MEETING OF OFFICERS, COUNCIL AND COMMITTEE CHAIRS

Telephonic Council Meeting
July 24, 2018 3:00 PM ET
866-646-6488 passcode 7282890493

COUNCIL MEETING AGENDA

<table>
<thead>
<tr>
<th>Item</th>
<th>Presenter</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Call to order; Introductions</td>
<td>Chris Rockers</td>
</tr>
<tr>
<td>2. Chair Report</td>
<td>Chris Rockers</td>
</tr>
<tr>
<td>2.1 Highlights from the Section Scorecard</td>
<td></td>
</tr>
<tr>
<td>2.2 Update on the Section Annual Meeting</td>
<td></td>
</tr>
<tr>
<td>Action Items</td>
<td></td>
</tr>
<tr>
<td>4. Approval of Section Positions on Reports and Recommendations, ABA House of Delegates</td>
<td>Chip Lion/Barbara Mayden/Alvin Thompson/Steve Weise/Chris Rockers</td>
</tr>
</tbody>
</table>
**SECTION WEBSITE PAGE VIEWS**

**FY2017 Q3 vs. FY2018 Q3 MONTHLY PAGE VIEWS**

<table>
<thead>
<tr>
<th>Month</th>
<th>FY2017</th>
<th>FY2018</th>
</tr>
</thead>
<tbody>
<tr>
<td>March</td>
<td>141,979</td>
<td>133,900</td>
</tr>
<tr>
<td>April</td>
<td>135,911</td>
<td>145,046</td>
</tr>
<tr>
<td>May</td>
<td>125,314</td>
<td>123,938</td>
</tr>
</tbody>
</table>

**MONTH-OVER-MONTH BLT PAGE VIEWS**

<table>
<thead>
<tr>
<th>Month</th>
<th>FY2018</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mar</td>
<td>33,963</td>
</tr>
<tr>
<td>Apr</td>
<td>33,153</td>
</tr>
<tr>
<td>May</td>
<td>36,077</td>
</tr>
</tbody>
</table>

**TOP ATTENDED CLE PROGRAMS AT SPRING MEETING 2018**

- Policy By Twitter: Is the Demise of Consumer Finance Regulation Merely a Hoax? (Fisher Memorial Program)
- An Update on Debt Collection Rules, Enforcement Actions and Case Law
- Fair Lending Under the New Regime: Where Are We and Where Are We Headed?
- Expansion of Ability to Repay and Other Doctrines of Suitability in Consumer Finance
- State Oversight of FinTech: The Evolution of Play in Regulatory Sandboxes

**SUCCESS BY NUMBERS**

- **1.7%** Increase in average number of committees per member YOY
- **8.4%** Increase in Lawyer Member Adds YOY
- **267** Program materials posted YTD
- **4,173** In The Know and Business Law Basics registrations for Q3
- **60** Number of sponsorships at Spring Meeting
- **28%** Open rate for BLT email in Q3
- **75%** Of FY2018 books produced by May

**BUSINESS LAW SECTION SCORECARD**

FY2018 Q3, MARCH 2018 - MAY 2018
### Membership - May 2018

<table>
<thead>
<tr>
<th>Section Counts</th>
<th>Current FY</th>
<th>Prior FY</th>
<th>Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lawyer</td>
<td>29,067</td>
<td>29,863</td>
<td>-2.67%</td>
</tr>
<tr>
<td>Associate</td>
<td>1,708</td>
<td>1,793</td>
<td>-4.74%</td>
</tr>
<tr>
<td>Student</td>
<td>13,426</td>
<td>14,020</td>
<td>-4.24%</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>44,201</strong></td>
<td><strong>45,676</strong></td>
<td><strong>-3.23%</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>ABA Counts</th>
<th>Current FY</th>
<th>Prior FY</th>
<th>Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lawyer</td>
<td>259,063</td>
<td>251,627</td>
<td>2.96%</td>
</tr>
<tr>
<td>Associate</td>
<td>15,020</td>
<td>15,132</td>
<td>-0.74%</td>
</tr>
<tr>
<td>Student</td>
<td>112,347</td>
<td>98,248</td>
<td>14.35%</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>386,430</td>
<td>365,007</td>
<td>5.87%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Section Activity</th>
<th>Current Month</th>
<th>Prior Month</th>
<th>Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lawyer Member Adds</td>
<td>4,453</td>
<td>4,110</td>
<td>8.35%</td>
</tr>
<tr>
<td>Lawyer Member Drops</td>
<td>-6,828</td>
<td>-7,406</td>
<td>-7.80%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Committees - Substantive</th>
<th>Current Month</th>
<th>Prior Month</th>
<th>Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>Members in a Substantive Cmt.</td>
<td>15,051</td>
<td>16,018</td>
<td>-6.04%</td>
</tr>
<tr>
<td>Average Committees</td>
<td>2.97</td>
<td>2.92</td>
<td>1.71%</td>
</tr>
</tbody>
</table>

### Marketing & Communication - Q3 Highlights

| Business Law Today | 32,712 | 28% |
| In The Know        | 33,541 | 28% |
| Business Law Basics| 34,209 | 28% |

<table>
<thead>
<tr>
<th>Website - May 2018</th>
<th>Current Month</th>
<th>Prior Month</th>
<th>Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unique Visitors</td>
<td>83,947</td>
<td>88,866</td>
<td>-5.54%</td>
</tr>
<tr>
<td>Page Views</td>
<td>125,314</td>
<td>145,046</td>
<td>-13.60%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Social Media - FY2018 Q3</th>
<th>Current Quarter</th>
<th>Prior Quarter</th>
<th>Change</th>
<th>Posts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Facebook</td>
<td>1,990</td>
<td>1,990</td>
<td>0.00%</td>
<td>77</td>
</tr>
<tr>
<td>Instagram</td>
<td>540</td>
<td>518</td>
<td>4.25%</td>
<td>0</td>
</tr>
<tr>
<td>LinkedIn</td>
<td>1,330</td>
<td>1,225</td>
<td>8.57%</td>
<td>56</td>
</tr>
<tr>
<td>Twitter</td>
<td>3,580</td>
<td>3,444</td>
<td>3.95%</td>
<td>76</td>
</tr>
</tbody>
</table>

### Content - FY2018

<table>
<thead>
<tr>
<th>CLE</th>
<th>Number of Registrants FYTD</th>
<th>Total Number Accessible</th>
</tr>
</thead>
<tbody>
<tr>
<td>In The Know</td>
<td>9</td>
<td>7,268</td>
</tr>
<tr>
<td>CLE Webinars</td>
<td>2</td>
<td>67</td>
</tr>
<tr>
<td>National Institutes</td>
<td>2</td>
<td>179</td>
</tr>
<tr>
<td>Business Law Basics</td>
<td>9</td>
<td>5,336</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Activities</th>
<th>Number of Registrants FYTD</th>
<th>Total Number Accessible</th>
</tr>
</thead>
<tbody>
<tr>
<td>Non-CLE Webinars</td>
<td>23</td>
<td>923</td>
</tr>
<tr>
<td>Podcasts</td>
<td>0</td>
<td>-</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Publications</th>
<th>Number of Registrants FYTD</th>
<th>Total Number Accessible</th>
</tr>
</thead>
<tbody>
<tr>
<td>Books (Print Editions)</td>
<td>12</td>
<td>-</td>
</tr>
<tr>
<td>e-Newsletters</td>
<td>28</td>
<td>-</td>
</tr>
<tr>
<td>The Business Lawyer (Proc 39,229)</td>
<td>3</td>
<td>-</td>
</tr>
<tr>
<td>Business Law Today</td>
<td>13</td>
<td>-</td>
</tr>
<tr>
<td>Technical Comments</td>
<td>0</td>
<td>-</td>
</tr>
<tr>
<td>Program Materials</td>
<td>267</td>
<td>-</td>
</tr>
</tbody>
</table>

### Committees - FY2018

<table>
<thead>
<tr>
<th>Five Largest Committees</th>
<th>Current FY</th>
<th>Prior FY</th>
<th>Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mergers and Acquisitions</td>
<td>5,121</td>
<td>4,965</td>
<td>3.14%</td>
</tr>
<tr>
<td>Corporate Governance</td>
<td>2,591</td>
<td>2,639</td>
<td>-1.82%</td>
</tr>
<tr>
<td>Federal Regulation of Securities</td>
<td>2,177</td>
<td>2,284</td>
<td>-4.68%</td>
</tr>
<tr>
<td>Banking Law</td>
<td>2,108</td>
<td>2,178</td>
<td>-3.21%</td>
</tr>
<tr>
<td>Private Equity and Venture Capital</td>
<td>2,083</td>
<td>2,083</td>
<td>0.00%</td>
</tr>
</tbody>
</table>

### Top Five Growth

<table>
<thead>
<tr>
<th>Publications</th>
<th>Number of Registrants FYTD</th>
<th>Total Number Accessible</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal Analytics</td>
<td>223</td>
<td>5</td>
</tr>
<tr>
<td>Sports Law</td>
<td>126</td>
<td>99</td>
</tr>
<tr>
<td>Corporate Laws</td>
<td>482</td>
<td>449</td>
</tr>
<tr>
<td>Director and Officer Liability</td>
<td>303</td>
<td>291</td>
</tr>
</tbody>
</table>

### Meetings - FY2018

<table>
<thead>
<tr>
<th>Meetings</th>
<th>Number Held</th>
<th>Number of Registrants</th>
<th>Number of Sponsorships</th>
<th>Sponsorship Revenue</th>
<th>Number of CLE Programs Offered</th>
<th>Number of CLE Cont. &amp; Sub Cont. Meetings</th>
<th>Total Net Revenue</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section Annual Meeting</td>
<td>1</td>
<td>1,598</td>
<td>55</td>
<td>$233,500</td>
<td>91</td>
<td>226</td>
<td>TBD</td>
</tr>
<tr>
<td>Section Fall Meeting</td>
<td>1</td>
<td>279</td>
<td>2</td>
<td>$5,000</td>
<td>16</td>
<td>33</td>
<td>TBD</td>
</tr>
<tr>
<td>Section Spring Meeting</td>
<td>1</td>
<td>1,524</td>
<td>60</td>
<td>$178,600</td>
<td>88</td>
<td>252</td>
<td>TBD</td>
</tr>
<tr>
<td>Committee Stand-alone</td>
<td>2</td>
<td>1,134</td>
<td>21</td>
<td>$91,500</td>
<td>51</td>
<td>47</td>
<td>TBD</td>
</tr>
</tbody>
</table>
MEMORANDUM

TO: BLS Officers

FROM: Budget Task Force

DATE: May 10, 2018 (consolidated comments from Section Officers added June 12, 2018)

RE: Recommendations for FY 2019 budget and subsequent budgets (with Section Officer comments highlighted in yellow)

The Section Officers discussed the Budget Task Force recommendations and agreed that the first draft of the budget would be developed using these principles for FY 2019 to see if we can reach the targeted spending goal. The highlighted comments indicate comments of some officers about additional considerations that should be taken into account as we develop the FY 2019 budget.

EXECUTIVE SUMMARY

For FY 2019, pursuant to the Section’s Investment Policy, the amount that can be budgeted from the Permanent Reserves to balance the Section’s budget is $835,417, and the amount that should be budgeted from the Contingent Reserve should not be more than $20,000 (estimate of anticipated return of 2% on $1,000,000). On the revenue side of the ledger, we are operating in an uncertain revenue environment. We have flat or declining dues revenue, and how One ABA is implemented will affect that revenue stream. Our membership number also determines how much general revenue support we receive, and the amount of head tax that we have to pay. While we look for non-dues revenue opportunities (meeting fees, publication, CLE, meeting sponsorships, and general section-wide sponsorships), raising revenue will not fill the gap between what we are allowed to spend per the investment policy and what we have been spending. In the face of these uncertainties and challenges, reducing expenses in a measured way as recommended below will allow us to position ourselves to meet these challenges.

Assuming Section Dues revenue and General Revenue funding holds steady, we are anticipating needing to cut between $550,000 and $600,000 in expenses for FY 2019. Based upon FY 2018 budget, that is a reduction in expenses of about 7% overall. Cutting budget funds for established initiatives is never easy or simple. Expense reductions are recommended in every segment of the Section’s budget, with the goal of retaining our existing priorities and programs but at a level we can realistically maintain.

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1 See Section’s Investment Policy, infra.

2 This is an ABA wide initiative to reduce and simplify the dues structure and provide two free section memberships included in the base ABA dues price. There will be a revenue share from this to the two sections chosen by the member. The amount of the revenue share is still under discussion. In addition, part of the initiative is to provide a broader bundle of electronic content to ABA members to enhance the value proposition for ABA members generally. This may impact the Section’s ability to market content as an enticement to join the Section. What the sections will be required to contribute to this broader bundle is also still under discussion.
While we can predict with some certainty the amount of savings we would realize by implementing some of the recommendations below, others require the staff responsible for those budgets to look at the recommendations and provide the projected savings.

The Budget Task Force submits the following recommendations to the Officers. If approved by the Officers, we recommend that the Council be provided this memorandum prior to development of the first draft budget for FY 2019 and the staff will use these recommendations to build the first draft of the FY 2019 budget.

SECTION POLICIES AND BUDGET TASK FORCE PROCESS

The Section’s Investment Policy provides:

Operating Expenses. The portion of the Permanent Reserve and anticipated return on the Operating Fund and Contingent Reserve that may be budgeted to cover operating expenses each year shall not exceed:

1. five percent (5%) of the average fair market value of the Permanent Reserve as of each of the preceding twelve (12) calendar quarters calculated as of December 31st of the preceding year and
2. a projected return on the short-term investments in the Operating Fund and Contingent Reserve for the year covered by the budget.

For FY 2018, the Section budgeted $806,000 from the Permanent Reserves and $609,040 from Contingent Reserve.³ The amount budgeted from the Permanent Reserve was calculated pursuant to Paragraph 1 above. Frankly, the amount budgeted from Contingent Reserve far exceeded the allowable amount under Paragraph 2 above⁴ and is not sustainable.

From September 1, 2014 through end of August 2017 (three fiscal years (FY 2015, FY 2016, FY 2017), we have had a net cash transfer out of total reserves of $1,762,060. This should not be surprising. Even when the Section’s budgeted and actual revenues exceed expenses (e.g., we “beat our budget), we are still taking an amount out of Permanent Reserves to balance the budget. Our current healthy reserve balance is due to market growth, not because we have added to reserves through profitable operations.⁵

³ The Permanent Reserve is the total reserve amount minus the amount designated as the Contingent Reserve. Amounts from the Permanent Reserve can be budgeted only if the Permanent Reserve is maintained at a certain level. The Investment Policy provides “As long as the level of the Permanent Reserve is maintained or exceeds 100% of the gross expenditures as budgeted at the beginning of the fiscal year, a portion of the Permanent Reserve may be used to cover operating expenses.” The Section’s gross expenditures for FY 2018 was budgeted at $8,105,091.

⁴ The Investment Policy provides “The Contingent Reserve is maintained for the purpose of covering shortfalls experienced during a year in budgeted revenues (including dues) or unpredicted expenses that cannot be made up through reallocating appropriations previously made for other purposes without significantly affecting existing programs and operations.”

⁵ To illustrate, our total reserve balance (Permanent and Contingent Reserve combined) on Sept. 30, 2014 was $16,709,609. On September 30, 2017, the total reserve balance was $19,180,841.58. The increase in reserve balances from September 2014 to September 2017, in spite of net cash transfer out of reserves in that time period of $1,762,060, is due to the market growth from
In order to bring us back within our investment policy regarding budgeting\(^6\) and to engage in a wholesale reevaluation of our budgeting, Chris Rockers appointed a Budget Task Force in the fall of 2017. The members of the Budget Task Force were Linda Rusch (chair), Chris Rockers, Vicki Tucker, Pat Clendenen, Jeannie Frey, Elizabeth Stong, Nikki Munro, Michael Fleming and Sue Tobias. The members meet frequently by phone from the fall of 2017 through May 2018 and engaged in a detailed review of all segments of the budget, including reports prepared by Linda Rusch and Sue Tobias detailing the spending as set forth in the ledgers maintained through the ABA financial services office. The Budget Task Force used the Lodestar document at the end of this memorandum to help guide their review of the Budget.

RECOMMENDATIONS

What follows are the recommendations of the Budget Task Force. We note that some of the recommendations may need to be implemented over a period of years due to existing commitments.

1. **Reorganize how the annual budget is presented.** The purpose of the reorganization is to disaggregate some expenses that were hidden within current categories to more explicitly track the costs and benefits of various efforts of the Section. The new organization is shown in Attachment 1 restating the FY 2018 budget into this new presentation.

2. **Recommendations regarding all meetings.** The new budget organization puts all Section and stand-alone Committee meetings in one category. The restated FY 2018 budget demonstrates that across all Section and Committee meetings, the Section is expected to lose $262,212.\(^7\) We need to cut expenses to bring that overall net loss down. Ideally for FY 2019, we should attempt to cut the overall loss on meetings to at least half of the FY 2018 loss (reduce loss by $130,000 or more). The Budget Task Force recommendations focus on cutting expenses for these meetings as the way to achieve the goal. The Budget Task Force makes the following recommendations regarding meetings:

   **COMMENT:** do not consider these as “losses” but instead consider them as “expenses” (a cost of doing business)

   a. **Regarding Section Annual and Section Spring meetings**

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\(^6\) The ABA has drafted an investment policy that requires review of all the sections’ investment policies. Our investment policy and our performance under that policy will be subject to scrutiny. It will be prudent to manage our investments pursuant to the Section’s investment policy in order to avoid any adverse actions.

