decision that transgender Americans would not be allowed to serve in the U.S. Armed Forces, White House press secretary Sarah Sanders stated that based on consultation with his national security team, the president “came to conclusion that it erodes military readiness and unit cohesion.” Unit cohesion, a military concept closely tied to morale, has been analyzed dating back to Sun Tzu, a Chinese military theorist who viewed cohesion as the unity of will of a unit through which all ranks could achieve victory. The importance of unit cohesion to the success of an army in battle has been emphasized by military theorists since. Karl von Clausewitz wrote that the loss of order and cohesion in a unit often makes even the resistance of individual units fatal for them. More recently, researchers studying military units during World War II, the Korean War, and the Vietnam War have concluded that unit cohesion enhanced fighting power, reducing combat inhibitors and promoting morale and teamwork. As one

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7 Major Alexander A. Cox, U.S. Army, "Unit Cohesion and Morale in Combat: Survival in a Culturally and Racially Heterogeneous Environment," School of Advanced Military Studies, U.S. Army Command and Staff College at 4 (1995), http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA309830&Location=U2&doc=GetTRDoc.pdf. Early analysis discussed cohesion in monolithic terms as an important contributor to military performance and winning on the battlefield, while more academic study distinguishes between task and social cohesion, a distinction that is now adopted in most academic study on the topic. NATIONAL DEFENSE RESEARCH INSTITUTE, SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: AN UPDATE OF RAND’S 1993 STUDY 139 (RAND Corp. 2010), https://www.rand.org/pubs/monographs/MG1056.html. Recent studies have concluded that task cohesion is the primary component of cohesiveness impacting performance and that social cohesion has no reliable effects on performance once task cohesion is statistically controlled. Id. at 142. For purposes of this report, we refer to “unit cohesion” in a monolithic sense.
8 Id. at 5.
Army officer recently wrote, unit cohesion is an important consideration in the best of times; in the worst of times unit cohesion may be the one attribute enabling a unit to survive.  

The importance of unit cohesion to military success coupled with the difficulty in objectively measuring it, has provided ready ammunition for opponents of social change in the U.S. armed forces. Throughout much of the U.S. military’s recent history, various groups have argued that a particular category of people—from African-Americans in the 1940s, to women in the 1970s, to gays and lesbians in the 1990s, and now —transgender individuals—would destroy the military from within by degrading unit cohesion. The underlying assumption is that if service members discover that a member of their unit is transgender (or Black, or a woman, or gay), this discovery would inhibit bonding within the unit, reducing operational readiness.11 It is an argument that has repeatedly proven to be false.

During World War II, the U.S. military was segregated despite the growing number of African-Americans serving in the military during the war, putting increasing pressure on the U.S. administration to desegregate the Armed Forces.12 Military officials frequently argued that racial integration of the armed forces would have a negative impact on unit cohesion.13 In 1940, President Franklin D. Roosevelt, stated that kept the armed forces segregated because he feared that “[a]t this time and this time only, we dare not confuse the issue of prompt preparedness with a new social experiment however important and desirable it may be.”14 A 1944 memorandum authored by the War Department (the predecessor of the Department of Defense) noted that “[t]he policy of the War Department is not to intermingle colored and white enlisted personnel in the same regimental organizations. This policy has proven satisfactory over a long period of years and to make changes would produce situations destructive to morale and detrimental to the preparation for national defense.”15

However, after testing the proposition of integrated units under wartime conditions, the threat to unit cohesion was dispelled. A 1945 survey of soldiers who had served in integrated units conducted by Truman’s Committee on Equality of Treatment and Opportunity in the Armed Services found that 64% percent of white service members had negative views of serving with African-Americans before they served in an integrated unit, but that 77% said they had more favorable views about serving in an integrated unit afterward. Similarly, evaluations of racial integration on supply ships during 1944 and 1945 revealed high performance and morale among the racially mixed crews. Currently, the U.S. Armed Forces is regarded as one of the most integrated and diverse institutions in the United States; as exemplified by interracial marriage, which is it is significantly more prevalent in the U.S. military than in civilian society.