\(^7\) One of the Task Force recommendations is that all substantive Section and Committee meetings break even or make a profit. The Midwinter Leadership Meeting is designed to develop leadership within the Section and is not a substantive meeting. Accordingly, the Budget Task Force recommendations focus on reducing the expenses at the Midwinter Leadership Meeting.
i. Section dinner: Host off site a maximum of one time a year, chair for that year can decide to not host off site if so desired so that both Section dinners are on site. Consider hosting off site once a year if it is something special/signature event, or if the off-site expense is substantially or completely supported by sponsorship dollars.

ii. Former chairs breakfast: eliminate catering to the event, attendees can get breakfast at the continental breakfast and bring in to meeting.

iii. Former chairs dinner: eliminate event **COMMENT: Do not eliminate but make more casual or consider onsite**

iv. Consolidate receptions such as ice breaker/welcome reception. Look at other events for opportunities where it makes sense to consolidate reception/events. Look at attendance at receptions/events and move to where it may make more sense, such as the sweet endings event may make more sense after Section dinner than after Thursday committee dinners. Consider whether the receptions are fulfilling their purpose and if not, eliminate them. **COMMENT: selective consolidation is appropriate**

v. Eliminate the afternoon snacks at beverage stations

vi. Consider cutting down on entertainment aspects of suite crawl, as that benefits fewer attendees

vii. Make the events for more attendees more fun consistent with membership goals from the Advance (i.e. designed to attract and retain new members).

viii. See below regarding speaker expenses at these meetings.

ix. Ideally the Section Annual and Section Spring meetings should turn a modest profit (especially as we continue to focus on increasing the level of financial sponsorships for these two meetings). **COMMENT: do not increase any costs to attendees**

**COMMENT: limit number of CLE which will increase hotel options, save expenses on A/V and related costs, reduce speaker travel expenses**

b. Regarding the Fall meeting:

i. Change marketing to make it a gathering of individual stand-alone committee meetings rather than a Section event. The Fall meeting must break-even or better. **COMMENT: do not consider these as “losses” but instead consider them as “expenses” (a cost of doing business)**

**COMMENT: consider the Fall Meeting a member benefit because of the ability to meet with government officials and therefore reconsider the need for this meeting to breakeven**

ii. Look at potential date change in consultation with affected committees.

iii. Perhaps change focus of meeting to look at federal related issues as a way of making the meeting more attractive.

iv. Verify with Committees which ones are participating and what experience has been with attendance.
v. See below regarding speaker expenses at these meetings.

c. **Regarding Stand-alone Committee meetings, Business Bar Leaders, and Delaware Law Forum:**
   i. All of these meetings must either break-even or make money. ALL costs of the meetings must be shown in the meeting budget. **COMMENT: Some meetings should be viewed as legitimate expenses undertaken to advance Section interests**
   ii. See below regarding speaker expenses at these meetings.
   iii. If a meeting does not break even in one year, it gets one more year of operation to break even or make revenue. If it does not, the meeting will not be allowed to continue in the next budget year (with recognition that unforeseen events may unexpectedly result in unusual expense for a meeting).
   iv. From a budget process standpoint, each stand-alone Committee meeting should have a separate line item in the budget so the results are not aggregated.
   v. Consider whether it makes sense to have a "joint" meeting with other Committees or move meeting times will be up to each Committee, the bottom line is that any meeting must break even or better each year.
   vi. The staff will work closely with Committee leaders to learn how to make the meeting break even or turn a profit through registration pricing and sponsorships. **COMMENT: do not increase registration costs**

d. **Regarding specialized receptions at any meetings.**
   i. If there are specialized receptions at any meetings, i.e. Pro Bono, Business Law Advisors, Diversity, which have a separate budget, see below recommendation (under Membership and Marketing) regarding consolidating receptions to save costs.

e. **Regarding the Midwinter Leadership Meeting:** **COMMENT: this is a very important meeting offers collaboration opportunities. It also is a thank you to leaders. One dinner is a mistake—need multiple opportunities and should not be ticketed. Do not eliminate suite, cut costs of suite but do not eliminate since it provides a place for all to congregate.**
   i. Look at a greater variety of venues that would be possible if we didn't do a hollow square Council meeting room. This might allow for more options so that we can spend less on the meeting overall.
   ii. Effectively end the meeting on Saturday after lunch, eliminating Saturday night dinner, Saturday night hospitality suite, and Sunday morning brunch. Perhaps offer a ticketed Saturday night dinner as an option. **COMMENT: do not ask active Section leaders to pay for dinner when it is a non-substantive meeting**
   iii. Plan the Friday night dinner on site, less formal and eliminating the need for bus transportation.
   iv. Simplified lunch menus, no open bar at lunches.
   v. Eliminate hospitality suite for all nights.
   vi. Manage tours on break even basis.
vii. See below regarding speaker expenses.

f. **Regarding Speaker Reimbursements at ALL meetings:**
   
i. Provide only one speaker registration fee waiver per CLE panel.
   
ii. Provide travel reimbursement only if speaker fits within usual subsidized traveler categories (academic, judge, government, public service lawyers) and for in-house counsel. The registration fee waiver would still be provided to speakers as per current policy for speakers.
   
iii. Do not reimburse speakers that are already in leadership structure of Section/Committees, unless the speaker is already a subsidized traveler.
   
iv. Continue exceptional circumstance policy as it currently exists for speakers.

g. **Regarding any person who is a subsidized traveler, has a registration fee waiver, or who is granted a special scholarship.** Registration fee waivers are not “reimbursements”, but they reduce the gross revenue that is booked to a meeting.  
   
8 COMMENT: remember that fee waivers attract attendees who would not otherwise be in attendance
   
i. Current policy provides: “The Section will no longer reimburse registration fees for the Spring Meeting, Section Annual Meeting or stand-alone Committee Meetings, with the exception of liaisons from the Law Student Division and the Young Lawyers Division, Business Law Advisors, Business Law Fellows, Business Law Ambassadors, Business Law Envoys, Business Law Diplomats and Consumer Fellows, business court representatives, government lawyers, public service lawyers and judges.”
   
ii. **SCHOLARSHIP program:** “Applications are available for a limited number of scholarships to defray the registration fee. Preference will be given to practitioners with limited means and to unemployed attorneys.” We receive an average of 5-7 scholarship requests for each meeting. We require the applicant to submit a brief statement explaining why they are in need of a scholarship. The applicant is informed preference will be given to lawyers with limited means and unemployed attorneys. If they are unemployed, they will most likely be awarded an 100% scholarship. If they are employed, but are experiencing hardship, 50% is usually awarded. We currently do not require any proof, just the statement.

The Task Force does not recommend a change to current policy.

3. **Recommendations regarding ALL Content.** The new Budget organization groups all content production into one category. After a thorough review of both the expense and revenue of these publication programs, the consensus was that it was very difficult to make expense cuts and

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8 Note that any person who has a registration fee waiver is in effect receiving all the services of the meeting without any cost of those services being covered by the registration fee (i.e. breakfast, internet café, etc.).
maintain the quality of the content produced so as to benefit our membership efforts. The Budget Task Force makes the following recommendations with respect to content:

a. **Book publications**: Continue to reduce and control costs regarding composition, inventory, etc. The publications team will continue to push Committees regarding good/salable products. The Budget Task Force recognizes that the Section needs to spend money to make money and may need to spend more strategically to increase sales. The goal is to work toward net $1M profit eventually and consistently. In addition, the goal is to increase revenue margins from 3X expense to 4X expense if possible. The Budget Task Force recognizes that this will take some time to achieve.

b. **The Business Lawyer**: Continue to explore a viable digital product to allow opt out of paper volumes to realize some cost savings in printing/mailing. If a viable digital product is developed, perhaps make people pay more for paper copies. There was also concern that TBL is one tangible/unavoidable member benefit for lawyer members that serves as a marketing vehicle in addition to provision of substantive content. There was not a clear consensus on any recommendations here. **COMMENT:** need further information on this issue since digital products are the future. **COMMENT:** give more emphasis to seeking opt-out on paper copies of *The Business Lawyer*. **COMMENT:** We should work on transition to electronic only.

c. **Business Law Today**: Costs should be reduced to no more than $50,000 per year, once the development stage has been completed.

d. **No recommendations regarding Educational Programming and In the Know/Business Law Basics.**

4. **Recommendations regarding ALL member (non speaker) reimbursements.** The new Budget organization groups all member reimbursements into one category (other than speaker reimbursements and registration fee waivers, both of which are included in the Meetings budget). In FY 2018, the Section budgeted to spend $556,600 on funding travel reimbursements. The Budget goal here is to reduce these costs by at least a third, if not more. Thus, for FY 2019, the goal is to get this number to $370,000 or less. The Budget Task Force first considered cuts to the amounts of reimbursements, but under current policy those amounts are already limited (limits on cost of hotel, cost of air fare, and meal reimbursements). The Budget Task Force’s recommendation is to cut the number of people supported. In any program where the recommendation is a reduction in the number of people supported, the Budget Task Force does not want current commitments to individuals voided. These cuts are for the forward years to avoid making additional commitments and it may take two budget cycles to get to the final number if the current commitment is for more than one year. The Budget Task Force makes the following recommendations regarding member reimbursements:

a. Current Business Law Advisors are 6 (3 each year for two-year terms). Reduce the total number in the program to 4 (2 each year for two-year terms).
b. Current Diversity Fellows are 40 (20 per class for two-year terms). Reduce number of fellows to 12 per class (for two-year terms). No third year allowed.

c. Current Consumer Fellows are 8 for one-year terms. Reduce the number to 6.

d. Current Judges/Business Court Reps are 6. Reduce that number to 4.

e. Current Diversity Clerkships are 9 authorized. We have seven Diversity Clerks currently (and interest in program is declining). Reduce that number to 4. See also the discussion below reducing the clerkship stipend.

f. Provide registration waivers per current policy (see above under Meetings).

g. Liaisons should no longer have a set budget amount for travel reimbursement to meetings other than those of the Business Law Section. To be eligible to make a request for reimbursement, a liaison must be an academic, judge, government, public service lawyer (as per subsidized traveler policy), and prior to travel, the request for reimbursement must be approved by officers to be eligible for reimbursement. This will reduce the amount provided in the Leadership travel budget.

h. The Leadership budget also includes Officer's dinners (two dinners per year (midyear and fall, included in leadership support). Discussion of whether to make a ticket price to some extent instead of no cost to Section Officers. Not a consensus on this. COMMENT: Section Officers put in an extraordinary amount of time and these are legitimate expenses

COMMENT: Officer Dinners are important to leadership and are a thank you—do not ticket.

COMMENT: Given the amount of time Officers devote to the Section, two dinners a year is appropriate.

i. For the Committee Leaders’ category (the current subsidized traveler program), the Chair of the Committee that is submitting the request to support the subsidized traveler must provide justification for naming that person a subsidized traveler by describing the expected contribution of that person to the work of the Committee. At the end of the year, the subsidized traveler and Committee Chair must report on what contributions were in fact made by that subsidized traveler. The goal is to provide accountability for the anticipated contribution to the work of the Section. The Budget Task Force anticipates that the accountability aspect will be enforced by the Officers during the Budget development process. COMMENT: Committee Chair should report on contribution of subsidized traveler, not the subsidized traveler

5. Recommendations regarding Grants/Gifts. In FY 2018, we gave away $121,300. The goals in this category are to make sure those grants/gifts benefit the Section and to cut spending in this category by half or more. The Budget Task Force makes the following recommendations regarding Grants/Gifts:

a. Regarding student-related spending: Break out all student-related spending from other budget categories and be strategic with this spending with the aim
of converting students to lawyer members. The existing programs were evaluated for his aspect and we found there was not significant conversion to lawyer members.

i. Student writing contest: Eliminate budget for travel to the Spring Meeting and the cash award.
   
   COMMENT: Consider keeping modest cash reward for winner.

ii. Diversity Clerkship: Reduce the number of clerks to 4 and reduce the stipend from $6,000 to $3,000. COMMENT: Be careful to not cut stipends too significantly where it might result in a person not being able to participate in the program.

iii. Legal Opportunity Scholarship Fund: The Section’s current commitment expires in FY 2018. If there is a desire to continue to give, propose a matching dollar commitment, with the Section matching contributions from members up to a stated cap each year, but no multi-year commitment. COMMENT: This has been a long-standing priority for the Section consider keeping contribution

iv. Each spend in this category would be made with the idea that it is designed to move students to lawyer members, and with yearly evaluation of whether it succeeded in moving students to lawyer members. This evaluation would be done by the staff and Officers during the budget development process. COMMENT: This has not traditionally been the primary goal

b. Regarding giving to entities outside the BLS, such as ABA asks and non-ABA entities:

i. Move all giving to entities outside the Section (ABA and non-ABA) into one budget pot. The purpose of this line would be to support things where the section gets a return in some way consistent with Section priorities. In the Gifts/Grant section of the budget, these are Governance Special Projects, ULC, Diversity Outreach re FJE/Brent/Spirit and National Conf. of Lawyer and CPAs.
   
   COMMENT: Need to recognize that the greater good of the profession is a priority.  
   COMMENT: To continue to have a seat at the table for ULC projects, need to contribute financially to the process.

ii. Nothing would be automatically spent from this budget, but must be specifically approved with clear statement of what we expect to gain from the spend, and then evaluation of whether we achieve it. COMMENT: Need to consider the importance of doing the right thing as a member of the profession and the ABA.

6. **Recommendations regarding Leadership and Committee Support:** These costs are costs of staff travel, conference calling, and office supplies. Compared to FY 2018 budget, FY 2019 will not have the costs of the Advance. There are not a lot of savings to be had in this category. The Budget Task Force recommends on Leadership and Committee Support:
a. Leadership directory: Consider whether it can be done in a web-based format to eliminate page setup costs and printing.

COMMENT: Sacred cow

7. **Recommendations regarding Membership and Marketing:** Overall, we have the impression we are not spending enough on membership and marketing. In addition, with declining ability to email members, postal mailings are one of the few ways in which we can reach all our members. A big question for the future is the effect of One ABA on marketing needs and spending. The Budget Task Force recommends regarding Membership and Marketing:

a. There was some discussion of tailoring BLT and TBL articles to reach the law student market through selective bibliography and "making it relevant to them" through interactive Q & A as a way to connect them to the Section.

b. Consider whether the receptions (Pro Bono, Business Law Advisors, Diversity) can be eliminated or combined with other receptions taking place at meetings to be more efficient use of resources per recommendations for Meetings as stated above.

COMMENT: Combining receptions may be appropriate but not eliminating. Ensure appropriate speechmaking and maintain visibility of all programs.

c. Consider whether these receptions (Pro Bono, Business Law Advisors, Diversity) should be in the individual Meetings budget lines (and not in Membership and Marketing budget segment), as a way to ensure all costs of the meetings are taken into account per recommendation given above regarding Meetings.

8. **Recommendations regarding Staff:** The staff budget includes all salary, benefits, and overhead costs (such as rent, equipment, etc.). In addition, there is small budget for staff development costs. Once a position is authorized, the Section Budget is automatically charged for those costs per that position, regardless of whether the position is filled. The Section does not control salary levels or benefit packages, or the costs of overhead. We also do not control raises. Because of difficulties of getting a position authorized, we historically have not eliminated a position even if left unfilled for some time. Under the new management approach at the Section, we think that if we need a new position, and can afford it, the authorization process will be easier. There are currently two unfilled staff positions we have carried on the books. The Budget Task Force recommends eliminating those positions, with an anticipated budget savings of $125,000 per year.
**COMMENT:** Add a lodestar that provides for promoting professionalism, access to justice and other legal profession issues

## LODESTARS

<table>
<thead>
<tr>
<th>Guiding principal/mission</th>
<th>Lodestars</th>
<th>Additional Questions</th>
</tr>
</thead>
</table>
| 1 Provide [a] place/medium/environment/opportunities for business lawyers to advance their professional lives. | ✗ Provide for the delivery of Content – Active Members  
✗ Provide for the delivery of Content – All Members  
✗ Provide opportunities to establish professional relationships -- includes diversity and inclusion goals  
✗ Opportunities for member development (content generation and delivery/leadership – this is from the member’s perspective) – includes diversity and inclusion goals  
✗ Member Growth and Development (this is from the Section’s perspective) |                      |
| 2 Mission: The BLS is the premiere international legal association of Business Lawyers and Judges devoted to professional growth of its members. | ✗ Invest in human capital over the long term: High quality staff, Fellows, Advisors, BCRs, In house counsel.  
✗ Ex.: Reduce the benefits to one-off non-member speaker reimbursements.  
✗ Invest in productive and valuable technology: TV & Radio media, podcasts, webinars, paperless, BLT.  
✗ Ex.: Convert TBL to paperless.  
✗ Invest in diversity in all its forms: personal and organizational. Government, judiciary, in house, international, private practice, small, and large firms.  
✗ Invest in content creation mechanisms, tools, and resources for members.  
✗ Invest in member collaboration experience through premiere in person meetings and technology. | ✗ By eliminating this expense, what short or long term losses will the BLS incur to its mission?  
✗ How can the cut initiative or cost be incorporated into existing BLS operations?  
✗ Are there latent revenue opportunities in the BLS?  
✗ Media: TV, Radio, Social Media?  
✗ Bundling sponsor products and services with membership, products, book?  
✗ Do we need professional consulting to advise us on revenue generation, sponsorships, media opportunities?  
✗ Can we offer personal services to people attending meetings for a sponsorship cost? Clothing, branding, tech etc. |
| 3 The Business Law Section exists to advance the practice of business law for its membership and for the legal profession. | ✗ a large, broad, and diverse membership, including a broad and diverse active membership that carries forward the work of the Section;  
✗ substantive and engaging meetings and programs at which the work of the Section can take place;  
✗ content at the highest level of practice as a resource and to educate its membership | Top down:  
What activities (and associated expenses, of funds, staff time, and member time) are critical to this particular lodestar?  
What can we not afford to lose?  
Bottom up:  
How does this expense advance one or more of the lodestars? |
<table>
<thead>
<tr>
<th></th>
<th>and the business bar, and to improve the law; -- opportunities, including leadership opportunities, for both established and new members to become involved in the work of the Section; -- engagement in the issues that face business lawyers, business courts, and the legal profession.</th>
<th>Is there a more cost-effective way to accomplish the same thing? Is this expense more in the nature of a necessity or a luxury to accomplish one or more of the lodestars?</th>
</tr>
</thead>
<tbody>
<tr>
<td>4</td>
<td>The BLS exists to provide tools, information and resources to, and a community for, business lawyers, including diverse lawyers, for professional development and to shape business laws, regulations and legal practices.</td>
<td>1. Invest in staff and technology sufficient to achieve the Section’s mission 2. Invest effort and funds in developing the tools, information, resources and community designed to engage existing members and attract new members 3. Invest effort and funds in activities designed to develop leaders within the Section 4. Invest effort and funds in activities that support diversity in all of its forms 5. Continue to engage in thoughtful strategic planning and budgeting that supports the foregoing</td>
</tr>
<tr>
<td>5</td>
<td>Further the understanding and development of business law in a coherent and practical way that balances competing interests and public goods Foster the development of communities of interest of a diverse range of business lawyers by practice areas, years of practice, geographic areas and other relevant characteristics Offer tools, pathways and inspiration to promote the professional development and professional satisfaction of business lawyers throughout their careers</td>
<td>For each budget item Which lodestar(s) does it further? [may be helpful to then categorize the budget items by lodestar] How well does it further such lodestar(s) - on a scale of 1-10/ or 1-5, how well does this item, as currently existing, further such lodestar(s) What changes should or could we consider to better further the applicable lodestar(s) – Where are there gaps – i.e., what else could we be doing to meet the lodestars What resources would we need to do specific things to address gaps What should we stop doing, or do differently, so as to have the resources for such new programs/activities</td>
</tr>
<tr>
<td>6</td>
<td>Provide resources that assist business lawyers in their practice and in</td>
<td>-up to date relevant information in business law practice areas -provide opportunities for involvement for improvement in business law</td>
</tr>
<tr>
<td>providing service to the profession</td>
<td>- provide opportunity for service to the public in business law area --provide the infrastructure necessary to achieve the goals</td>
<td>of expenditure in advancing the lodestar? Is there a more cost effective manner to achieve the same goal?</td>
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### Revenue (Unrestricted)

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<th>Revenue/Expense/Projection</th>
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<th>Expense</th>
<th>Net</th>
<th>Revenue</th>
<th>Expense</th>
<th>Net</th>
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<th>Expense</th>
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<td>Book publications</td>
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<td><strong>All Member (Non Speaker) Travel Reimbursement</strong></td>
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<td>(252,000)</td>
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<td>(225,000)</td>
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<tr>
<td>Judges/Business Court Reps</td>
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<td>(25,000)</td>
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<td>(27,612)</td>
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<td>Business Law Advisors</td>
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<td>Consumer Fellows</td>
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<td>(3,000)</td>
<td>-</td>
<td>(4,594)</td>
<td>(4,594)</td>
<td>(4,594)</td>
<td>-</td>
<td>(3,000)</td>
</tr>
<tr>
<td><strong>Subtotal</strong></td>
<td>-</td>
<td>(556,500)</td>
<td>(556,500)</td>
<td>-</td>
<td>(540,089)</td>
<td>(540,089)</td>
<td>(590,214)</td>
<td>-</td>
<td>(518,300)</td>
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<td>All Grants/Gifts</td>
<td>Revenue</td>
<td>Expense</td>
<td>Net</td>
<td>Revenue</td>
<td>Expense</td>
<td>Net</td>
<td>Projection</td>
<td>Revenue</td>
<td>Expense</td>
</tr>
<tr>
<td>-----------------------------------------</td>
<td>---------</td>
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<td>Diversity Clerks Stipend</td>
<td>$-</td>
<td>$ (54,000)</td>
<td>$ (54,000)</td>
<td>$-</td>
<td>$ (42,000)</td>
<td>$ (42,000)</td>
<td>$-</td>
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<td>Governance Special Projects</td>
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<td>$ (5,000)</td>
<td>$ (5,000)</td>
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<td>$ (5,000)</td>
<td>$-</td>
<td>$-</td>
<td>$-</td>
<td>$-</td>
<td>$ (5,000)</td>
<td>$ (5,000)</td>
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<tr>
<td>Misc Diversity Outreach FJE/Brent/Spirit</td>
<td>$-</td>
<td>$ (4,350)</td>
<td>$ (4,350)</td>
<td>$-</td>
<td>$ (2,500)</td>
<td>$ (2,500)</td>
<td>$-</td>
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<td>$ (4,350)</td>
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<td>ABA Legal Opportunity Scholarship Fund</td>
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<td>$ (30,000)</td>
<td>$-</td>
<td>$-</td>
<td>$-</td>
<td>$-</td>
<td>$ (10,000)</td>
<td>$ (10,000)</td>
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<tr>
<td>National Conf of Lawyer CPA</td>
<td>$-</td>
<td>$ (10,000)</td>
<td>$ (10,000)</td>
<td>$-</td>
<td>$ (6,000)</td>
<td>$ (6,000)</td>
<td>$-</td>
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<td>$ (10,000)</td>
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<td>Student Writing Contest</td>
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<td>$ (8,000)</td>
<td>$ (8,000)</td>
<td>$-</td>
<td>$ (6,532)</td>
<td>$ (6,532)</td>
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<td>$ (1,000)</td>
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<tr>
<td><strong>Subtotal</strong></td>
<td>$-</td>
<td>$ (121,350)</td>
<td>$ (121,350)</td>
<td>$-</td>
<td>$ (62,032)</td>
<td>$ (62,032)</td>
<td>$-</td>
<td>$ (62,350)</td>
<td>$ (62,350)</td>
</tr>
<tr>
<td>Leadership and Committee Support</td>
<td>Revenue</td>
<td>Expense</td>
<td>Net</td>
<td>Revenue</td>
<td>Expense</td>
<td>Net</td>
<td>Projection</td>
<td>Revenue</td>
<td>Expense</td>
</tr>
<tr>
<td>Leadership office overhead</td>
<td>$-</td>
<td>$ (3,500)</td>
<td>$ (3,500)</td>
<td>$-</td>
<td>$ (225)</td>
<td>$ (225)</td>
<td>$-</td>
<td>$ (3,500)</td>
<td>$ (3,500)</td>
</tr>
<tr>
<td>Leadership Support/Staff Travel</td>
<td>$-</td>
<td>$ (20,000)</td>
<td>$ (20,000)</td>
<td>$-</td>
<td>$ (27,570)</td>
<td>$ (27,570)</td>
<td>$-</td>
<td>$ (26,300)</td>
<td>$ (26,300)</td>
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<td>Directory</td>
<td>$-</td>
<td>$ (5,000)</td>
<td>$ (5,000)</td>
<td>$-</td>
<td>$ (4,025)</td>
<td>$ (4,025)</td>
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<td>Committee support</td>
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<td>$ (47,200)</td>
<td>$-</td>
<td>$ (17,940)</td>
<td>$ (17,940)</td>
<td>$-</td>
<td>$ (45,700)</td>
<td>$ (45,700)</td>
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<tr>
<td>Advance V</td>
<td>$-</td>
<td>$ (34,000)</td>
<td>$ (34,000)</td>
<td>$-</td>
<td>$ (63,921)</td>
<td>$ (63,921)</td>
<td>$-</td>
<td>$-</td>
<td>$-</td>
</tr>
<tr>
<td><strong>Subtotal</strong></td>
<td>$-</td>
<td>$ (109,700)</td>
<td>$ (109,700)</td>
<td>$-</td>
<td>$ (113,681)</td>
<td>$ (113,681)</td>
<td>$-</td>
<td>$ (78,000)</td>
<td>$ (78,000)</td>
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<tr>
<td>Membership and Marketing</td>
<td>Revenue</td>
<td>Expense</td>
<td>Net</td>
<td>Revenue</td>
<td>Expense</td>
<td>Net</td>
<td>Projection</td>
<td>Revenue</td>
<td>Expense</td>
</tr>
<tr>
<td>Membership</td>
<td>$-</td>
<td>$ (200,000)</td>
<td>$ (200,000)</td>
<td>$-</td>
<td>$ (14,938)</td>
<td>$ (14,938)</td>
<td>$-</td>
<td>$ (166,000)</td>
<td>$ (166,000)</td>
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<tr>
<td>Marketing</td>
<td>$-</td>
<td>$ (25,000)</td>
<td>$ (25,000)</td>
<td>$-</td>
<td>$ (33,821)</td>
<td>$ (33,821)</td>
<td>$-</td>
<td>$ (60,000)</td>
<td>$ (60,000)</td>
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<tr>
<td>Pro Bono Receptions &amp; support</td>
<td>$-</td>
<td>$ (2,000)</td>
<td>$ (2,000)</td>
<td>$-</td>
<td>$ (1,138)</td>
<td>$ (1,138)</td>
<td>$-</td>
<td>$ (2,000)</td>
<td>$ (2,000)</td>
</tr>
<tr>
<td>Business Law Advisors Receptions &amp; support</td>
<td>$-</td>
<td>$ (3,400)</td>
<td>$ (3,400)</td>
<td>$-</td>
<td>$ (6,464)</td>
<td>$ (6,464)</td>
<td>$-</td>
<td>$ (3,200)</td>
<td>$ (3,200)</td>
</tr>
<tr>
<td>Diversity Receptions &amp; outreach support</td>
<td>$-</td>
<td>$ (11,500)</td>
<td>$ (11,500)</td>
<td>$-</td>
<td>$ (6,821)</td>
<td>$ (6,821)</td>
<td>$-</td>
<td>$ (4,000)</td>
<td>$ (4,000)</td>
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<tr>
<td><strong>Subtotal</strong></td>
<td>$-</td>
<td>$ (241,900)</td>
<td>$ (241,900)</td>
<td>$-</td>
<td>$ (63,182)</td>
<td>$ (63,182)</td>
<td>$-</td>
<td>$ (235,200)</td>
<td>$ (235,200)</td>
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<tr>
<td><strong>Total</strong></td>
<td>$ 8,105,091</td>
<td>$ (8,105,091)</td>
<td>$ (8,105,091)</td>
<td>$ -</td>
<td>$ (6,220,101)</td>
<td>$ (6,974,359)</td>
<td>$ (754,258)</td>
<td>$ 278,723</td>
<td>$ (7,504,674)</td>
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</tbody>
</table>

**Note:** The table details the revenue, expense, and net figures for various programs and initiatives. The figures include projections and totals for comparison.
<table>
<thead>
<tr>
<th>Report</th>
<th>Sponsor and Subject</th>
<th>Reviewing Entity</th>
<th>Recommended Position</th>
<th>Final Section Position</th>
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<tbody>
<tr>
<td>101</td>
<td>STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY</td>
<td>Professional Responsibility</td>
<td>SUPPORT</td>
<td></td>
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<tr>
<td></td>
<td>Amends Model Rules 7.1 through 7.5 and their related Comments of the ABA Model Rules of Professional Conduct regarding lawyer advertising rules.</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>102A</td>
<td>SECTION OF FAMILY LAW</td>
<td>Taxation</td>
<td>NO POSITION</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Urges governments to enact preserve tax code provisions that allow the alimony deduction for payors and treat alimony as taxable income to payees.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>102B</td>
<td>SECTION OF FAMILY LAW</td>
<td>Health Law and Life Sciences</td>
<td>SUPPORT</td>
<td></td>
</tr>
<tr>
<td></td>
<td>SECTION OF SCIENCE AND TECHNOLOGY LAW</td>
<td>Intellectual Property</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Adopts the ABA Model Act Governing Assisted Reproductive Technology, dated August 2018 to replace the 2008 Model Act, and urges its adoption by appropriate governmental agencies.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>103</td>
<td>ABA WORKING GROUP TO ADVANCE WELL-BEING IN THE LEGAL PROFESSION</td>
<td>Professional Responsibility</td>
<td>OPPOSE</td>
<td></td>
</tr>
<tr>
<td></td>
<td>COMMISSION ON LAWYER ASSISTANCE PROGRAMS</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Adopts the ABA Model Law Firm Policy on Impairment, dated August 2018, to provide a mechanism within law firms to identify impairment and craft proper intervention, and to prevent professional standards and the quality of work for clients from being compromised by any law firm personnel's impairment, and urges law firms to adopt the Model Policy.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>104B</td>
<td>SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE</td>
<td>Banking Law</td>
<td>OPPOSE</td>
<td>OPPOSE</td>
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<tr>
<td></td>
<td>SECTION OF STATE AND LOCAL GOVERNMENT LAW</td>
<td>Consumer Financial Services</td>
<td></td>
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<tr>
<td>Section</td>
<td>Issue</td>
<td>Position</td>
<td></td>
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<td>----------</td>
<td></td>
<td></td>
</tr>
<tr>
<td>105 SECTION OF DISPUTE RESOLUTION</td>
<td>Business and Corporate Litigation</td>
<td>SUPPORT</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Urges providers of domestic and international dispute resolution to expand their rosters with minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities (&quot;diverse neutrals&quot;), and to encourage the selection of diverse neutrals.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>113 NATIONAL CONFERENCE OF THE ADMINISTRATIVE LAW JUDICIARY JUDICIAL DIVISION SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE GOVERNMENT PUBLIC SECTOR LAWYERS DIVISION COLORADO BAR ASSOCIATION DENVER BAR ASSOCIATION</td>
<td>Business and Corporate Litigation</td>
<td>NO POSITION</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Adopts the ABA Model Code of Judicial Conduct for State Administrative Law Judges, dated August 2018, and urges governments to enact and adopt the Model Code.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>116A COMMISSION ON DISABILITY RIGHTS</td>
<td>Middle Market and Small Business</td>
<td>TBD</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Amends the Air Carrier Access Act (&quot;ACAA&quot;), 49 U.S.C. § 41705 (1986), to establish a private right of action violations of the ACAA and to provide equitable and legal relief, including compensatory and punitive damages, as well as reasonable attorneys' fees, reasonable expert fees, and the costs to plaintiffs who prevail in civil actions.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>116C COMMISSION ON DISABILITY RIGHTS</td>
<td>Cyberspace Law Intellectual Property</td>
<td>OPPOSE NO POSITION</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Urges all courts and other appropriate government entities to interpret Titles II and III of the Americans with Disabilities Act to apply to technology, and goods and services delivered thereby, regardless of whether it exists solely in virtual space or has a nexus to a physical space.
RESOLUTION

RESOLVED, That the American Bar Association amends Rules 7.1 through 7.5 and Comments of the ABA Model Rules of Professional Conduct as follows (insertions underlined, deletions struck through):

1
2
3

underlined, deletions struck through):
Model Rule 7.1: Communications Concerning A Lawyer’s Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Comment

[1] This Rule governs all communications about a lawyer’s services, including advertising. Whatever means are used to make known a lawyer’s services, statements about them must be truthful.

[2] Truthful statements that are misleading truthful statements are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer’s communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood exists that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer’s services for which there is no reasonable factual foundation. A truthful statement is also misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer’s communication requires that person to take further action when, in fact, no action is required.

[3] It is misleading for a communication to provide information about a lawyer’s fee without indicating the client’s responsibilities for costs, if any. If the client may be responsible for costs in the absence of a recovery, a communication may not indicate that the lawyer’s fee is contingent on obtaining a recovery unless the communication also discloses that the client may be responsible for court costs and expenses of litigation. See Rule 1.5(c).

[3][4] An advertisement A communication that truthfully reports a lawyer’s achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client’s case. Similarly, an unsubstantiated claim about a lawyer’s or law firm’s services or fees, or an unsubstantiated comparison of the lawyer’s or law firm’s services or fees with the services or fees those of other lawyers or law firms, may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison or claim can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.
It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.4(c). See also Rule 8.4(e) for the prohibition against stating or implying an ability to improperly influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

Firm names, letterhead and professional designations are communications concerning a lawyer’s services. A firm may be designated by the names of all or some of its current members, by the names of deceased members where there has been a succession in the firm’s identity or by a trade name if it is not false or misleading. A lawyer or law firm also may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name such as “Springfield Legal Clinic,” an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction.

Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0(c), because to do so would be false and misleading.

It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm’s behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

Rule 7.2: Advertising Communications Concerning a Lawyer’s Services: Specific Rules

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise communicate information regarding the lawyer’s services through written, recorded or electronic communication, including public any media.

(b) A lawyer shall not compensate, give or promise anything of value to a person who is not an employee or lawyer in the same law firm for recommending the lawyer’s services except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;
(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:

   (i) the reciprocal referral agreement is not exclusive; and

   (ii) the client is informed of the existence and nature of the agreement; and

(5) give nominal gifts that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

(c) 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 authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and

   (2) the name of the certifying organization is clearly identified in the communication.

(d) Any communication made pursuant to this Rule must include the name and contact information of at least one lawyer or law firm responsible for its content.

Comment

[1] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public’s need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.
This Rule permits public dissemination of information concerning a lawyer’s or law firm’s name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer’s fees are determined, including prices for specific services and payment and credit arrangements; a lawyer’s foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against “undignified” advertising. Television, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. But see Rule 7.3(a) for the prohibition against a solicitation through a real-time electronic exchange initiated by the lawyer.

Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Paying Others to Recommend a Lawyer

Except as permitted under paragraphs (b)(1)-(b)(4)(5), lawyers are not permitted to pay others for recommending the lawyer’s services or for channeling professional work in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer’s credentials, abilities, competence, character, or other professional qualities. Directory listings and group advertisements that list lawyers by practice area, without more, do not constitute impermissible “recommendations.”

Paragraph (b)(1) however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff, television and radio station employees or spokespersons and website designers.

Paragraph (b)(5) permits nominal gifts as might be given for holidays, or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.
Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator’s communications are consistent with Rule 7.1 (communications concerning a lawyer’s services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person’s legal problems when determining which lawyer should receive the referral. See Comment [2] (definition of “recommendation”). See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).

A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such Qualified referral services are understood by the public to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. See, e.g., the American Bar Association’s Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act. (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of the public; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not make referrals to lawyers who own, operate or are employed by the referral service.)

A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer’s professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.
[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer’s professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Communications about Fields of Practice

[9] Paragraph (a) of this Rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer “concentrates in” or is a “specialist,” practices a “specialty,” or “specializes in” particular fields based on the lawyer’s experience, specialized training or education, but such communications are subject to the “false and misleading” standard applied in Rule 7.1 to communications concerning a lawyer’s services.

[10] The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer’s communications about these practice areas are not prohibited by this Rule.

[11] This Rule permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate authority of a state, the District of Columbia or a U.S. Territory or accredited by the American Bar Association or another organization, such as a state supreme court or a state bar association, that has been approved by the authority of the state, the District of Columbia or a U.S. Territory to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to ensure that a lawyer’s recognition as a specialist is meaningful and reliable. To ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

6
Required Contact Information

[12] This Rule requires that any communication about a lawyer or law firm’s services include the name of, and contact information for, the lawyer or law firm. Contact information includes a website address, a telephone number, an email address or a physical office location.

Model Rule 7.3: Solicitation of Clients

(a) “Solicitation” or “solicit” denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

(b) A lawyer shall not solicit professional employment by live person-to-person contact in person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer’s doing so is the lawyer’s or law firm’s pecuniary gain, unless the person contacted is with a:

1. is a lawyer; or

2. person who has a family, close personal, or prior business or professional relationship with the lawyer; or

3. person who is known by the lawyer to be an experienced user of the type of legal services involved for business matters.

(c) A lawyer shall not solicit professional employment by written, recorded or electronic communication or by in person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

1. the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

2. the solicitation involves coercion, duress or harassment.

(d) Every written, recorded or by electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the words “Advertising Material” on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(d) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.
(d)(e) Notwithstanding the prohibitions in this Rule paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone live person-to-person contact to solicit enroll memberships or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

[1] A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, Paragraph (b) prohibits a lawyer from soliciting professional employment by live person-to-person contact when a significant motive for the lawyer’s doing so is the lawyer’s or the law firm’s pecuniary gain. A lawyer’s communication is typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to electronic Internet searches.

[2] “Live person-to-person contact” means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications such as Skype or FaceTime, where the person is subject to a direct personal encounter without time for reflection. Such person-to-person contact does not include chat rooms, text messages or other written communications that recipients may easily disregard. There is a potential for abuse overreaching exists when a solicitation involves a lawyer, seeking pecuniary gain, direct in-person, live telephone or real-time electronic contact solicits a person by a lawyer with someone known to be in need of legal services. These forms of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate fully all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer’s presence and insistence upon being retained immediately an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[3] This potential for abuse overreaching inherent in live person-to-person contact directly in-person, live telephone or real-time electronic solicitation justifies its prohibition, particularly since lawyers have alternative means of conveying necessary information. to those who may be in need of legal services. In particular, communications can be mailed or transmitted by email or other electronic means that do not involve real-time contact and do not violate other laws governing solicitations. These forms of communications and solicitations make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to live person-to-person direct in-person, telephone or real-time electronic persuasion that may overwhelm a person’s judgment.
The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to the public, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of live person-to-person direct in-person live telephone or real-time electronic contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

There is far less likelihood that a lawyer would engage in abusive practices overreaching against a former client, or a person with whom the lawyer has a close personal, family, business or professional relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer’s pecuniary gain. Nor is there a serious potential for abuse overreaching when the person contacted is a lawyer or is known to be an experienced user of the type of legal services involved for business purposes. For instance, an "experienced user" of legal services for business matters may include those who hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who hire lawyers for lease or contract issues; and other people who retain lawyers for business transactions or formations. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, Paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

But even permitted forms of solicitation can be abused. Thus, any solicitation that which contains false or misleading information which is false or misleading within the meaning of Rule 7.1, that which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(c)(2), or that which involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(c)(1) is prohibited. Moreover, if after sending a letter or other communication as permitted by Rule 7.2, the lawyer receives no response, any further effort to communicate with the recipient of the communication may violate the provisions of Rule 7.3(b). Live, person-to-person contact of individuals who may be especially vulnerable to coercion or duress is ordinarily not appropriate, for example, the elderly, those whose first language is not English, or the disabled.

This Rule is does not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of
informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[8] The requirement in Rule 7.3(c) that certain communications be marked “Advertising Material” does not apply to communications sent in response to request so potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[8] Communications authorized by law or ordered by a court or tribunal include a notice to potential members of a class in class action litigation.

[9] Paragraph (d)(e) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit enroll members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d)(e) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone person-to-person solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to must be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b)(c). See 8.4(a).

Rule 7.4 Communication of Fields of Practice and Specialization (Deleted in 2018.)

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation “Patent Attorney” or a substantially similar designation.

(c) A lawyer engaged in Admiralty practice may use the designation “Admiralty,” “Proctor in Admiralty” or a substantially similar designation.
(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

Comment

[1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.

[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

[3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

Rule 7.5 Firm Names And Letterheads (Deleted in 2018.)

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.
(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

Comment

[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm’s identity or by a trade name such as the “ABC Legal Clinic.” A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as “Springfield Legal Clinic,” an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.

[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.
REPORT

LAWYER ADVERTISING RULES FOR THE 21st CENTURY

I. Introduction

The American Bar Association is the leader in promulgating rules for regulating the professional conduct of lawyers. For decades, American jurisdictions have adopted provisions consistent with the Model Rules of Professional Conduct, relying on the ABA’s expertise, knowledge, and guidance. In lawyer advertising, however, a dizzying number of state variations exist. This breathtaking variety makes compliance by lawyers who seek to represent clients in multiple jurisdictions unnecessarily complex, and burdens bar regulators with enforcing prohibitions on practices that are not truly harmful to the public.¹ This patchwork of advertising rules runs counter to three trends that call for simplicity and uniformity in the regulation of lawyer advertising.

First, lawyers in the 21st century increasingly practice across state and international borders. Clients often need services in multiple jurisdictions. Competition from inside and outside the profession in these expanded markets is fierce. The current web of complex, contradictory, and detailed advertising rules impedes lawyers’ efforts to expand their practices and thwart clients’ interests in securing the services they need. The proposed rules will free lawyers and clients from these constraints without compromising client protection.

Second, the use of social media and the Internet—including blogging, instant messaging, and more—is ubiquitous now.² Advancing technologies can make lawyer advertising easy, inexpensive, and effective for connecting lawyers and clients. Lawyers can use innovative methods to inform the public about the availability of legal services. Clients can use the new technologies to find lawyers. The proposed amendments will facilitate these connections between lawyers and clients, without compromising protection of the public.