Similar arguments were voiced during the debates that occurred over the integration of women into the military and the end to the prohibition on gays and lesbians serving in the United States military. With the enactment of the Armed Services Integration Act in 1948, women were limited to 2% of active duty personnel in each of the Services and it was not until the late-1970s, the number and the roles of women in the military increased. As with racial integration, many leaders expressed concerns about women having a negative impact on unit cohesion. U.S. Navy surveys of ships’ crews integrating women indicated concerns about unit cohesion. However, as with racial integration, the Department of Defense has found that “the expansion of women’s roles in the military have not brought a degradation in military readiness, military effectiveness, or unit cohesion.”

Similarly, the concern about the effect that a gay or lesbian service member would have on unit cohesion dominated the debate over ending the prohibition on gay and lesbian people serving in the U.S. military. At the time, the Chairman of the Joint Chiefs of Staff and other senior military leaders believed that the presence of a known gay person in a unit would seriously undermine the cohesiveness of that unit. Congress codified the

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16 ROSTKER supra note 13 at 173.
18 ROSTKER supra note 13 at 173.
20 Id. at 86.
21 Id.
22 Id.
23 Id. at 87.
24 ROSTKER supra note 13 at xxii.
25 Id. at 1, 28.
unit cohesion argument in the 1993 “Don’t Ask, Don’t Tell” legislation.\textsuperscript{26} In 2010, those who opposed repeal of the “Don’t Ask, Don’t Tell” policy continued to use the same argument.\textsuperscript{27} However, a Department of Defense study conducted in 2010 surveyed active duty service members and concluded that the risk of permitting open service by gays and lesbian people on overall military effectiveness was low.\textsuperscript{28} The surveys indicated that approximately 70\% of service members predicted that repeal of the prohibition service by gay and lesbian people would have mixed, positive or no effects on unit cohesion.\textsuperscript{29}

A recent study of the implications of allowing transgender individuals to serve in the U.S. Armed Forces examined the impact of such service on unit cohesion and found that existing data suggests a minimal impact on unit cohesion as a result of allowing transgender individuals to serve.\textsuperscript{30} The study reviewed the experiences of foreign militaries that permit service by transgender individuals and found that there has been no significant effect on cohesion, operational effectiveness, or readiness.\textsuperscript{31}

As outlined above, the U.S. military, has historically wrestled with the integration of diverse populations: African-Americans, women, and gays and lesbians. We now know that a great body of research shows that this concern for the protection of unit cohesion has consistently proven to be unjustified. There is in fact, research that suggests that that concealment of sexual orientation appears to reduce, rather than increase unit cohesion. While sexual orientation disclosure positively impacted unit cohesion.\textsuperscript{32}

\textbf{II. Costs associated with extending health coverage for transgender individuals is negligible.}

In announcing the ban on Twitter, President Trump cited “tremendous medical costs” as another primary basis for his decision. However, research commissioned by the DoD do not bear this statement out. \textsuperscript{33}

Instead, the study found that a change in policy that permits transition-related care for transgendered individuals was likely to have marginal impact on health care costs. The

\begin{quote}
\textsuperscript{26} 10 U.S.C. § 654(a)(15) (2006) (“The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of Armed Forces capability.”).
\textsuperscript{27} NATIONAL DEFENSE RESEARCH INSTITUTE, supra note 7 at 5.
\textsuperscript{28} U.S. DEP’T OF DEF., supra note 19 at 129.
\textsuperscript{29} Id. at 119.
\textsuperscript{30} SCHAEFER supra note 11 at xii.
\textsuperscript{31} Id. at 45.
\textsuperscript{33} AGNES GEREBEN SCHAEFER ET AL.,
report stated that only a small population of service members would likely seek transition-related care each year (described as both surgical and hormone therapy) therefore the estimated costs were only expected to be a .013-percent increase. (A high end estimate was $8.4 million a year, out of health care expenditures for active component military members of $6.27 billion in 2014.)

Conversely, the report revealed the potential cost of not providing necessary transition-related health care. One risk identified included having transgender personnel avoid other necessary health care, including preventative care and increased rates of substance abuse and even suicide. Other risks identified included individuals turning to alternative solutions such as injecting construction-grade silicone into their bodies to alter body shape. The report did note that the potential cost of mental health care services for individuals who did not receive care due to implementing the ban would cost $960 million— more than 100 times the cost of providing necessary healthcare services to transgender troops.

III. The Transgender service ban violates the constitutional guarantees of equal protection and due process.

a. The Transgender Service Member Ban Violates the Equal Protection Component of the Fifth Amendment to the United States Constitution

“The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws.” United States v. Windsor, 133 S. Ct. 2675, 2695 (2013). This equal protection guarantee applies to men and women who serve in the Armed Forces. See, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973); Emory v. Sec'y of Navy, 819 F.2d 291 (D.C. Cir. 1987) (per curiam).

A government action that treats certain classes of people differently “is presumed to be valid and will be sustained if the classification drawn . . . is rationally related to a legitimate state interest.” City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985). This general rule does not apply, however, where the government action draws distinctions between individuals based on certain suspect or quasi-suspect classification and, in those instances, courts apply a heightened degree of scrutiny. Id. at 440-441.

The transgender military service ban is subject to a heightened degree of scrutiny for two reasons. First, the targeting of men and women who are transgender involves a suspect classification because they have experienced a “history of purposeful unequal treatment” and been “subjected to unique disabilities on the basis of stereotyped characteristics

34 See, e.g., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY. EXECUTIVE SUMMARY Grant, Jaime M., Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman, and Mara Keisling. Washington:
not truly indicative of their abilities.” See Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976); see also Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1051 (7th Cir. 2017) (holding that “[t]here is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity,” and that “[a]ccording to a report issued by the National Center for Transgender Equality, 78% of students who identify as transgender or as gender non-conformant, report being harassed while in grades K-12”). See also GG ex rel. Grimm v. Gloucester County School Bd., 822 F. 3d 709 (4th Cir. 2017) (Concurrence by Davis, J.) (Noting animus against transgender people and need to protect them from discrimination); Federal Register / Vol. 76, No. 15 / Monday, January 24, 2011 / Proposed Rules, Equal Access to Housing in HUD Programs—Regardless of Sexual Orientation or Gender Identity (proposing rule to curb pervasive discrimination against transgender people in housing).

Further, transgender individuals as a group have been “relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.” Murgia, 427 U.S. at 313. Transgender individuals also “exhibit obvious, immutable, or distinguishing characteristics that define [the members of the class] as a discrete group.” Bowen v. Gilliard, 483 U.S. 587, 602 (1987). The presence of these factors “is a signal that the particular classification is ‘more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective,’ thus requiring heightened scrutiny.” Golinski v. OPM, 824 F. Supp. 2d 968, 983 (N.D. Cal. 2012).

Second, the transgender military service ban is subject to heightened scrutiny because it is a form of discrimination on the basis of sex. Gender-based discrimination includes discrimination based on non-conformity with gender stereotypes. See Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989); Hively v. Ivy Tech Community College of Indiana, 853 F.3d 339 (7th Cir. 2017); see also Fabian v. Hosp. of Cent. Conn., 172 F.Supp.3d 509, 527 (D. Conn. 2016) (noting that “[d]iscrimination against transgender people because they are transgender people, by that reading, is quite literally discrimination “because of sex”).