Finally, trends in First Amendment and antitrust law suggest that burdensome and unnecessary restrictions on the dissemination of accurate information about legal services may be unlawful. The Supreme Court announced almost forty years ago that lawyer advertising is commercial speech protected by the First Amendment. Advertising

² See Association of Professional Responsibility Lawyers 2015 Report of the Regulation of Lawyer Advertising Committee (2015) [hereinafter APRL 2015 Report], https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aprl_june_22_2015%20report.authcheckdam.pdf at 18-19 (“According to a Pew Research Center 2014 Social Media Update, for the 81% of American Adults who use the Internet: 52% of online adults now use two or more social media sites; 71% are on Facebook; 70% engage in daily use; 56% of all online adults 65 and older use Facebook; 23% use Twitter; 26% use Instagram; 49% engage in daily use; 53% of online young adults (18-29) use Instagram; and 28% use LinkedIn.”).
that is false, misleading and deceptive may be restricted, but many other limitations have been struck down.\(^3\)

Antitrust law may also be a concern. For nearly 20 years, the Federal Trade Commission (FTC) has actively opposed lawyer regulation where the FTC believed it would, for example, restrict consumer access to factually accurate information regarding the availability of lawyer services. The FTC has reminded regulators in Alabama, Arizona, Florida, Indiana, Louisiana, New Jersey, New Mexico, New York, Ohio, Tennessee, and Texas that overly broad advertising restrictions may reduce competition, violate federal antitrust laws, and impermissibly restrict truthful information about legal services.\(^4\)

The Standing Committee on Ethics and Professional Responsibility (SCEPR) is proposing amendments to ABA Model Rules 7.1 – 7.5 that respond to these trends. It is hoped the U.S. jurisdictions will follow the ABA’s lead to eliminate compliance confusion and promote consistency in lawyer advertising rules. As amended, the rules will provide lawyers and regulators nationwide with models that continue to protect clients from false and misleading advertising, but free lawyers to use expanding and innovative technologies to communicate the availability of legal services and enable bar regulators to focus on truly harmful conduct. The amended rules will also increase consumer access to accurate information about the availability of legal services and, thereby, expand access to legal services.

II. Brief Summary of the Changes

The principal amendments:

- Combine provisions on false and misleading communications into Rule 7.1 and its Comments.
- Consolidate specific provisions on advertising into Rule 7.2, including requirements for use of the term “certified specialist”.  
- Permit nominal “thank you” gifts under certain conditions as an exception to the general prohibition against paying for recommendations.
- Define solicitation as “a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer

\(^3\) For developments in First Amendment law on lawyer advertising, see APRL June 2015 Report, supra note 2, at 7-18.

\(^4\) The recent decision in North Carolina State Board of Dental Examiners v. F.T.C., 135 S. Ct. 1101 (2015) may be a warning. The Court found that the Board of Dental Examiners exclusion of non-dentists from providing teeth whitening services was anti-competitive and an unfair method of competition in violation of the Federal Trade Commission Act. The Court determined that a controlling number of the board members were “active market participants” (i.e., dentists), and there was no state entity supervision of the decisions of the non-sovereign board. Many lawyer regulatory entities are monitoring the application of this precedent as the same analysis might be applicable to lawyers. See also, ABA Center for Professional Responsibility, FTC Letters Regarding Lawyer Advertising (2015), http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_ethics_in_lawyer_advertising/FTC_lawyerAd.html.
knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

- Prohibit live, person-to-person solicitation for pecuniary gain with certain exceptions.
- Eliminate the labeling requirement for targeted mailings but continue to prohibit targeted mailings that are misleading, involve coercion, duress or harassment, or that involve a target of the solicitation who has made known to the lawyer a desire not to be solicited.

III. Discussion of the Proposed Amendments

A. Rule 7.1: Communications Concerning a Lawyer’s Services

Rule 7.1 remains unchanged; however, additional guidance is inserted in Comment [2] to explain that truthful information may be misleading if consumers are led to believe that they must act when, in fact, no action is required. New Comment [3] provides that communications that contain information about a lawyer’s fee must also include information about the client’s responsibility for costs to avoid being labeled as a misleading communication.

In Comment [4], SCEPR recommends replacing “advertising” with “communication” to make the Comment consistent with the title and scope of the Rule. SCEPR expands the guidance in Comment [4] by explaining that an “unsubstantiated claim” may also be misleading. SCEPR also recommends in Comment [5] that lawyers review Rule 8.4(c) for additional guidance.

Comments [6] through [9] have been added by incorporating the black letter concepts from current Rule 7.5. Current Rule 7.5(a) restates and incorporates Rule 7.1, and then provides examples of misleading statements. SCEPR has concluded that Rule 7.1, with the guidance of new Comments [6] through [9], better addresses the issues.

B. Rule 7.2: Communications Concerning a Lawyer’s Services: Specific Rules

Specific Advertising Rules: Specific rules for advertising are consolidated in Rule 7.2, similar to the current structure of Rule 1.8, which provides for specific conflict situations.

SCEPR recommends amendments to Rule 7.2(a) parallel to its recommendations for changes to Comments to Rule 7.1, specifically replacing the term “advertising” with “communication” and replacing the identification of specific methods of communication with a general statement that any media may be used.

Gifts for Recommendations: Rule 7.2(b) continues the existing prohibition against giving “anything of value” to someone for recommending a lawyer. New subparagraph (b)(5), however, contains an exception to the general prohibition. This subparagraph
permits lawyers to give a nominal gift to thank the person who recommended the lawyer to the client. The new provision states that such a nominal gift is permissible only where it is not expected or received as payment for the recommendation. The new words “compensate” and “promise” emphasize these limitations: the thank you gift cannot be promised in advance and must be no more than a token item, i.e. not “compensation.”

SCEPR’s amendments to Rule 7.2(b) allow lawyers to give something “of value” to employees or lawyers in the same firm. As to lawyers, this new language in Rule 7.2(b) simply reflects the common and legitimate practice of rewarding lawyers in the same firm for generating business. This is not a change; it is a clarification of existing rules. As to employees, SCEPR has concluded that lawyers ought to be permitted to give nominal gifts to non-lawyers, e.g. paralegals who may refer friends or family members to a firm, marketing personnel and others. Rule 5.4 continues to protect against any improper fee sharing. Rule 7.3 protects against solicitation by, for example, so-called “runners,” which are also prohibited by other rules, e.g. Rule 8.4(a).

SCEPR recommends deleting the second sentence Rule 7.2(b)(2) because it is redundant. Comment [6] has the same language.

Specialization: Provisions of Rule 7.4 regarding certification are moved to Rule 7.2(c) and Comments. SCEPR acknowledges suggestions offered by the Standing Committee on Specialization, which shaped revisions to Rule 7.4. Based on these and other recommendations, the prohibition against claiming certification as a specialist is moved to new subdivision (c) of Rule 7.2 as a specific requirement. Amendments also clarify which entities qualify to certify or accredit lawyers. The remaining provisions of Rule 7.4 are moved to Comments [9] through [11] of Rule 7.2. Finally, Comment [9] adds guidance on the circumstances under which a lawyer might properly claim specialization by adding the phrase “based on the lawyer’s experience, specialized training or education.”

Contact Information: In provision 7.2(d) [formerly subdivision (c)] the term “office address” is changed to “contact information” to address technological advances on how a lawyer may be contacted and how advertising information may be presented. Examples of contact information are added in new Comment [12]. All “communications” about a lawyer’s services must include the firm name (or lawyer’s name) and some contact information (street address, telephone number, email, or website address).

Changes to the Comments: Statements in Comments [1] and [3] justifying lawyer advertising are deleted. Advertising is constitutionally protected speech and needs no additional justification. These Comments provide no additional guidance to lawyers.

New Comment [2] explains that the term “recommendations” does not include directories or other group advertising in which lawyers are listed by practice area.

New language in Comment [3] clarifies that lawyers who advertise on television and radio may compensate “station employees or spokespersons” as reasonable costs for advertising. These costs are well in line with other ordinary costs associated with
advertising that are listed in the Comment, i.e. “employees, agents and vendors who are engaged to provide marketing or client development services.”

New Comment [4] explains what is considered nominal, including ordinary social hospitality. It also clarifies that a gift may not be given based on an agreement to receive recommendations or to make future recommendations. These small and token gifts are not likely to result in the harms addressed by the rule: that recommendation sources might interfere with the independent professional judgment of the lawyer, interject themselves into the lawyer-client relationship, or engage in prohibited solicitation to gain more recommendations for which they might be paid.

Comment [6] continues to address lawyer referral services, which remain limited to qualified entities approved by an appropriate regulatory authority. Description of the ABA Model Supreme Court Rules Governing Lawyer Referral Services is omitted from Comment [6] as superfluous.

The last sentence in Comment [7] is deleted because it is identical to the second sentence in Comment [7] (“Legal services plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules.”) (Emphasis added.).

C. Rule 7.3: Solicitation of Clients

The black letter of the current Rules does not define “solicitation;” the definition is contained in Comment [1]. For clarity, a definition is added as new paragraph (a). The definition of solicitation is adapted from Virginia’s definition. A solicitation is:

a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

Paragraph (b) continues to prohibit direct, in-person solicitation for pecuniary gain, but clarifies that the prohibition applies solely to live person-to-person contact. Comment [2] provides examples of prohibited solicitation including in-person, face-to-face, telephone, and real-time visual or auditory person-to-person communication such as Skype or FaceTime or other face-to-face communications. Language added to Comment [2] clarifies that a prohibited solicitation does not include chat rooms, text messages, or any other written communications to which recipients would not feel undue pressure to respond.

The Rule no longer prohibits real-time electronic solicitation because real-time electronic communication includes texts and Tweets. These forms of communication are more like a written communication, which allows the reader to pause before responding and creates less pressure to immediately respond or to respond at all, unlike a direct interpersonal encounter.
Exceptions to live person-to-person solicitation are slightly broadened in Rule 7.3(b)(2). Persons with whom a lawyer has a business relationship—in addition to or separate from a professional relationship—may be solicited because the potential for overreaching by the lawyer is reduced.

Exceptions to prohibited live person-to-person solicitation are slightly broadened in Rule 7.3(b)(3) to include “experienced users of the type of legal services involved for business matters.” Similarly, Comment [5] to Rule 7.3 is amended to explain that the potential for overreaching, which justifies the prohibition against in-person solicitation, is unlikely to occur when the solicitation is directed toward experienced users of the legal services in a business matter.

The amendments retain Rule 7.3(c)(1) and (2), which prohibit solicitation of any kind when a target has made known his or her desire not to be solicited, or the solicitation involves coercion, duress, or harassment. These restrictions apply to both live in-person and written solicitations. Comment [6] identifies examples of persons who may be most vulnerable to coercion or duress, such as the elderly, those whose first language is not English, or the disabled.

After much discussion, SCEPR is recommending deletion of the requirement that targeted written solicitations be marked as “advertising material.” Agreeing with the recommendation of the Standing Committee on Professionalism and the Standing Committee on Professional Discipline’s suggestion to review both Oregon’s rules and Washington State’s proposed rules, which do not require such labeling, SCEPR has concluded that the requirement is no longer necessary to protect the public. Consumers have become accustomed to receiving advertising material via many methods of paper and electronic delivery. Advertising materials are unlikely to mislead consumers due to the nature of the communications. SCEPR was presented with no evidence that consumers are harmed by receiving unmarked mail solicitations from lawyers, even if the solicitations are opened by consumers. If the solicitation itself or its contents are misleading, that harm can and will be addressed by Rule 7.1’s prohibition against false and misleading advertising.

The statement that the rules do not prohibit communications about legal services authorized by law or by court order is moved from Comment [4] of Rule 7.2 to new paragraph (d) of Rule 7.3.

Amendments were made to Rule 7.3(e) to make the prohibition language consistent with the solicitation prohibition and to reflect the reality that prepaid and group legal service plans enroll members and sell subscriptions to wide range of groups. They do not engage in solicitation as defined by the Rules.

New Comment [8] to Rule 7.3 adds class action notices as an example of a communication that is authorized by law or court order.
IV. SCEPR’s Process and Timetable

The amendments were developed during two years of intensive study by SCEPR, after SCEPR received a proposal from the Association of Professional Responsibility Lawyers (APRL) in 2016. Throughout, SCEPR’s process has been transparent, open, and welcoming of comments, suggestions, revisions, and discussion from all quarters of the ABA and the profession. SCEPR’s work included the formation of a broad-based working group, posting drafts for comment on the website of the Center for Professional Responsibility, holding public forums at the Midyear Meetings in February 2017 and February 2018, conducting a webinar in March 2018, and engaging in extensive outreach seeking participation and feedback from ABA and state entities and individuals.

A. Development of Proposals by the Association of Professional Responsibility Lawyers (APRL) – 2013 - 2016

In 2013, APRL created a Regulation of Lawyer Advertising Committee to analyze and study lawyer advertising rules. That committee studied the ABA Model Rules and various state approaches to regulating lawyer advertising and made recommendations aimed at bringing rationality and uniformity to the regulation of lawyer advertising and disciplinary enforcement. APRL’s committee consisted of former and current bar regulators, law school professors, authors of treatises on the law of lawyering, and lawyer-experts in the field of professional responsibility and legal ethics. Liaisons to the committee from the ABA Center for Professional Responsibility and the National Organization of Bar Counsel (“NOBC”) provided valuable advice and comments.

The APRL committee obtained, with NOBC’s assistance, empirical data derived from a survey sent to bar regulators regarding the enforcement of current advertising rules. That committee received survey responses from 34 of 51 U.S. jurisdictions.

APRL’s 2014 survey of U.S. lawyer regulatory authorities showed:

- Complaints about lawyer advertising are rare;
- People who complain about lawyer advertising are predominantly other lawyers and not consumers;
- Most complaints are handled informally, even where there is a provable advertising rule violation;
- Few states engage in active monitoring of lawyer advertisements; and
- Many cases in which discipline has been imposed involve conduct that would constitute a violation of ABA Model Rule 8.4(c).

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5 APRL’s April 26, 2016 Supplemental Report can be accessed here: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aprl_april_26_2016%20report.authcheckdam.pdf.
6 Written comments were received through the CPR website. SCEPR studied them all. Those comments are available here: https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mrpc_rule71_72_73_74_75/modelrule7_1_7_5comments.html.
APRL issued reports in June 2015 and April 2016 proposing amendments to Rules 7.1 through 7.5 to streamline the regulations while maintaining the enforceable standard of prohibiting false and misleading communications.

In September 2016 APRL requested that SCEPR consider its proposals for amendments to the Model Rules.

B. ABA Public Forum – February 2017

On February 3, 2017 SCEPR hosted a public forum at the ABA 2017 Midyear Meeting to receive comments about the APRL proposals. More than a dozen speakers testified, and written comments were collected from almost 20 groups and individuals.

C. Working Group Meetings and Reports – 2017

In January 2017, SCEPR’s then chair Myles Lynk appointed a working group to review the APRL proposals. The working group, chaired by SCEPR member Wendy Wen Yun Chang, included representatives from Center for Professional Responsibility (“CPR”) committees: Client Protection, Ethics and Professional Responsibility, Professional Discipline, Professionalism, and Specialization. Liaisons from the National Conference of Bar Presidents, the ABA Solo, Small Firm and General Practice Division, NOBC, and APRL were also appointed.

Chang provided SCEPR with two memoranda summarizing the various suggestions received for each advertising rule and, where applicable, identified recommendations from the working group.

D. SCEPR December 2017 Draft

After reviewing the Chang memoranda and other materials SCEPR drafted proposed amendments to Model Rules 7.1 through 7.5, and Model Rule 1.0 (terminology), which were presented to all ABA CPR Committees at the October 2017 Leadership Conference. SCEPR then further modified the proposed changes to the advertising rules based in part on the suggestions and comments of CPR Committees. In December 2017, SCEPR released for comment and circulated to ABA entities and outside groups a new Working Draft of proposed amendments to Model Rules 7.1-7.5.

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7 Links to both APRL reports are available at: [https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mrpc_rule71_72_73_74_75.html](https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mrpc_rule71_72_73_74_75.html).

8 Written submissions to SCEPR are available at: [https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mrpc_rule71_72_73_74_75/modelrule7_1_7_5comments.html](https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mrpc_rule71_72_73_74_75/modelrule7_1_7_5comments.html).
E. ABA Public Forum – February 2018

In February 2018, the SCEPR hosted another public forum at the 2018 Midyear Meeting, to receive comments about the revised proposals.9 The proposed amendments were also posted on the ABA CPR website and circulated to state bar representatives, NOBC, and APRL. Thirteen speakers appeared. Twenty-seven written comments were submitted. SCEPR carefully considered all comments and further modified its proposals.10

On March 28, 2018, SCEPR presented a free webinar to introduce and explain the Committee’s revised recommendations. More than 100 people registered for the forum, and many favorable comments were received.11

V. The Background and History of Lawyer Advertising Rules Demonstrates Why the Proposed Rules are Timely and Necessary

A. 1908 – A Key Year in the Regulation of Lawyer Advertising

Prior to the ABA’s adoption of the Canons of Professional Ethics in 1908, legal advertising was virtually unregulated. The 1908 Canons changed this landscape; the Canons contained a total ban on attorney advertising. This prohibition stemmed partially from an explosion in the size of the legal profession that resulted in aggressive attorney advertising, which was thought to diminish ethical standards and undermine the public’s perception of lawyers.12 This ban on attorney advertising remained for approximately six decades, until the Supreme Court’s decision in 1977 in Bates v. Arizona.13

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9 Speakers included George Clark, President of APRL; Mark Tuft, Chair, APRL Subcommittee on Advertising; Charlie Garcia and Will Hornsby, ABA Division for Legal Services; Bruce Johnson; Arthur Lachman; Karen Gould, Executive Director of the Virginia State Bar; Dan Lear, AVVO; Matthew Driggs; and Elijah Marchbanks.

10 All Comments can be found here: https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mrpc_rule71_72_73_74_75/modelrule7_1_7_5comments.html. The full transcript of the Public Forum can be accessed here: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/public_hearing_transcript_complete.authcheckdam.pdf.

11 An MP3 recording of the webinar can be accessed here: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/advertising_rules_webinar.authcheckdam.mp3. A PowerPoint of the webinar is also available: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/webinar_advertising_powerpoint.authcheckdam.pdf.


B. Attorney Advertising in the 20th Century

*Bates* established that lawyer advertising is commercial speech and entitled to First Amendment protection. But the Court also said that a state could prohibit false, deceptive, or misleading ads, and that other regulation may be permissible.

Three years later, in *Central Hudson*, the Supreme Court explained that regulations on commercial speech must “directly advance the [legitimate] state interest involved” and “[i]f the governmental interest could be served as well by a more limited restriction . . . the excessive restrictions cannot survive.”

In the years that followed, the Supreme Court applied the *Central Hudson* test to strike down a number of regulations on attorney-advertising. The Court reviewed issues such as the failure to adhere to a state “laundry list” of permitted content in direct mail advertisements, a newspaper advertisement’s use of a picture of a Dalkon Shield intrauterine device in a state that prohibited all illustrations, and an attorney’s letterhead that included his board certification in violation of prohibition against referencing expertise. The court’s decisions in these cases reinforced the holding in *Bates*: a state may not constitutionally prohibit commercial speech unless the regulation advances a substantial state interest, and no less restrictive means exists to accomplish the state’s goal.

C. Solicitation

Unlike advertising, in-person solicitation is subject to heightened scrutiny. In *Ohralik v. Ohio State Bar Ass’n*, the Supreme Court upheld an Ohio regulation prohibiting lawyers from in-person solicitation for pecuniary gain. The Court declared: “[T]he State—or the Bar acting with state authorization—constitutionally may discipline a lawyer for soliciting clients in-person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent.” The Court added: “It hardly need be said that the potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person.” The Court concluded that a prophylactic ban is constitutional given the virtual impossibility of regulating in-person solicitation.

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15 447 U.S. at 564.
16 See APRIL 2015 Report, *supra* note 2, at 9-18, for a discussion of these cases.
22 *Id.* at 464–65.
23 *Id.* at 465-467.
Ohralik's blanket prohibition on in-person solicitation does not extend to targeted letters. The U.S. Supreme Court held in *Shapero v. Kentucky Bar Ass’n*, 24 that a state may not prohibit a lawyer from sending truthful solicitation letters to persons identified as having legal problems. The Court concluded that targeted letters were comparable to print advertising, which can easily be ignored or discarded.