Moreover, the transgender service member ban fails any level of scrutiny. Under rational basis review, the classification must have a “footing in the realities of the subject addressed,” Heller v. Doe by Doe, 509 U.S. 312, 321 (1993), and the government “may
not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.” *Cleburne*, 473 U.S. at 446. A “desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” *Romer v. Evans*, 517 U.S. 620, 634 (1996). The transgender military service ban is not rationally related to military effectiveness, particularly as service members who are transgender are held to the same standards as other service members. Moreover, the de minis deployability constraints based on undergoing transition-related surgery does not plausibly justify the sweeping ban on transgender service members. The transgender military service ban is also not rationally related to an interest in avoiding costs as medically necessary surgeries for men and women who are transgender are overwhelmingly small.

In determining whether a law is motivated by an improper animus or purpose, “[d]iscriminations of an unusual character” especially require careful consideration.” *Windsor*, 133 S. Ct. at 2693 (quoting *Romer*, 517 U.S. at 633). The discrimination demonstrated by the ban is just that; and evidence of animus is borne out by the timeline of events that took place just prior to the ban going into effect.

As outlined above, after a lengthy review process by senior military personnel, the military had determined that permitting transgender individuals to serve would not have adverse effects on the military and had announced that such individuals were free to serve openly. In contrast, the earlier announcement to permit transgendered individuals to serve freely, the President’s announcement, via Twitter, was seemingly made with no formality or any deliberative processes that generally accompany the development and announcement of major policy changes. These circumstances serve as evidence that the decision to exclude transgender individuals was not driven by genuine concerns regarding military efficacy. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) (holding that “[t]he specific sequence of events leading up the challenged decision . . . may shed some light on the decisionmaker’s purposes” and “[d]epartures from the normal procedural sequence also might afford evidence that improper purposes are playing a role”).

Finally as stated above, the President’s stated rationale’s claiming an impact on military readiness and medical costs have not been borne out by facts. The use of unfounded rationalizations is a strong indication that the true motive for the ban is animus. See, *e.g.*, *Romer*, 517 U.S. at 635 (the constitutional guarantee of equal protection under the law will not tolerate “a status-based enactment divorced from any factual context from which [one] could discern a relationship to legitimate state interests”); *Perry*, 671 F.3d at 1081 (“A law that has no practical effect except to strip one group of [a] right … raises an even stronger inference that the disadvantage imposed is born of animosity toward the class of persons affected.”) Moreover, the ban’s “sheer breadth is discontinuous with the
reasons offered for it,” so much so that it “seems inexplicable by anything other than animus toward the class it affects.” *Romer*, 517 U.S. at 632. Transgender individuals are banned from military service “in any capacity.” When, as here, the breadth of governmental discrimination “is so far removed from the[] particular justifications” given, it is “impossible to credit them.” *Id.* at 635.

b. The Transgender Service Member Ban Violates the Due Process Clause of the Fifth Amendment to the United States Constitution


President Trump’s arbitrary decision to exclude men and women who are transgender, which is inconsistent with and contradicted by the findings of the Department of Defense, serves no legitimate purpose and cannot be reconciled with the liberty and equality protected by the Constitution.

The due process requirement that every government action must have a “reasonable justification in the service of a legitimate governmental objective” protects individuals against the arbitrary and oppressive exercise of government power. *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998) (internal quotations omitted); *Abdelfattah v. U.S. Dep’t of Homeland Sec.*, 787 F.3d 524, 540 (D.C. Cir. 2015). The President’s abrupt reversal of a policy that had been carefully studied, implemented, and in place for more than a year altogether fails that test.

As explained in detail above, the ban lacks any rational connection to a legitimate governmental objective, and for this reason violates due process as well as equal protection. See, e.g., *George Washington Univ. v. Dist. of Columbia*, 391 F. Supp. 2d 109, 114 (D.D.C. 2005) (noting that the rational basis tests under equal protection and due process “are almost indistinguishable”).