**D. Commercial Speech in the Digital Age**

The *Bates*-era cases preceded the advent of the Internet and social media, which have revolutionized attorney advertising and client solicitation. Attorneys are posting, blogging, and Tweeting at minimal cost. Their presence on websites, Facebook, LinkedIn, Twitter, and blogs increases exponentially each year. Attorneys are reaching out to a public that has also become social media savvy.

More recent cases, while relying on the commercial speech doctrine, exemplify digital age facts. A 2010 case involves a law firm's challenge to New York's 2006 revised advertising rules, which prohibited the use of "the irrelevant attention-getting techniques unrelated to attorney competence, such as style and advertising gimmicks, puffery, wisps of smoke, blue electrical currents, and special effects, and... the use of nicknames, monikers, mottos, or trade names implying an ability to obtain results in a matter." 25 The U.S. Court of Appeals for the Second Circuit found New York's regulation to be unconstitutional as a categorical ban on commercial speech. The speech was not likely to be misleading. 26 The court noted that prohibiting potentially misleading commercial speech might fail the *Central Hudson* test. 27 The court concluded that even assuming that New York could justify its regulations under the first three prongs of the *Central Hudson*

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24 486 U.S. 466 (1988). But see, *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995). The Supreme Court has upheld (in a 5 to 4 decision) a Florida Bar rule banning targeted direct mail solicitation to personal injury accident victims or their families for 30 days. The court found that the timing and intrusive nature of the targeted letters was an invasion of privacy; and, when coupled with the negative public perception of the legal profession, the Florida rule imposing a 30 day "cooling off" period materially advanced a significant government interest. This decision, however, does not support a prophylactic ban on targeted letters, only a restriction as to their timing. But see, *Ficker v. Curran*, 119 F.3d 1150 (4th Cir. 1997), in which Maryland’s 30-day ban on direct mail in traffic and criminal defense cases was found unconstitutional, distinguishing *Went for It*, because criminal and traffic defendants need legal representation, time is of the essence, privacy concerns are different, and criminal defendants enjoy a 6th amendment right to counsel.

25 *Alexander v. Cahill*, 598 F.3d 79, 84-86 (2d Cir. 2010). The court commented, "Moreover, the sorts of gimmicks that this rule appears designed to reach—such as Alexander & Catalano’s wisps of smoke, blue electrical currents, and special effects—do not actually seem likely to mislead. It is true that Alexander and his partner are not giants towering above local buildings; they cannot run to a client’s house so quickly that they appear as blurs; and they do not actually provide legal assistance to space aliens. But given the prevalence of these and other kinds of special effects in advertising and entertainment, we cannot seriously believe—purely as a matter of ‘common sense’—that ordinary individuals are likely to be misled into thinking that these advertisements depict true characteristics. Indeed, some of these gimmicks, while seemingly irrelevant, may actually serve ‘important communicative functions: [they] attract [ ] the attention of the audience to the advertiser’s message, and [they] may also serve to impart information directly.’“ (Citations omitted.).

26 *Alexander v. Cahill*, 598 F.3d 79, at 96.

27 *Id.*
test, an absolute prohibition generally fails the prong requiring that the regulation be narrowly fashioned.28

In 2011, the Fifth Circuit reached a similar conclusion, ruling that many of Louisiana’s 2009 revised attorney advertising regulations contained absolute prohibitions on commercial speech, rendering the regulations unconstitutional due to a failure to comply with the least restrictive means test in *Central Hudson*.29 The Fifth Circuit applied the *Central Hudson* test to attorney advertising regulations.30 Although paying homage to a state’s substantial interest in ensuring the accuracy of information in the commercial marketplace and the ethical conduct of its licensed professionals, the Fifth Circuit relied on the Supreme Court’s decision in *Zauderer* to conclude that the dignity of attorney advertising does not fit within the substantial interest criteria.31

[T]he mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity.32

Florida also revised its attorney advertising rules in light of the digital age evolution of attorney advertising and the commercial speech doctrine. Nonetheless, some of Florida’s rules and related guidelines have failed constitutional challenges. For example, in *Rubenstein v. Florida Bar*, the Federal District Court for the Southern District of Florida declared Florida Bar’s prohibition on advertising of past results to be unconstitutional because the guidelines prohibited any such advertising on indoor and outdoor displays, television, or radio.33 The state’s underlying regulatory premise was that these “specific media . . . present too high a risk of being misleading.” This total ban on commercial speech again did not survive constitutional scrutiny.34

Finally, in *Searcy v. Florida Bar*, a federal court enjoined The Florida Bar from enforcing its rule requiring an attorney to be board certified before advertising expertise in an area of law.35 The Searcy law firm challenged the regulation as a blanket prohibition

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28 Id. Note that the court did uphold the moratorium provisions that prevent lawyers from contacting accident victims for a certain period of time.
29 *Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 632 F.3d 212, 229 (5th Cir. 2011). Note that the court did uphold the regulations that prohibited promising results, that prohibited use of monikers or trade names that implied a promise of success, and that required disclaimers on advertisements that portrayed scenes that were not actual or portrayed clients who were not actual clients. The court distinguished its holding from New York’s in *Cahill* by indicating that the Bar had produced evidence in the form of survey results that supported the requirement that the regulation materially advanced the government’s interest in protecting the public.
31 Id. at 220.
34 Id. at 1312.
on commercial speech, arguing board certification is not available in all areas of practice, including the firm’s primary mass torts area of expertise.

VII. Conclusion

Trends in the profession, the current needs of clients, new technology, increased competition, and the history and law of lawyer advertising all demonstrate that the current patchwork of complex and burdensome lawyer advertising rules is outdated for the 21st Century. SCEPR’s proposed amendments improve Model Rules 7.1 through 7.5 by responding to these developments. Once amended, the Rules will better serve the bar and the public by expanding opportunities for lawyers to use modern technology to advertise their services, increasing the public’s access to accurate information about the availability of legal services, continue the prohibition against the use of false and misleading communications, and protect the public by focusing the resources of regulators on truly harmful conduct. The House of Delegates should proudly adopt these amendments.

Respectfully submitted,

Barbara S. Gillers, Chair
Chair, Standing Committee on Ethics and Professional Responsibility
August, 2018
1. **Summary of Resolution.** The SCEPR recommends amendments to Model Rules 7.1 through 7.5 and their related Comments. These amendments:

- Streamline and simplify the rules while adhering to constitutional limitations on restricting commercial speech, protecting the public, and permitting lawyers to use new technologies to inform consumers accurately and efficiently about the availability of legal services.

- Combine the provisions on false and misleading communications into Rule 7.1 and its Comments. The black letter of Rule 7.1 remains unchanged. Provisions of Rule 7.5, which largely relate to misleading communications, are moved into Comments to Rule 7.1.

- Consolidate specific rules for advertising into Rule 7.2, change “office address” to “contact information” (to accommodate technological advances) and delete unrelated or superfluous provisions. Provisions of Rule 7.4 regarding certification are moved to Rule 7.2(c) and its Comments. Lawyer referral services remain limited to qualified entities approved by an appropriate regulatory authority.

- Add a new subparagraph to Rule 7.2(b) as an exception to the general provision against paying for recommendations. The new provision would permit only nominal “thank you” gifts and contains other restrictions.

- Define solicitation as “a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.” Live person-to-person solicitation is prohibited. This includes in-person, face-to-face, telephone, and real-time visual or auditory person-to-person communication such as Skype or FaceTime.

- Broaden slightly the exceptions in Rule 7.3(b)(2) and (3) to permit live person-to-person solicitation of “experienced users of the type of legal services involved for business matters,” and of “persons with whom a lawyer has a business relationship”. Additional Comments offers guidance on the new terms.

- Eliminate the requirement to label targeted mailings as “Advertising”, but prohibit targeted mailings that are misleading, involve coercion, duress, or harassment, or where the target of the solicitation has made known to the lawyer a desire not to be solicited.
2. Approval by Submitting Entity

The SCEPR approved this recommendation on April 11, 2018.

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

Yes. All amendments to the ABA Model Rules of Professional Conduct must be approved by the House of Delegates.

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

Adoption of this resolution would result in amendments to the ABA Model Rules of Professional Conduct. Goal II of the Association—to improve our profession by promoting ethical conduct—would be advanced by the adoption of this resolution.

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

N/A


N/A

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

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

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

None.

9. Disclosure of interest:

N/A.

10. Referrals.

In February 2017, SCEPR hosted a public forum when it received from the Association of Professional Responsibility Lawyers (APRL) a proposal to amend the lawyer advertising rules. Invitations to attend and comment were extended to ABA entities including:
Bar Activities and Services
Client Protection
Delivery of Legal Services
Election Law
Group and Prepaid Legal Services
Lawyers Referral and Information Services
Lawyers’ Professional Liability
Legal Aid and Indigent Defendants
Pro Bono and Public Service
Professional Discipline
Professionalism
Public Education
Specialization
Technology and Information Services
Bioethics and the Law
Commission on Disability Rights
Commission on Domestic and Sexual Violence
Hispanic Legal Rights and Responsibilities
Commission on Homelessness and Poverty
Commission on Immigration
Commission on Law and Aging
Commission on Lawyer Assistance Programs
Center for Racial and Ethnic Diversity
Commission on Sexual Orientation and Gender Identity
Commission on Women in the Profession
Administrative Law and Regulatory Practice
Antitrust Law
Business Law Section
Civil Rights and Social Justice
Criminal Justice Section
Section of Dispute Resolution
Section of Environment, Energy and Resources
Section of Family Law
Government and Public Sector Lawyers Division
Health Law Section
Infrastructure and Regulated Industries Section
Intellectual Property Law
Section of International Law
Judicial Division
Labor and Employment Law
Law Practice Division
Law Student Division
Section of Litigation
Section of Public Contract Law
Real Property, Trust and Estate Law
Science and Technology Law
In December 2017, SCEPR released a Working Draft of its proposal to amend the Model Rules regulating lawyer advertising. Information released also included instructions on how to comment in writing and about the February 2018 public forum the Committee was to host. This was emailed to the state bar associations, state disciplinary agencies and the ethics committees of the following ABA entities:

Antitrust Law
Business Law
Criminal Justice
Dispute Resolution
Environment, Energy and Resources
Family Law
Government and Public Sector Lawyers Division
Health Law
Intellectual Property
International Law
Judicial Division
Labor and Employment Law
Law Practice Division
Litigation
Real Property, Trust and Estate Law
Senior Lawyers
Solo, Small Firm, and General Practice
State and Local Govt. Law
Tort Trial and Insurance Practice
Young Lawyers Division

SCEPR also made its work available to the press and the public. Many news articles about its work appeared in the Lawyers’ Manual on Professional Conduct, the ABA Journal, and other legal news outlets.

In February 2018, SCEPR hosted a Public Forum at the Midyear Meeting in Vancouver. More than 50 people attended, many spoke, and many written comments were received. A transcript of the proceedings and all the Comments were posted on the Committee’s website.
In March 2018, SCEPR hosted a free webinar on the revisions it made to its proposal to amend the Model Rules. Information was emailed to members of the ABA House of Delegates, state bars, state regulators, and other groups.

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

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

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EXECUTIVE SUMMARY

1. Summary of Resolution.

The Resolution proposes changes to Model Rules 7.1 through 7.5, known as the lawyer advertising rules. The changes highlight the American Bar Association’s long-standing leadership in promulgating rules for the professional conduct of lawyers generally, and in the rules governing lawyer advertising in particular.

A dizzying number of state variations in the rules governing lawyer advertising exist. There are vast departures from the Model Rules and numerous differences between jurisdictions. These differences cause compliance confusion among intra-state and interstate lawyers and firms, time-consuming and expensive litigation, and enforcement uncertainties for bar regulators. At the same time, changes in the law on commercial speech, trends in the profession including increased cross-border practice and intensified competition from inside and outside the profession, and technological advances demand greater uniformity, more simplification, and focused enforcement.

As amended the rules will provide lawyers and regulators nationwide with models that protect clients from false and misleading advertising, free lawyers to use expanding and innovative technologies for advertising, and enable bar regulators to focus on truly harmful conduct. The amended rules will also increase consumer access to accurate information about the availability of legal services and, thereby, expand access to legal services.

2. Summary of the issues which the Resolution addresses.

The Resolution addresses at least five issues. First, the Resolution addresses the overwhelming variation in the rules governing lawyer advertising by promoting simplified, targeted, and more uniform regulation in this area. Second, the Resolution addresses changes in the profession resulting from increased competition from inside and outside the profession and from increased cross-border practice. Lawyers who serve clients across jurisdictions and clients who need service across jurisdictions will benefit from the proposed changes. Third, the Resolution frees bar regulators to focus on truly harmful conduct: advertising that is misleading, harassing, and coercive. Fourth, the Resolution will increase access to legal services by freeing lawyers and clients to connect via ever-expanding technologies. Finally, the Resolution responds to developments in First Amendment law governing commercial speech and antitrust concerns.

3. An explanation of how the proposed policy position will address the issue.

At least three policies inform the Resolution. First, lawyers and clients should be free to use advancing technology to provide the public with greater access to legal services. Second, lawyer advertising rules should focus on truly harmful conduct: false, deceptive, and misleading statements, harassment, coercion, and invasions of privacy, freeing
lawyers of unnecessary restrictions. Finally, bar regulators should be able to concentrate their limited enforcement resources on truly harmful conduct.

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

Minority opposition has been received from two state bar associations: the Illinois State Bar Association and the New Jersey State Bar Association. There was also opposition, but only on two amendments, from the Connecticut Bar Association Standing Committee on Professional Ethics (the “Connecticut Ethics Committee”). The two amendments opposed by the Connecticut Ethics Committee are: (i) eliminating the labeling requirement and (ii) permitting nominal gifts for recommendations.

That said, proposals to change the Model Rules of Professional Conduct typically generate diverse comments rooted in dissimilar philosophical and drafting approaches. The comments received by SCEPR throughout this process followed that pattern; they reflected divergent approaches toward lawyer advertising. Generally, however, the minority views fell into two categories.

One group of minority views argued that SCEPR’s proposals do not remove enough restrictions on lawyer communications with the public regarding legal services and the availability of legal services. In this group are states and individuals—within and outside the ABA—who argue that the Model Rules should prohibit only false or misleading communications.

The other group thought the opposite was true—that SCEPR’s proposals went too far in lifting regulatory constraints on lawyers. In this group are a handful of individuals and state bar associations that oppose, for example, (i) lifting limitations on communicating with experienced users of legal services in business matters, (ii) permitting nominal gifts for recommendations, and (iii) removing the labelling requirement on targeted mail. Some of these commenters also opposed the simple restructuring of current provisions on firm names and claims about specialization.

SCEPR considered all of these, as well as other comments. After significant study, debate, deliberation, and work, SCEPR concluded that its proposals represent the right mix of regulations to protect the public from false, misleading, and harassing conduct while freeing lawyers to use innovative technologies to communicate accurate information about the availability of legal services, enabling clients to find lawyers using those technologies, and focusing regulators on truly harmful conduct.
RESOLVED, That the American Bar Association urges Congress to enact former Sections 215 and 682 of the Internal Revenue Code that, before their repeal in the Tax Cuts and Jobs Act of 2017 allowed payors to deduct and required payees to treat as taxable income alimony payments.

FURTHER RESOLVED, That, if Congress does not reinstate the alimony deduction and section 682 of the Internal Revenue Code, the American Bar Association urges all federal, state, territorial and tribal governments to enact laws protecting the reasonable expectations of taxpayers with respect to agreements and arrangements entered into prior to the effective date of said repeal, including but not limited to pre-nuptial agreements, post-nuptial agreements, trusts and similar arrangements, but only to the extent that income is not attributable to corpus added to a trust after the effective date of on which the Tax Cuts and Jobs Act of 2017 became effective.
REPORT

I. INTRODUCTION AND SUMMARY

Among the many tax deductions that the Tax Cuts and Jobs Act eliminated from the Internal Revenue Code was the deduction for alimony payments. This deduction is not a deduction like others that eliminates the payment of tax on income. Rather, this deduction shifts the tax obligation to the individual who has the benefit of spending the income. In promoting the 2017 Tax 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.¹ Even if true, this savings should not be funded at the expense of divorcing families whose financial conditions are most often changing for the worse. The 2017 Tax Cuts and Jobs Act was signed into law on December 22, 2017. The elimination of the alimony deduction applies to:

(1) any divorce or separation instrument (as defined in section 71(b)(2) of the Internal Revenue Code of 1986 as in effect before the date of the enactment of this Act) executed after December 31, 2018, and

(2) any divorce or separation instrument (as so defined) executed on or before such date and modified after such date if the modification expressly provides that the amendments made by this section apply to such modification.

This Resolution asks Congress to reinstate the alimony deduction available to payors of alimony. Eliminating the deduction will make court proceedings more costly and time consuming as many states which currently use gross income to calculate alimony awards will now have to determine net income to calculate alimony awards. Further, divorcing couples will receive less favorable tax benefits than married couples. Without the alimony deduction, alimony paying spouses will pay taxes on money they do not get to spend at a higher tax rate and without many of the deductions available to married couples. As a result, the same gross income that was available during the marriage to support one household will be taxed at a higher rate leaving less net income to allocate between two households. Finally, the elimination of the alimony deduction will negatively affect couples who entered into prenuptial agreements with alimony provisions based on the assumption that the alimony deduction would be available. Because prenuptial agreements do not qualify as “divorce or separation instruments,” if the couple divorces after December 31, 2018, the party who agreed to pay alimony on the assumption that it would be tax deductible will now be required to pay the amount agreed upon without that benefit and the party receiving the alimony will receive a windfall.

The 2017 Tax Act also repealed section 682 of the Tax Code which provided rules regarding the tax treatment of income of alimony trusts payable to a former spouse. Section 682(a)

¹ Joint Committee on Taxation, Description of the Chairman’s Mark of the “Tax Cuts and Jobs Act” (JCX-51-17) (2017).
provides that the donee spouse is to include the gross income actually received rather than requiring the donor spouse to include the gross income. With the repeal of section 682, parties that set up such alimony trusts prior to December 31, 2018 but who are not divorced or legally separated until after December 31, 2018 will lose the anticipated tax treatment.

II. BACKGROUND

In a divorce situation, alimony payments are often based upon one party’s need and the other party’s ability to pay or on the disparity in the parties’ incomes. 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.\(^2\) The Internal Revenue Code includes alimony and separate maintenance receipts in the definition of “Gross Income.”\(^3\) 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.\(^4\)

Before its repeal Section 215 provided:

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.\(^5\)

The change is effective for any divorce or separation agreements or court orders entered into after December 31, 2018 and for any divorce or separation agreements or court orders entered into before December 31, 2018 that are modified after December 31, 2018. A party paying alimony will no longer receive a deduction and the party receiving alimony will no longer have to

\(^3\) 26 U.S.C. § 61(a)(8).
\(^4\) 26 U.S.C. § 71(b).
report it as income. When the bill was introduced in the House, the House Ways and Means Committee claimed that the “intent of the proposal was to follow the rule of the Supreme Court’s holding in Gould v. Gould\textsuperscript{6}, in which the Court held that such payments are not taxable income to the recipient.”\textsuperscript{7} 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 again enact the alimony deduction. 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 divorcing couples to continue to share income as they did during marriage and has done so in a manner that makes calculations easy for the parties without the expense of having attorneys, experts and the court perform complicated net income calculations.

The other purpose of this Resolution is to urge Congress to enact legislation to protect the expectation of taxpayers who entered into agreements to create Section 682 Trusts in the event of a divorce. If such legislation is not enacted, couples who have a 682 Trust agreement in place but who do not divorce before December 31, 2018 will lose the anticipated ability to transfer tax liability to the spouse receiving the payment and the grantor spouse will be required to pay tax on all trust income. As a result, the grantor spouse will have a higher tax burden and beneficiary spouse will receive non-taxable funds.

IV. THE IMPORTANCE OF THE ALIMONY DEDUCTION

The alimony deduction has been an important tool for family law attorneys since 1942 and has enabled divorced families to easily calculate alimony agreements without the necessity of lengthy and expensive court proceedings involving experts to calculate net incomes of the parties. Allowing the higher income spouse to make payments based on gross income by shifting part of the tax liability on his/her income to the lower income spouse enables the divorcing couple to share the same income they had to support one household during the marriage in a way that results in the ability to provide for the two households. Further, unlike other tax deductions, the alimony deduction is not one that results in no revenue to the federal government. Rather, the alimony deduction shifts the tax obligation to the party who actually receives the funds. Without the alimony tax deduction, divorced spouses will be unable to continue to share the same income that was available in the household during the marriage and the higher income spouse will not be able 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

\textsuperscript{6}245 U.S. 151 (1917).
\textsuperscript{7}Committee on Ways and Means, \textit{Tax Cuts and Jobs Act, H.R. 1: Section-by-Section Summary}, at 61 (2017).
greater benefit to the one receiving it. Essentially, the spouse receiving alimony is getting considerably more in actual dollars than the spouse paying it.\(^8\)

Thus, many family law attorneys view the elimination of the alimony tax deduction as a “divorce penalty,” not a “divorce subsidy.”

If alimony is no longer deductible, the ability of an ex-spouse to pay it 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.\(^9\)

Additionally, many states use gross income to determine a party’s alimony obligation because the party receiving alimony will be paying the taxes on the funds. Being able to calculate a party’s alimony obligation based on gross income is easier for the courts and results in less frequent modifications due to fluctuating tax deductions from year to year. The elimination of the alimony deduction will require many states to formulate a new methodology for determining alimony and will likely cause parties to file modification requests more frequently as their tax obligations change.

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 as the parties will now be sharing less net income between two households. Divorcing couples will have greater tax obligations than married couples on the same amount of gross income. There is also concern that the elimination of the alimony deduction will cause some unhappy couples or couples where domestic violence or other abuses exist to remain married because they will simply be unable to afford to get divorced.

Family lawyers are also concerned that the repeal of the alimony deduction has overlooked couples who have entered into prenuptial agreements with alimony provisions on the assumption that the alimony deduction will be available. Since the Internal Revenue Code’s definition of “divorce or separation instrument” does not include a prenuptial agreement that is not in pay status, if the couple divorces after December 31, 2018, the party who agreed to pay alimony will no longer be able to deduct the payments. Rather, the party paying alimony will have to pay the agreed upon amount without being able to deduct the payments and the party receiving alimony will receive an unanticipated windfall by not having to pay taxes on the payments. This unanticipated consequence could lead to more court proceedings in seeking to modify or enforce such prenuptial agreements.


\(^9\) Id.
V. THE IMPORTANCE OF IRC SECTION 682

The effect of the repeal of IRC Section 682 is addressed in the attached Tax Section Report on Alimony Transitional Guidance. As noted therein, before its repeal, Section 682 allowed the grantor spouse to transfer separate property to a trust for the benefit of the other spouse. Upon divorce, the beneficiary spouse would receive the income from the trust for a certain term and pay the taxes on the income received. The principal would eventually revert back to the grantor spouse.

The 2017 Tax Act did not grandfather in Section 682 Trusts and agreements to create 682 trusts in the event of a divorce that are not yet in pay status. Thus, couples who divorce after December 31, 2018 will not receive the benefit of their bargain. Rather, the grantor spouse who agreed to place certain assets into trust with the expectation of transferring the tax liability for the payments made by the trust will now have to pay the taxes. If the beneficiary spouse is not willing to renegotiate changes to the trust or if the trust is irrevocable, the divorcing couples may experience further stress and additional litigation costs.

VI. CONCLUSION

This Resolution urges Congress to consider the detrimental effects on the family court system and divorced families caused by eliminating the alimony deduction and to reinstate the alimony deduction. This Resolution also urges Congress to reinstate former Section 682 of the Internal Revenue Code, as its elimination will have unintended consequences for parties who established alimony trusts prior to December 31, 2018, but who are not yet divorced or legally separated.

VII. Alimony Transitional Guidance

Background On The Alternative Resolution

Prior to its repeal in the Tax Cut And Jobs Act of 2017 (TCJA), the alimony deduction, as codified by Internal Revenue Code (IRC) Section 71, was one of the longest-standing deductions available to individual taxpayers. A part of the income tax law for roughly 75 years, the alimony deduction predates the first modern income tax code. For many taxpayers, the alimony deduction was treated as an immutable fact upon which to base planning for future divorce contingencies. The revocation of the alimony deduction puts many taxpayers who incorporated the alimony deduction into their post marital planning in a difficult position. These taxpayers have pre-existing, binding agreements that will lose their intended economic effect if the taxpayer divorces after 2018.

Restoring the alimony deduction, as requested by the ABA Family Law Section in Resolution 115A would eliminate the issues addressed below. Should Congress not restore the alimony deduction, this report is intended to: 1) identify issues that should be addressed by separate legislation, or if appropriate, rule-making; and 2) provide recommendations on how to correct some of the most serious problems arising from the repeal of the alimony deduction.
Current State Of The Law

The alimony deduction allows the payor of alimony, as specifically defined, to take a deduction from income for amounts paid to a former spouse. The recipient of the alimony then includes the payment as income and pays tax on the amounts received. As long as both the payor and the recipient include the same amount as deductible and as income, 100% of the income is reported to the IRS. Each party is then responsible for calculating and paying the correct amount of tax based upon their individual situation. Given the recipient of the alimony often has a lower marginal rate than the person paying the alimony, the deduction frequently reduces the combined overall tax burden of the former spouses.10

The TCJA repealed the alimony deduction for couples divorcing after 2018. Couples that are divorced, or finalize their divorce, prior to the end of 2018, may apply pre-TCJA law and will be able to claim the alimony deduction. Those couples that divorce in 2019 or later will no longer be able to claim the alimony deduction. Absent the alimony deduction, all income is taxed to the person who earned the income regardless of what obligations they may have to pay support to a former spouse.

Guiding Principles Of The Report

This report is not intended to be an exhaustive list of potential future problems associated with the repeal of the §71 alimony deduction. It is intended to be narrowly construed and only seeks to comment on issues that are of importance to the integrity of tax administration, which seeks to provide consistent tax treatment of similarly situated taxpayers. The repeal of the alimony deduction has created two categories of taxpayers who may face different and unequal treatment under the new law because it grandfathers in certain taxpayers into the current alimony rules but excludes others. These two categories of excluded taxpayers are:
1. Taxpayers who entered into binding contracts through pre and post nuptial agreements, prior to the repeal of the alimony deduction, under which they are obligated to make alimony payments.
2. Taxpayers who entered into binding contracts to create, or have previously created, trusts that pay support similar to alimony and which prior to 2019, would result in the payments from the trust being income to the beneficiary rather than the grantor under IRC Section 682.

Importance Of Equal Treatment

The issues selected for this report were selected because the repeal of the alimony deduction changed the economic effect of previously agreed to contracts. Other similar contracts, such as privately negotiated divorce settlements entered into prior to 2019, were allowed to maintain the bargained-for economic effect. This creates a system where two contracts, both made before the effective date of TCJA, that both made the same assumptions about the future deductibility of alimony payments, and both provided for the same alimony payments, nonetheless have two different tax treatments under TCJA.

10Many scholars view alimony payments as payments made for the value of gains made by the marital unit during the length of marriage. Under this gain theory of alimony these payments represent ongoing property divisions from current income rather than true “deductions” which are normally tied to expenses for the production of income.
It is important to note how similar these types of private contracts are to divorce decrees or separation agreements. Taxpayers who enter into an agreement in contemplation of divorce have the same type of representation as those taxpayers who enter into settlement after a couple has filed for divorce. In both circumstances, each party is represented by a family law attorney, each has access to the other party's financial information, and both use similar information to calculate support payments.

Pre and Post Nuptial Agreements

Pre and postnuptial agreements are binding agreements made between individuals that are enforceable under state law. As these agreements specify what should happen in the event of a future divorce, they require the parties and their counsel to make assumptions about what the future will hold. Every agreement that specifies support after the termination of the marriage, either by the application of an earnings formula or a specified dollar amount, is implicitly based upon the assumption that alimony would be deductible by the payor.

TCJA grandfathered payments structured under a pre-2019 divorce decree, allowing application of the alimony deduction. However, pre and postnuptial agreements entered into prior to 2019 are not grandfathered under the legislation. This causes a number of problems for currently married couples who entered into these agreements. First, if a couple with a prenuptial agreement, even a 20 year old prenuptial agreement, divorces after 2019, the economic effect of the agreement has been altered. The payor will likely end up with a larger tax burden than anticipated, while the recipient will receive tax-exempt payments.

Fixing these economic distortions is not as simple as saying the agreement should be renegotiated. Even under the best of circumstances, renegotiating the agreement would cause familial stress. Each side would likely incur additional legal fees and in many cases the renegotiation would fail. It is likely that in many circumstances the recipient of the alimony would refuse to renegotiate if the recalculated alimony amount would be reduced because that would be against their interests. It is also likely that there would be an increased volume in contests to the validity of the agreement based on the change in the law. This could lead to litigation and uncertainty, which is what pre and post nuptial agreements are intended to avoid.

Trust Payments Pursuant To A Divorce - Irc Section 682

Prior to its repeal by the Tax Cut and Jobs Act of 2017, Section 682 provided that income from a trust established by a grantor as part of a divorce decree or a separation agreement was properly taxable to the designated beneficiary, rather than the grantor of the trust. Section 682 allowed a spouse with substantial separate property to transfer a principal amount to a trust. In the event of a divorce, or pursuant to a preexisting plan or agreement, the income from the property held by the trust would be payable to the former spouse for a certain term, after which the property, or the income from the property would revert back to the grantor.

The advantage of a Section 682 trust was that it reduced some of the uncertainties for each party. The contributing party was assured that the principal would not be at risk. The recipient of
the income would be assured of a steady stream of income from assets that could not be squandered or transferred beyond their reach, and each party could rely on a professional to manage the assets of the trust so that the assets would generate a commercially reasonable rate of return.

Like pre/post nuptial agreements, existing Section 682 trusts and agreements to create Section 682 trusts in the event of a divorce, are not grandfathered into the alimony deduction under TCJA. If a couple has a valid Section 682 trust agreement in place and does not divorce before 2019, the trust will be treated under the general grantor trust rules, which essentially treat the grantor as the taxpayer. The grantor would be responsible for paying tax on all of the income from the trust assets, including amounts legally required to be transferred to the former spouse.

The economic distortion caused by the repeal of the alimony deduction on Section 682 trusts is twofold. First, the grantor will have a higher tax burden and the beneficiary will receive non-taxable distributions. Second, if the agreement only specified a set amount of principal to be transferred to the trust because the negotiations assumed, but the documents did not incorporate in a support formula with an assumed rate of a return and the beneficiary’s tax rate on that income, the amount of principal contributed may be higher than needed to achieve the desired agreed upon result.\(^{11}\)

Curing these economic distortions may not always be possible. In some cases, Section 682 trusts are irrevocable trusts. As an irrevocable trust, it may be impossible for the settlor or the beneficiary to modify the terms of the trust so that it complies with the couple’s original intentions. As with prenuptial agreements, the beneficiary spouse may be unwilling to negotiate any changes, and any negotiations regardless of success will take resources and cause family stress.

**Solution To TCJA Created Consequences For Pre-2019 Marital Agreements And Trusts**

Payments under binding agreements such as prenuptial agreements and Section 682 trusts entered into before 2019 should be given the same tax treatment as payments pursuant to divorce decrees entered into before 2019. In both situations, the payor should receive a deduction and the payee should pay tax on the amount that would be considered alimony under the pre-2019 rules.

Granting binding agreements the same protections as divorce decrees is good tax policy. Pre and post nuptial agreements as well as Section 682 trusts are not substantially different from the agreement that currently are grandfathered into the existing alimony deduction. As binding agreements, the parties should be able to enjoy the economic effect that they agreed to when entering the contract. Grandfathering these agreements into the alimony deduction creates certainty for the parties involved. Furthermore, the proposed grandfathering saves taxpayers time, resources, and marital stress by not forcing them to attempt to renegotiate old agreements.

\(^{11}\) A simple support formula may be Annual Support = (Principal x rate of return) - Beneficiary’s tax rate. The document may simply solve for Principal to avoid the grantor being responsible for a lower than expected rate of return due to market conditions.
Administration Of Proposed Solution

From an administrative standpoint, proving the existence of a pre-2019 agreement does not require significant resources. Any agreement which would be grandfathered into the current alimony rules is a written agreement which is dated and signed by the parties. In the event of an audit, a revenue agent can simply request a copy of the document and verify the date on which the parties signed the agreement. If there is a question of authenticity there are other parties which can verify the date of the agreement. Overall, it is a small burden for the IRS when compared to the significant impact on affected taxpayers.

Conclusion

Good tax administration should strive to treat all similarly situated taxpayers the same way. The way the repeal of the alimony deduction was drafted does not accomplish this goal. The law as written grandfathers in some taxpayers into the current alimony system while depriving other similarly situated taxpayers the same benefit. In order to treat all similarly situated taxpayers the same, Congress should pass legislation that extends the alimony deduction to all taxpayers who entered into binding agreements prior to the repeal date.

Respectfully submitted,

Roberta S. Batley
Chair, Family Law Section

Dated: August 2018
102A

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 reinstate the tax deduction for alimony payments.

2. **Approval by Submitting Entity.** The ABA Section of Family Law approved submission of this Resolution on June 4, 2018.

3. Has this or a similar resolution been submitted to the House or Board previously? Yes, it was submitted for the Midyear 2018 Meeting of the House of Delegates, but was withdrawn prior to February 5.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? There is no ABA policy on this subject so no existing policy would be adversely affected by this Resolution. This resolution strives to give divorcing individuals equal treatment to other taxpayers and is in harmony with other ABA policy designed to ensure 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 Resolution urges enactment of tax code sections previously repealed in on December 22, 2017, but there is no pending legislation.

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.**

    Section of Taxation  
    Real Property, Trust and Estate Law Section  
    Business Law Section  
    Litigation Section  
    Dispute Resolution Section  
    Solo, Small Firm and General Practice Division  
    Young Lawyers Division  
    Senior Lawyers Division
11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address).

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution
   The Resolution urges Congress to reinstate the tax deduction for alimony payments.

2. Summary of the Issue that the Resolution Addresses
   Alimony is often relied upon to provide ongoing financial support to the lower income spouse following a divorce. The alimony deduction helps enable divorced families 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 allocated between two households. Elimination of the alimony deduction from the new tax code may have a chilling effect on divorce settlements; may result in lower alimony awards; and may have a negative effect on divorced families.

3. Please Explain How the Proposed Policy Position will address the issue
   This Resolution urges Congress to enact anew provisions providing for an alimony deduction. It similarly urges Congress to reinstate Section 682 of the Internal Revenue Code, with similar effect on the taxability of alimony trusts.

4. Summary of Minority Views
   None.
RESOLUTION

RESOLVED, That the American Bar Association adopts the *ABA Model Act Governing Assisted Reproductive Technology* dated August 2018 (“2018 Model Act”) to replace the 2008 *ABA Model Act Governing Assisted Reproductive Technology*; and

FURTHER RESOLVED, That the American Bar Association urges state, territorial, and tribal governments to enact the 2018 Model Act.
AMERICAN BAR ASSOCIATION
MODEL ACT GOVERNING
ASSISTED REPRODUCTIVE TECHNOLOGY [2018]

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ARTICLE 6. CHILD OF ASSISTED REPRODUCTION
ARTICLE 7. SURROGACY

SECTION 701. SURROGACY AGREEMENTS AUTHORIZED
SECTION 702. ELIGIBILITY
SECTION 703. REQUIREMENTS FOR A SURROGACY AGREEMENT
SECTION 704. TERMINATION OF SURROGACY AGREEMENT PRIOR TO PREGNANCY
SECTION 705. ESTABLISHMENT OF PARENT CHILD RELATIONSHIP - GESTATIONAL SURROGACY
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SECTION 708. EFFECT OF SURROGATE’S SUBSEQUENT MARRIAGE
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SECTION 711. EFFECT OF NONCOMPLIANCE
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ARTICLE 8. PAYMENT TO DONORS AND GESTATIONAL CARRIERS

SECTION 801. REIMBURSEMENT
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ARTICLE 9. HEALTH INSURANCE

SECTION 901. INFERTILITY AND EXPERIMENTAL PROCEDURES
SECTION 902. REQUIRED NOTICE
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ARTICLE 10. QUALITY ASSURANCE

SECTION 1001. QUALIFICATION OF PROVIDERS
SECTION 1002. DONOR AND COLLABORATIVE REPRODUCTION REGISTRIES
SECTION 1003. HEALTH INFORMATION MANAGEMENT

SECTION 1004. PATIENT SAFETY

ARTICLE 11. ENFORCEMENT

SECTION 1101. DAMAGES

ARTICLE 12. MISCELLANEOUS PROVISIONS

SECTION 1201. LIMITATION OF MEDICAL PROFESSIONAL LIABILITY

SECTION 1202. SEVERABILITY
ARTICLE 1. GENERAL PROVISIONS

SECTION 101. SHORT TITLE

This Act is entitled the 2018 Model Act Governing Assisted Reproductive Technology.

SECTION 102. DEFINITIONS

1. “ART Storage Facility” means a licensed facility that stores reproductive, biological, or genetic material used in Assisted Reproductive Technology, and is in compliance with the Fertility Clinic and Certification and Success Rate Act of 1992 (FCSRCA, or Public Law 102-493).

2. “Assisted Reproduction” means a method of causing pregnancy through means other than by sexual intercourse. In the foregoing context, the term includes, but is not limited to:

   (a) Intrauterine insemination;
   (b) Donation of eggs or sperm;
   (c) Donation of Embryos;
   (d) In vitro fertilization and Embryo Transfer; and
   (e) Intracytoplasmic sperm injection.

3. “Assisted Reproductive Technology” (“ART” as used in this Act) means any medical or scientific intervention, provided with the intent of having a Child.


5. “Child” means an individual born pursuant to ART whose parentage may be determined under this Act or other law.

6. “Collaborative Reproduction” involves any Assisted Reproduction in which an individual other than an intended parent provides genetic material or agrees to act as a Gestational or Genetic Surrogate.

7. “Compensation” means payment of any valuable consideration for time, effort, pain and/or risk to health in excess of reasonable medical and ancillary costs.

8. “Consultation” means a meeting with a licensed professional for the purpose of counseling and educating the Participant in accordance with ASRM guidelines about the effects and potential consequences of their participation in any ART procedure.

9. “Court” means the appropriate court with competent jurisdiction as determined by the State.
10. “Donor” means an individual, including an Embryo Donor or a Genetic Surrogate, who provides gametes for Assisted Reproduction. The term does not include: (a) an intended parent who provides gametes to be used for Assisted Reproduction; (b) a woman who gives birth to a Child by means of Assisted Reproduction except as otherwise provided in Article 6; or (c) a parent under Article 6 or an intended parent under Article 7.

11. “Embryo” means a fertilized egg that has the potential to develop into a fetus if transferred into a uterus.

12. “Embryo Donor” means an individual who transfers ownership of an Embryo to another and relinquishes all parental rights of and obligations to the resulting Child.

13. “Embryo Transfer” (also referred to herein as “Transfer”) means the placement of an Embryo into a uterus.

14. “Escrow Account” means an independent, insured, bonded escrow depository maintained by a licensed, independent, bonded escrow company; or an insured and bonded trust account maintained by an attorney.

(a) For purposes of this section, a non-attorney ART Agency may not have a financial interest in any escrow company holding client funds. A non-attorney ART Agency and any of its officers, managers, owners of more than 5% ownership interest, directors or employees shall not be an agent of any escrow company holding client funds; and

(b) Client funds may only be disbursed by the attorney or Escrow Agent as set forth in the assisted reproduction agreement and the fund management agreement between the Intended Parent(s) and the Escrow Account holder.

15. “Escrow Agent” means the trustee for an Escrow Account.

16. “Evaluation” means a Consultation with and, where required by this Act, an assessment in accordance with ASRM guidelines as to whether a Participant is cleared to proceed with participation in any ART procedure.

17. “Gamete” means a cell containing a haploid complement of DNA that has the potential to form an Embryo when combined with another Gamete. Sperm and eggs are Gametes. A Gamete may consist of nuclear DNA from one human being combined with the cytoplasm, including cytoplasmic DNA, of another human being.