The ban impermissibly burdens transgender service members’ fundamental rights to autonomy. The right to live in accord with one’s gender identity is an inherent aspect of the right to personal autonomy. As the Supreme Court has repeatedly explained, the liberty protected by the Due Process Clause includes the right to make “certain personal choices central to individual dignity and autonomy, including intimate choices that define

Under these well-established principles, the fundamental right to autonomy must include a person’s right to be transgender, just as it includes a person’s right to be lesbian, gay, bisexual, or heterosexual. Like a person’s sexual orientation or other central aspects of personhood, gender identity is “inherent to one’s very identity as a person.” Hernandez-Montiel v. INS, 225 F.3d 1084, 1093-94 (9th Cir. 2000) (internal citations and quotation marks omitted). The ban intrudes upon the right of transgender men and women to live as who they are, consistent with this core aspect of their identity. Thus it is subject to heightened review. See Witt v. Dep’t of AirForce, 527 F.3d 806, 819 (9th Cir. 2008) (holding that heightened scrutiny applies “when the government attempts to intrude upon … the rights [of personal autonomy] identified in Lawrence”).

Moreover, the ban is also subject to heightened due process review because it burdens this fundamental right selectively, only for transgender people. “Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects.” Lawrence, 539 U.S. at 575. Subjecting one group of persons to adverse treatment based solely on a characteristic that is so central, immutable, and deep-seated violates that prohibition unless supported by a sufficient governmental interest. See id.

Finally, transgendered service members have a right not to be discharged on account of their gender identity after having relied upon the Government’s explicit promise that they could serve openly. See Landgraf v. USI Film Prods., 511 U.S. 244, 265-66 (1994) (due process does not permit government to use actions it permitted or encouraged as a ground for punishment); see also Lewis, 523 U.S. at 845-46 (“[T]he substantive due process guarantee protects [the individual] against government power arbitrarily and oppressively exercised[.]”).

Conclusion

Men and women who are transgender have long served in the United States Armed Forces and have been able to serve their country openly since June 30, 2016. For all of
the reasons stated above, the ABA should have a policy that supports the continued service by all Americans regardless of sexual orientation or gender identity.

Respectfully submitted,

Mark Johnson Roberts,
Chair, ABA Commission on Sexual Orientation and Gender Identity

February 2018
GENERAL INFORMATION FORM

Submitting Entities: ABA Commission on Sexual Orientation and Gender Identity

Submitted by: Mark Johnson Roberts, Chair, ABA Commission on Sexual Orientation and Gender Identity

1. Summary of Resolution

This Resolution would enable the ABA to more specifically address any and all discriminatory actions perpetuated by the federal, state, local, territorial and tribal courts to bar service in the United States armed forces based on one’s sexual orientation or gender identity.

2. Approval by Submitting Entity

November 4, 2017

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

No.

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

This resolution is consistent with prior policy supporting laws that prohibit discrimination on the basis of sexual orientation and gender identity. See 06A122B and 89M8.

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

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

The policy will provide authority for the preparation and filing of any ABA *amicus curiae* brief in the U.S. Supreme Court or other appropriate judicial forum in any case presenting the issues that are addressed in the policy. The policy would also allow the ABA to directly advocate on behalf of the tens of thousands of transgender military personnel.

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

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

9. Disclosure of Interest

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

10. Referrals

This recommendation is being distributed to each of the Sections, Divisions, Standing Committees, and Commissions of the Association. Additionally, this is being distributed to the National LGBT Bar Association and OUTServe SLDN. OutServe-SLDN is the association for actively serving LGBT military personnel and veterans.

11. Contact Persons (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 will establish policy to recognize that service in the United States Armed Forces should not be restricted and that members should not be discriminated against based on one’s sexual orientation or gender identity.

2. Summary of the Issue that the Resolution Addresses

The Resolution addresses a number of factors that were outlined by the current administration as reasons why the United States Government will reverse course and not accept or allow transgender individuals to serve in any capacity in the U.S. Armed Forces.

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

The Resolution clarifies and emphasizes the ABA’s position on discrimination by the United States Government on the bases of sexual orientation and/or gender identity and more fully enables the Governmental Affairs Office, the ABA President, and the Standing Committee on Amicus Curiae Briefs to act.

4. Summary of Minority Views

None.