18. “Gamete Provider” means an individual who provides sperm or eggs for use in Assisted Reproduction.
19. “Genetic Surrogate” means an adult, not an Intended Parent, who enters into a Surrogacy Agreement to bear a Child and who is a Gamete Provider for the Child.

20. “Genetic Surrogacy Agreement” is a written contract between Intended Parent(s) and a Genetic Surrogate.

21. “Genetic Surrogacy Arrangement” means the process by which a Genetic Surrogate intends to carry and give birth to a Child.

22. “Gestational Surrogate” means an adult, not an Intended Parent, who enters into a Surrogacy Agreement to bear a Child and who is not a Gamete Provider for the Child.

23. “Gestational Surrogacy Agreement” is a written contract between Intended Parent(s) and a Gestational Surrogate.

24. “Gestational Surrogacy Arrangement” means the process by which a Gestational Surrogate intends to carry and give birth to a Child.

25. “Independent Legal Representation” (also referred to herein as “Independent Legal Counsel”) means representation of the Participants by separate legal counsel as required by the applicable rules of professional responsibility unless such representation is knowingly and voluntarily waived in writing.

26. “Infertility” means the definition set forth by ASRM.

27. “Intended Parent” means an individual who intends to be legally bound as a parent of the Child.

28. “Legal Spouse” means an individual married to another.

29. “Medical Evaluation” means a Consultation with and an evaluation by a physician meeting the requirements of Section 903.

30. “Medical Information” means any protected individually identifiable health information obtained by a health care provider in the course of Medical Evaluation, Consultation, diagnosis, or treatment.

31. “Mental Health Counseling” means additional Consultation(s) after an initial Consultation for the purpose of advising and supporting the Participant throughout the implementation of any ART procedure.

32. “Mental Health Evaluation” means a Consultation with and an evaluation by a mental health professional meeting the requirements of Section 301.
33. “Parent” means an individual who has established a Parent-Child Relationship under this Act or other applicable law.

34. “Parent-Child Relationship” means the legal relationship between the Child and a Parent of the Child.

35. “Participant” means an Intended Parent, Donor, Gestational or Genetic Surrogate and their Legal Spouse, if applicable, who is involved in Assisted Reproduction under this Act.

36. “Patient” means an individual participating in Assisted Reproduction under the direction of a Provider.

37. “Physician” means an individual licensed to practice medicine.

38. “Provider” means an individual, including all medical, psychological, or counseling professionals: (a) licensed to administer health care; (b) who is qualified under this Act to provide ART services; and (c) has a Provider-Patient relationship with a Participant. Any professional corporation or corporation licensed by the State to provide health care, of which a Provider is an owner or employee, is also a Provider.

39. “Record” means information inscribed in a tangible medium or stored in an electronic or other medium that is retrievable in perceivable form.

40. “Retrieval” means the procurement of eggs or sperm from a Gamete Provider.

41. “State” means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

42. “Surrogacy Agreement” is a written contract between Intended Parent(s) and a Gestational or Genetic Surrogate.

43. “Surrogacy Arrangement” means the process by which a Gestational or Genetic Surrogate intends to carry and give birth to a Child.

44. “Transfer” means a procedure for assisted reproduction by which an embryo or sperm is placed into the body of the person who will give birth to a Child.

ARTICLE 2. INFORMED CONSENT

SECTION 201. INFORMED CONSENT STANDARDS

1. Informed consent must be provided by all Participants prior to the commencement of Assisted Reproduction.
2. Informed consent requires that all of the following be provided to all Participants orally and in a Record that meets the requirements of Section 202:

(a) A statement that the Patient retains the right to withhold or withdraw consent at any time prior to Transfer of Gametes or Embryos without affecting the right to future care or treatment or risking the loss or withdrawal of any program benefits to which the Patient would otherwise be entitled.

(b) A statement that the ART Provider retains the right to withdraw for reasonable justification and with reasonable notice.

(c) A statement that the Donor’s, right to withhold or withdraw consent to fertilization terminates upon Retrieval of his or her Gametes, subject only to the terms of any prior agreement in a Record pursuant to Article 5.

(d) A statement of the known, potential medical and procedural risks and benefits of ART. Such description shall include the inherent risk of Embryo loss due to aneuploidy, thawing, and failure of implantation; the risks associated with the use of hormones and other drugs that may be used; the procedural risks associated with egg Retrieval and/or other ART procedures; the incidence of, and risks regarding, multiple pregnancies and selective reduction; and the incidence and risk of birth defects associated with IVF.

(e) A statement of acknowledgement that alternative therapies and options have been discussed in detail.

(f) A statement that the Patient shall be informed that there may be foreseen or unforeseen legal consequences and that Independent Legal Representation is advisable and may be required by this Act or by State law.

(g) A statement describing all existing confidentiality protections.

(h) A statement of guarantee that a Patient, whether a Donor, Intended Parent, Gestational Surrogate or Genetic Surrogate (a Participant), has access to all of his/her Medical Information to the extent allowed by applicable law and not otherwise waived by the Participant. The Patient may have to pay a fee for copies of the Record.

(i) A statement that the Intended Parent has a right to access a summary of medical and psychological information about Donors and Gestational or Genetic Surrogates as described in this Act.

(j) A statement that the release of any Participant-identifiable information, including images, shall not occur without the consent of the Participant in a Record.
(k) A statement that the Intended Parent(s) or an Embryo Donor, not the ART Provider or ART Storage Facility, has the right to possession and control of their Embryos, subject to any prior agreement in a Record or as provided in Section 504.

(l) A statement of the need for Intended Parents to agree in advance who shall acquire the right to possession and control of the Embryos or Gametes in the event of marriage dissolution or separation of the Intended Parents, death of one or both of them, or subsequent disagreement over disposition in compliance with the provisions of Section 501 of this Act.

(m) The policy of the provider regarding the number of Embryos Transferred and any limitation on the number of Embryos Transferred, as well as the existence of national guidelines as published by the ASRM.

(n) A statement of the need for Participants to decide whether the Embryos or Gametes can be used for purposes other than Assisted Reproduction.

(o) Signed in presence of member of staff or notary.

SECTION 202. RECORD AUTHORIZATION REQUIRED

1. The provider must document informed consent in a Record for each Participant that must:

   (a) Be in plain language;

   (b) Be dated and signed by the provider and by the Participant in the presence of a member of the staff of the provider or before a notary;

   (c) State that disclosures have been made pursuant to this Act;

   (d) Specify the length of time the consent remains valid; and

   (e) Advise the party signing the informed consent document of the right to receive a copy of the Record.

2. The Record(s) must be executed in accordance with this Act before informed consent is valid or the commencement of any Assisted Reproduction.

3. The Record required in paragraph 1 of this Section shall become part of the medical record.

4. If Collaborative Reproduction is utilized and a legal agreement is entered into between the Participants, the Record must reflect that the parties have entered into a signed legal agreement with Independent Legal Representation, prior to the start of any medications.
SECTION 203.  DISCLOSURES

1. Disposition of preserved Embryos: Prior to each Retrieval, a Provider must disclose to all Intended Parents and Donors, whose identity is known to the Provider, the following possible dispositions of Embryos:

(a) Storage, including length of time, costs, and location;

(b) Embryo Transfer;

(c) Donation:

   (i) To a known individual for Embryo Transfer;

   (ii) To an anonymous individual for Embryo Transfer, either directly or through the provider, or through a third party Embryo donation program;

   (iii) For scientific or clinical research, including the institution conducting the research and the intended nature of the research, if known, subject to any agreement in a Record as provided in Section 502; or

(d) Destruction.

2. Right to transport. A Provider is not required to offer all possible dispositions, but the provider must inform the Patient that other providers may offer other options and that the Patient has the right to transport Embryos to other providers.

3. Embryo Transfer disclosure. Before each Embryo Transfer cycle, the provider must provide each Intended Parent with the following information in a Record, where applicable:

(a) Method used to achieve fertilization and the results of semen analysis, including, but not limited to, motility, count, and morphology;

(b) Number of eggs retrieved;

(c) For the Retrieval and Transfer of fresh Embryos:

   (i) Number formed;

   (ii) Number viable for Embryo Transfer;

   (iii) Number to be Transferred;

   (iv) Number preserved;

   (v) Quality of each Embryo Transferred; and
(vi) Quality of each Embryo preserved;

(d) For the Transfer of preserved Embryos:

(i) Number of Embryos thawed;

(ii) Number of Embryos viable for Embryo Transfer after thawing; and

(iii) Quality of Embryos Transferred;

(iv) Remaining viability of thawed but unused Embryos, if any.

(e) A statement that failure to adhere to drug administration schedules may affect the outcome of the treatment.

4. Disclosure to Donors. If additional information is learned through medical or psychological evaluation prior to or upon Retrieval of Gametes that is relevant to the Donor’s health that information must be made available to the Donor if the Donor has made such a request. The Provider must disclose to a Donor that such information can be made available upon request.

5. Disclosure regarding health. Individuals from whom eggs are retrieved must be informed prior to the Retrieval or commencement of medications of the health risks and adverse effects of ovarian stimulation and retrieval. Women undergoing Transfer must be informed of the health risks of that process. Health risk disclosures must include, where relevant, the following information regarding the fertility drugs to be used:

(a) Known potential present and future side effects;

(b) Alternative drug therapies and natural cycling;

(c) Process of drug administration; and

(d) Whether the drug is approved by the Food and Drug Administration (FDA).

6. Disclosure regarding multiple births/Retrievals. Where relevant, a Provider must disclose in a Record, to Participants other than Donors, prior to Retrieval, the known risks of multiple births to the Participant and to the fetuses, including the positive and negative factors involved in selective reduction; and the known potential birth defects related to IVF. A Provider must disclose prior to Retrieval to individuals undergoing egg retrieval the known potential present and future risks of multiple courses of ovarian stimulation drugs.

7. Disclosure regarding Embryo research. A Provider shall not accept from a Participant an Embryo designated for research under Section 502, and the Provider must disclose the
existence of any financial or professional relationship with any entity accepting the Embryo for research.

**SECTION 204. DONOR LIMITATIONS**

In accordance with the requirements set forth elsewhere in this Act:

1. A Donor of Gametes or Embryos may condition donation on a reasonable assurance of anonymity so long as non-identifying health information is provided.

2. A Donor who has given permission for release of identifying health or other information may not revoke such permission after Transfer of the donated Gametes or of Embryos formed with the donated Gametes.

3. A Donor of Gametes or Embryos may condition donation on other reasonable use or disposition restrictions as set forth in a Record prior to donation.

**SECTION 205. COLLECTION OF GAMETES FROM PRESERVED TISSUE OR GAMETES FROM DECEASED OR INCOMPETENT INDIVIDUALS**

1. Gametes shall not be collected from deceased or incompetent individuals or from preserved tissues unless consent in a Record was executed prior to death or incompetency by the individual from whom the Gametes are to be collected, or the individual’s authorized fiduciary who has express authorization from the principal to so consent, does consent.

2. In the event of an emergency where the required consent is alleged but unavailable and where, in the opinion of the treating Physician, loss of viability would occur as a result of delay, and where there is a genuine question as to the existence of consent in a Record, an exception is permissible.

3. If Gametes are collected pursuant to paragraph 2 of this Section, Transfer of Gametes or of an Embryo formed from such a Gamete is expressly prohibited unless approved by a Court. Absence of a Record as described in Paragraph 1 shall constitute a presumption of non-consent.

*Legislative Note: States should customize this article to comport with the State’s criminal code.*

**SECTION 206. LOSS OF EMBRYOS OR GAMETES DUE TO NATURAL DISASTER, ACT OF GOD, TERRORISM, OR WAR**

An ART Storage Facility for Embryos or Gametes is not liable for destruction or loss of Embryos due to natural disaster, act of God, terrorism or war.
ARTICLE 3. MENTAL HEALTH EVALUATION AND ADDITIONAL COUNSELING

SECTION 301. MENTAL HEALTH EVALUATION

1. Intended Parents must receive a Mental Health Consultation prior to undergoing any ART procedure.

2. All other Participants known to the ART Provider, other than Intended Parents, must undergo a Mental Health Evaluation with a Mental Health Professional in accordance with the most recently published Professional Guidelines of ASRM prior to the ART procedure. The results of this Evaluation shall only be used to determine suitability to participate in Collaborative Reproduction.

3. During a Mental Health Consultation or Mental Health Evaluation described above, the Provider must inform the Participant(s) of additional counseling options. The Participant’s acceptance of additional counseling is voluntary.

4. For purposes of this Article, Mental Health Professional is an individual who:

   (a) Holds a Masters or Doctoral degree in the field of Psychiatry, Psychology, Counseling, Social Work, Psychiatric Nursing, Marriage and Family Therapy, or State equivalent; and

   (b) Is licensed, certified, or registered to practice in the mental health field; and

   (c) Has received training in, or has knowledge of, reproductive physiology; the testing, diagnosis, and treatment of Infertility; and the psychological issues in Infertility and Collaborative Reproduction. If there are questions about inherited or genetic disorders, the Mental Health Professional must refer the Participant to a qualified professional for Consultation.

SECTION 302. ADDITIONAL COUNSELING REQUIREMENTS

1. An ART procedure using Collaborative Reproduction shall not be initiated or performed until:

   (a) All Participants made known to the ART Provider have been offered Mental Health Counseling following the initial Evaluation as provided for in Section 301; and

   (b) The Mental Health Professional(s) have prepared and delivered to the medical Provider(s) a statement in a Record that he or she has met with the Participant(s) and that they have undergone the requisite Mental Health Evaluation;
2. Opportunity to receive counseling. It shall be conclusively presumed that a Participant has been offered an opportunity to receive additional counseling from a Mental Health Professional pursuant to Section 301 if that individual signs a statement containing the following language:

“I understand that counseling is recommended for all participants in collaborative reproduction and that counseling is a separate process from any consultation that [Provider] has required me to complete. [Provider] has given me the opportunity to meet with and receive counseling from a mental health professional with specialized knowledge of the social and psychological impact of assisted and collaborative reproduction on participants. I understand that I may choose any such mental health professional, and that I am not required to choose one recommended by this treatment facility.”

3. Assessment available to Intended Parents. A Mental Health Professional’s recommendation regarding the assessment of that Gamete Donor or Surrogate Participant for Collaborative Reproduction shall be transmitted to an Intended Parent only if:

(a) Intended Parent has requested such recommendation;
(b) Intended Parent’s request is prior to Transfer of gametes or embryos;
(c) Intended Parent’s request is prior to execution of any Collaborative Reproduction agreement; and
(d) The affected Participant’s Informed Consent was obtained pursuant to Article 201.
(e) Any such transmission as well as the retention of the information transmitted or the documents or other materials upon which the assessment was based, shall otherwise be controlled by applicable state or Federal law.

ARTICLE 4. PRIVACY AND CONFIDENTIALITY

SECTION 401. INDIVIDUALLY IDENTIFIABLE MEDICAL INFORMATION

All individually identifiable information obtained or created in the course of ART treatment is Medical Information and subject to medical record confidentiality requirements.

ARTICLE 5. EMBRYO TRANSFER AND DISPOSITION OF EMBRYOS NOT TRANSFERRED

SECTION 501. PARENTAL RIGHTS AND OBLIGATIONS

1. Intended Parents shall enter into a written agreement prior to Embryo formation detailing:
(a) Intended use of Embryos;

(b) Disposition of cryopreserved Embryos in the event of:

(i) Dissolution of Intended Parents’ relationship (or divorce of Intended Parents, if married); and

(ii) Incapacity or death of one or both Intended Parents.

2. Such agreements may be amended in a Record, at any time prior to Embryo Transfer or the death of either Intended Parent.

3. All agreements shall include an address and permanent identifier of the Intended Parents.

4. All agreements must be delivered to the Providers and the ART Storage Facility, if any.

5. Any party to an Embryo storage or disposition agreement may withdraw his or her consent to the terms of the agreement in writing prior to an Embryo Transfer to a uterus of an Intended Parent, Gestational Surrogate, or Genetic Surrogate.

(a) Notice of said withdrawal of consent to the terms of the agreement must be given in a Record to the parties to the agreement and the Providers and ART Storage Facility, if any.

(b) After receipt of said notice in a Record by the other Intended Parent and/or by the ART Provider or ART Storage Facility of that individual’s intent to avoid Embryo Transfer, an Intended Parent may not Transfer the Embryos into the uterus of any person with the intent to create a Child. No prior agreement to the contrary will be enforceable.

(c) In the event that an Embryo Transfer occurs after receipt of notice in a Record of that individual’s intent to avoid Embryo Transfer as set forth in paragraph 5(b) of this Section that Intended Parent will not be the Parent of a resulting Child.

6. Following the death of an Intended Parent who has previously consented in a Record to posthumous use of cryopreserved Gametes and/or Embryos, the surviving Intended Parent or the person designated in the Record to receive control of use of the Embryos may use the Embryos in accordance with the decedent’s written consent in a Record. Except as otherwise provided in the enacting jurisdiction's probate code, the Child born as a result of Embryo Transfer after the death of an Intended Parent or Gamete Provider is not the Child of that Gamete Provider or Intended Parent unless the deceased individual consented in a Record that if Assisted Reproduction were to occur after death, the deceased individual would be a Parent of the Child.
7. No Provider shall Transfer or create any Embryos following the death of an Intended Parent unless the necessary consent referred to in paragraph 6 of this Section is obtained and permanently recorded.

8. In the event that a written agreement pursuant to paragraph 1 is not executed prior to Embryo formation, the Intended Parent[s] may execute an agreement consistent with this Section that may be enforceable on a prospective basis.

SECTION 502. DONATION OF UNUSED EMBRYOS

Intended Parent(s) may choose to donate their unused Embryos for any of the following purposes subject only to any limitations set forth in a Record prior to donation as permitted and imposed pursuant to the provisions of Section 204 hereof, which choices shall be reflected in their agreement(s):

1. Donation to another Patient(s), either known or anonymous, for the purpose of the recipient attempting to create a Child and become that Child’s Parent.

2. Donation for approved research, the nature of which may be specifically set forth in the informed consent Record and which has received the approval of an institutional review board. No research will be permitted that is not within the scope of the informed consent of the recorded agreement. This agreement may only be modified with the consent of the Intended Parent(s). After an Intended Parent has died, that individual’s consent endures and is irrevocable.

SECTION 503. SCREENING OF EMBRYO DONORS

Donors shall be screened prior to such donation in compliance with applicable state and federal law in accordance with applicable medical standards. Records of the donation shall be maintained in compliance with applicable state and federal law.

SECTION 504. ABANDONMENT OF EMBRYOS AND DISPOSITION OF ABANDONED EMBRYOS

1. An Embryo is deemed to be abandoned only if:

   (a) At least five years have elapsed since last communication from Intended Parents to Provider and/or ART Storage Facility unless the Participants select another time by agreement as provided in a Record; and

   (b) A diligent attempt to notify the interested Participants, as well any Provider(s) who contracted for storage, that the Embryo is deemed to be abandoned (such attempt shall include, but not be limited to, notice by certified mail (or equivalent trackable medium) to each interested Participant’s permanent address or last known address, and shall require a period of not less than ninety days to elapse before any action is taken); and
The interested Participants have acknowledged that they have been informed of the provisions of (a) and (b) of this paragraph in an agreement in a Record executed prior to storage with the Provider and/or ART Storage Facility.

2. Disposition of an Embryo deemed to be abandoned under Paragraph 1 must be in accordance with the most recent recorded agreement between Participants and the ART Storage Facility. If there is no agreement in a Record, or if no agreement in a Record can be found after a diligent search, disposition must be as ordered by a Court.

3. Any Provider and/or ART Storage Facility that disposes of Embryos in compliance with this Section is immune from all civil and criminal liability that may arise as a result of the disposition of such Embryos, absent criminal intent, gross negligence, or intentional misconduct.

SECTION 505. TRANSPORTATION OF EMBRYOS

1. Transportation of Embryos is the responsibility of the individual or individuals requesting the transport.

2. Unless the ART Storage Facility has requested or required transport, it is immune from all civil and criminal liability incurred as a result of the transport, absent criminal intent, gross negligence, or intentional misconduct.

ARTICLE 6. CHILD OF ASSISTED REPRODUCTION

SECTION 601. SCOPE OF ARTICLE

This Article does not apply to the birth of a Child conceived by means of sexual intercourse, or as the result of a Surrogacy Agreement as provided in Article 7.

SECTION 602. PARENTAL STATUS OF DONOR

A. A Donor is not a Parent of a Child conceived by means of Assisted Reproduction.

B. Donor Agreements Authorized.

1. A Gamete Donor and an Intended Parent(s) may enter into an agreement in a Record providing that:
   (a) The Donor agrees to donate Gametes in order for the Intended Parent(s) to conceive a Child through Assisted Reproduction.
   (b) The Donor, and spouse if married, relinquishes all property, parental, or other rights, responsibilities and claims with respect to any resulting Gametes, Embryos, and any Child born as a result of the Gamete donation;
Any donated Gametes, and any Embryos formed from the donated Gametes, shall be the sole property and responsibility of the Intended Parent(s), subject to the terms of the Donor agreement; and

The Intended Parent(s) shall be the Child’s Parent(s), and shall have a Parent-Child Relationship from birth with all the rights and responsibilities resulting therefrom.

Any Donor limitations as noted in Section 204 should be specified in the Donor agreement.

SECTION 603. PARENTAGE OF CHILD OF ASSISTED REPRODUCTION

An individual who provides Gametes for, or consents to, Assisted Reproduction by a person as provided in Section 604 with the intent to be a Parent of the Child is a Parent of the resulting Child.

SECTION 604. CONSENT TO ASSISTED REPRODUCTION

1. An individual’s consent to be a Parent of a Child born by Assisted Reproduction must be in a signed Record in accordance with Article 2. This requirement does not apply to a Donor.

2. Failure of an Intended Parent to sign a consent required by paragraph 1, before or after birth of the Child, does not preclude a finding of parentage if the person giving birth and the Intended Parent resided together with the Child during the first two years of the Child’s life and openly held out the Child as their own, unless the individual dies or becomes incapacitated before the child becomes two years of age or the Child dies before the Child becomes two years of age, in which case a court may find consent to parentage under this subsection if a party proves by clear-and-convincing evidence that the person giving birth and the individual intended to reside together in the same household with the Child and both intended that the individual would openly hold out the Child as the individual’s child, but that the individual was prevented from carrying out that intent by death or incapacity.

SECTION 605. LIMITATION ON LEGAL SPOUSE’S DISPUTE OF PARENTAGE

1. The Legal Spouse of a person who gives birth to a Child by means of Assisted Reproduction may not challenge the parentage of the Child unless:

   (a) Within two years after learning of the birth of the Child a proceeding in the appropriate Court is commenced to adjudicate parentage and the Court finds that the Legal Spouse did not provide the Gametes for the Child and did not consent to Assisted Reproduction, before or after birth of the Child; or.

   (b) The Legal Spouse never openly held out the Child as his or her own; or
(c) The Legal Spouse and the person who gave birth to the child have not cohabited since the probable time of assisted reproduction.

2. This Section applies to a marriage declared invalid after Assisted Reproduction.

SECTION 606. EFFECT OF DISSOLUTION OF MARRIAGE OR WITHDRAWAL OF CONSENT

1. If a marriage is dissolved before an insemination or Embryo Transfer the former spouse is not a Parent of the resulting Child unless the former spouse consented in a Record that if Assisted Reproduction were to occur after a divorce, the former spouse would be a Parent of the Child.

2. The consent of an individual to Assisted Reproduction may be withdrawn by that individual in a Record at any time before an insemination or Embryo Transfer. An individual who withdraws consent under this Section is not a Parent of the resulting Child.

SECTION 607. PARENTAL STATUS OF DECEASED INDIVIDUAL

Except as otherwise provided in the enacting jurisdiction's probate code, if an individual who consented in a Record to be a Parent by Assisted Reproduction dies before an insemination or Embryo Transfer, the deceased individual is not a Parent of the resulting Child unless the deceased spouse consented in a Record that if Assisted Reproduction were to occur after death, the deceased individual would be a Parent of the Child.

ARTICLE 7. SURROGACY

SECTION 701. SURROGACY AGREEMENTS AUTHORIZED

A. A Gestational or Genetic Surrogate and, if married, the Gestational or Genetic Surrogate’s Legal Spouse and the Intended Parent(s) may enter into an agreement in a Record providing that:

1. The Gestational or Genetic Surrogate agrees to attempt pregnancy by means of Assisted Reproduction;

2. The Gestational or Genetic Surrogate and, if married, the Gestational or Genetic Surrogate’s Legal Spouse relinquish all parental rights and duties with respect to any Child resulting from the Assisted Reproduction procedure(s); and

3. The Intended Parent(s) shall be recognized as the sole Parent(s) of the Child.

B. A Surrogacy Agreement may provide for payment of consideration under Article 8 of this Act.
C. A Surrogacy Agreement may not limit the right of the Gestational or Genetic Surrogate to make decisions to safeguard the Gestational or Genetic Surrogate’s health or that of the Embryo(s) or fetus.

D. A Genetic Surrogacy Agreement shall be subject to the following additional requirements and is enforceable only if:

1. Judicially validated as provided in Section 706; and
2. The Assisted Reproduction procedure(s) utilized to attempt a pregnancy are performed under the supervision of a licensed Physician.

SECTION 702. ELIGIBILITY

A. A Gestational or Genetic Surrogate shall be deemed to have satisfied the requirements of this Act if the Gestational or Genetic Surrogate has met the following requirements at the time the Surrogacy Agreement is executed and prior to the anticipated pregnancy. The Gestational or Genetic Surrogate:

1. Is at least twenty-one (21) years of age;
2. Has given birth to at least one (1) Child;
3. Has completed a Medical Evaluation relating to the anticipated pregnancy;
4. Has completed a Mental Health Evaluation relating to the anticipated Surrogacy Arrangement;
5. Has undergone legal Consultation with Independent Legal Counsel regarding the terms of the Surrogacy Agreement and the potential legal consequences of the Surrogacy Arrangement;
6. Has, or obtains prior to undergoing Assisted Reproduction procedure(s) to achieve pregnancy, a health insurance policy that covers major medical treatments and hospitalization and the health insurance policy has a term that extends throughout the duration of the expected pregnancy and for eight (8) weeks after the birth of the Child; however, the policy may be procured by the Intended Parents on behalf of the Gestational or Genetic Surrogate pursuant to the Surrogacy Agreement.

B. The Intended Parent(s) shall be deemed to have satisfied the requirements of this Act if the Intended Parent(s) have met the following requirements at the time the Surrogacy Agreement is executed and prior to the anticipated pregnancy. Intended Parent(s):
1. Have a medical need for the Surrogacy Arrangement as evidenced by a qualified Physician’s affidavit attached to the Surrogacy Agreement;

2. Have completed a Mental Health Consultation relating to the anticipated Surrogacy Arrangement; and

3. Have undergone legal Consultation with Independent Legal Counsel regarding the terms of the Surrogacy Agreement and the potential legal consequences of the Surrogacy Arrangement.

C. The relevant State regulatory agency may adopt rules pertaining to the required Medical Evaluations and Mental Health Evaluations for a Surrogacy Agreement. Until the relevant State regulatory agency adopts such rules, Medical Evaluations and Mental Health Evaluations and procedures shall be conducted in accordance with the recommended guidelines published by ASRM. The rules may adopt these guidelines or others by reference.

SECTION 703. REQUIREMENTS FOR A SURROGACY AGREEMENT

A. A Surrogacy Agreement is enforceable only if:

1. It meets the contractual requirements set forth in Section 703(B); and

2. It contains at a minimum each of the terms set forth in Section 703(C); and

3. If the Surrogacy Agreement is a Genetic Surrogacy Agreement, it must be judicially validated, as required by Section 706, prior to attempting pregnancy by means of Assisted Reproduction.

B. A Surrogacy Agreement shall meet the following requirements:

1. It shall be in writing;

2. It shall be executed prior to the commencement of any medical procedures in furtherance of the Surrogacy Arrangement (other than Medical Evaluations or Mental Health Evaluations necessary to determine eligibility of the parties pursuant to Section 702 of this Act), by:

   (a) A Gestational or Genetic Surrogate meeting the eligibility requirements of Section 702(A) of this Act and, if married, the Gestational or Genetic Surrogate’s Legal Spouse; and

   (b) The Intended Parent(s) meeting the eligibility requirements of Section 702(B) of this Act.
3. The Gestational or Genetic Surrogate, and, if married, the Gestational or Genetic Surrogate’s Legal Spouse, and the Intended Parent(s) shall be represented by Independent Legal Counsel in all matters concerning the Surrogacy Arrangement and the Surrogacy Agreement;

4. Each of the parties acknowledge in writing that they received information about the legal, financial, and contractual rights, expectations, penalties, and obligations of the Surrogacy Agreement;

5. If the Surrogacy Agreement provides for the payment of Compensation to the Gestational or Genetic Surrogate, the Compensation shall be placed in escrow with an independent Escrow Agent prior to the Gestational or Genetic Surrogate’s commencement of any medical procedure (other than Medical or Mental Health Evaluations necessary to determine the Gestational or Genetic Surrogate’s eligibility pursuant to Section 702(A) of this Act); and

6. Each party’s signature shall be notarized or witnessed by two (2) competent adults who are not parties to the Surrogacy Agreement.

C. A Surrogacy Agreement shall provide for:

1. The express written agreement of the Gestational or Genetic Surrogate to:

   (a) Undergo Assisted Reproduction procedure(s) to achieve a pregnancy and attempt to carry and give birth to a Child; and

   (b) Surrender custody of any Child resulting from such Assisted Reproduction procedure(s) to the Intended Parent(s) immediately upon birth;

2. If the Gestational or Genetic Surrogate is married, the express agreement of the Gestational or Genetic Surrogate’s Legal Spouse to:

   (a) Undertake the obligations imposed on the Gestational or Genetic Surrogate pursuant to the terms of the Surrogacy Agreement; and

   (b) Surrender custody of any Child resulting from such Assisted Reproduction procedure(s) to the Intended Parent(s) immediately upon birth;

3. The right of the Gestational or Genetic Surrogate to utilize the services of a Physician chosen by the Gestational or Genetic Surrogate, after Consultation with the Intended Parents, to provide care to the Gestational or Genetic Surrogate during the pregnancy; and
4. The right of the Gestational or Genetic Surrogate to make decisions to safeguard their own health or that of the Embryo(s) or fetus(es).

5. The express written agreement of the Intended Parent(s) to:

   (a) Accept custody of any Child resulting from such Assisted Reproduction procedure(s) immediately upon birth regardless of number, gender, or mental or physical condition; and

   (b) Assume sole responsibility for the support of the Child immediately upon birth.

6. Intended Parent(s) payment of reasonable medical and/or ancillary expenses including:

   (a) The premiums for a health insurance policy that covers medical treatment and hospitalization for the Gestational or Genetic Surrogate unless otherwise mutually agreed upon by the parties, pursuant to the terms of the Surrogacy Agreement; and

   (b) The payment of all uncovered medical expenses; and

   (c) Other reasonable financial arrangements mutually agreed upon by the parties, pursuant to the terms of the Surrogacy Agreement.

D. The appropriate State law for determining the Parent-Child Relationship pursuant to a Surrogacy Agreement is where:

   1. At least one of the parties to the Surrogacy Agreement is a resident; or

   2. At least one of the medical procedures pursuant to the Surrogacy Agreement occurs; or

   3. The birth occurs or is anticipated to occur.

   4. If none of the above applies, the appropriate State law for determining the Parent-Child Relationship shall be determined under the Uniform Child Custody Jurisdiction and Enforcement Act.

E. A Surrogacy Agreement is enforceable even though it contains one or more of the following provisions, and if any of the following provisions are included in the Agreement, such provisions are enforceable:

   1. The Gestational or Genetic Surrogate’s agreement to undergo all medical exams, treatments, and fetal monitoring procedures that the Physician recommends for the success of the pregnancy;
2. The Gestational or Genetic Surrogate’s agreement to abstain from any activities that the Intended Parent(s) or the Physician reasonably believe to be harmful to the pregnancy and future health of the Child, including, without limitation, smoking, drinking alcohol, using non-prescribed drugs, using prescription drugs not authorized by a Physician aware of the Gestational or Genetic Surrogate’s pregnancy, exposure to radiation, or any other activities proscribed by a health care Provider;

3. The agreement of the Intended Parent(s) to pay the Gestational or Genetic Surrogate reasonable Compensation; and

4. The agreement of the Intended Parent(s) to pay for or reimburse the Gestational or Genetic Surrogate for reasonable expenses (including, without limitation, medical, legal, or other professional or necessary expenses) related to the Surrogacy Arrangement and to the Surrogacy Agreement.

SECTION 704. TERMINATION OF SURROGACY AGREEMENT

A. Prior to Pregnancy

1. Before a Gestational or Genetic Surrogate undergoes the Assisted Reproduction procedure(s) to attempt pregnancy, and subject to the terms of the Surrogacy Agreement, any party may terminate the Surrogacy Agreement by giving written notice of termination to all other parties.

2. No party may terminate the Surrogacy Agreement after an Embryo Transfer procedure and prior to a pregnancy test at a time to be determined by a qualified Physician.

3. Any party who terminates a Genetic Surrogacy Agreement after the appropriate Court issues an order validating a Genetic Surrogacy Agreement under Section 706 but before the Genetic Surrogate becomes pregnant by means of Assisted Reproduction shall also file notice of the termination with the appropriate Court. On receipt of the notice, the appropriate Court shall order a stay on all medical procedures contemplated under the terms of the Genetic Surrogacy Agreement.

4. Except as otherwise agreed to among the parties in the Surrogacy Agreement, no party shall be liable to any other party for terminating the Surrogacy Agreement before the Gestational or Genetic Surrogate becomes pregnant by means of Assisted Reproduction.

B. After Pregnancy is confirmed.

1. Subject to the provisions of Section 714(C), no party may terminate a Surrogacy Agreement once a successful pregnancy is confirmed.
SECTION 705. ESTABLISHMENT OF PARENT CHILD RELATIONSHIP IN GESTATIONAL SURROGACY

A. RIGHTS OF PARENTAGE

1. Except as provided in this Act, a woman who gives birth to a Child is presumed to be the mother of that Child for purposes of State law.

2. The parties to a Gestational Surrogacy Agreement shall assume the rights and obligations of paragraphs 2 and 3 of this Section 705(A) if:

   a. The Gestational Surrogate satisfies the eligibility requirements set forth in Section 702(A);

   b. The Intended Parent(s) satisfy the eligibility requirements set forth in Section 702(B); and

   c. The Gestational Surrogacy Agreement complies with the requirements of Section 703.

3. In the case of a Gestational Surrogacy Agreement satisfying the requirements set forth in paragraph 1 of this Section 705(A):

   a. The Intended Parent(s) shall be the Parents of the Child for purposes of State law immediately upon the birth of the Child;

   b. The Child shall be considered the Child of the Intended Parent(s) for purposes of State law immediately upon the birth of the Child;

   c. Parental rights shall vest in the Intended Parent(s) immediately upon the birth of the Child;

   d. Sole custody of the Child shall rest with the Intended Parent(s) immediately upon the birth of the Child; and

   e. Neither the Gestational Surrogate nor the Gestational Surrogate’s Legal Spouse, if any, shall be the Parent of the Child for purposes of State law immediately upon the birth of the Child.

4. If the parentage of a Child born to a Gestational Surrogate is alleged not to be the result of the Assisted Reproduction procedure(s), the appropriate Court shall order genetic testing to determine the parentage of the Child. If the child was not conceived as result of the Assisted Reproduction procedure(s), the Parent-Child Relationship shall be determined as provided under other applicable State law.
5. In the case of a Gestational Surrogacy Arrangement meeting the requirements set forth in this Section 705, in the event of a laboratory error in which the laboratory transfers embryo(s) not legally belonging to the Intended Parent(s), the Intended Parents will be the Parents of the Child for purposes of State law unless otherwise determined by a Court in an action which can only be brought by one or more of the parties to the Surrogacy Agreement or the genetic contributors within two (2) years of the date of the Child’s birth.

B. ADMINISTRATIVE ESTABLISHMENT OF THE PARENT-CHILD RELATIONSHIP

1. For purposes of the State’s relevant parentage act, the Parent-Child Relationship that arises immediately upon the birth of the Child pursuant to Section 705(A) is established, if, prior to or within three (3) business days following the birth of a Child born through a Gestational Surrogacy Agreement, the attorneys representing both the Gestational Surrogate and the Intended Parent(s) certify in a Record to the birth hospital and the State office responsible for issuing birth records that the parties entered into a Surrogacy Agreement and satisfied the requirements of Section 704 of this Act with respect to the Child.

2. The attorneys’ certifications required by paragraph 1 of this Section 705(B) shall be filed on forms prescribed by the relevant State regulatory agency and in a manner consistent with the requirements of the State’s relevant parentage act, if any.

3. The attorney certifications required by paragraph 1 of this Section 705(B) shall be effective for all purposes hereunder if completed prior to or within three (3) business days following the Child’s birth.

4. In lieu of the attorney certifications required by paragraph 1 of this Section 705(B), a party to a Surrogacy Agreement that has satisfied the requirements of Section 704 of this Act may petition the appropriate Court for a pre-birth or post-birth judgment establishing the parent-child relationship with respect to the Child.

5. Upon compliance with the certification provision of this Section, or upon presentation of a Court-ordered judgment establishing the parent-child relationship, all hospital representatives and/or employees and the State’s relevant regulatory agency shall, on an expedited basis, complete all birth records and the original birth certificate of the Child to reflect the Intended Parent(s) as the Child’s Parent(s) thereon.

6. If a birth results under a Gestational Surrogacy Agreement that does not comply with all the requirements and procedures set forth in this Section 705, the Parent-Child Relationship shall be determined as provided under other
applicable State law specifically taking into consideration the intent of the parties at the time of the execution of the Gestational Surrogacy Agreement and the best interests of the Child. An Intended Parent is a presumed parent who has standing to request and be awarded legal parentage of the Child for the purposes of this provisions and any parentage proceeding hereunder.

SECTION 706. ESTABLISHMENT OF PARENT CHILD RELATIONSHIP IN GENETIC SURROGACY

A. RIGHTS OF PARENTAGE

1. The parties to a Genetic Surrogacy Agreement shall assume the rights and obligations of paragraphs 2 and 3 of this Section 706(A) if:

   (a) The Genetic Surrogate satisfies the eligibility requirements set forth in Section 702(A);

   (b) The Intended Parent(s) satisfy the eligibility requirements set forth in Section 702(B); and

   (c) The Genetic Surrogacy Agreement complies with the requirements of Section 703 and has been judicially pre-approved prior to the commencement of any medical procedures in furtherance of the Surrogacy Arrangement (other than Medical Evaluations or Mental Health Evaluations necessary to determine eligibility of the parties pursuant to Section 702 of this Act) as set forth in this Section 706.

2. In the case of a Genetic Surrogacy Agreement satisfying the requirements set forth in paragraph 1 of this Section 706(A):

   (a) The Intended Parent(s) shall be the Parents of the Child for purposes of State law immediately upon the birth of the Child;

   (b) The Child shall be considered the Child of the Intended Parent(s) for purposes of State law immediately upon the birth of the Child;

   (c) Parental rights shall vest in the Intended Parent(s) immediately upon the birth of the Child;

   (d) Sole custody of the Child shall rest with the Intended Parent(s) immediately upon the birth of the Child; and

   (e) Neither the Genetic Surrogate nor the Genetic Surrogate’s Legal Spouse, if any, shall be the Parent of the Child for purposes of State law immediately upon the birth of the Child.
3. In the case of a Genetic Surrogacy Arrangement meeting the requirements set forth in this Section 706, in the event of a laboratory error in which the laboratory transfers embryo(s) not legally belonging to the Intended Parent(s), the Intended Parents will be the Parents of the Child for purposes of State law unless otherwise determined by a Court in an action which can only be brought by one or more of the parties to the Surrogacy Agreement or the genetic contributors within two (2) years of the date of the Child’s birth.

B. JUDICIAL PRE-APPROVAL OF GENETIC SURROGACY AGREEMENT

1. Prior to the commencement of any medical procedures in furtherance of the Genetic Surrogacy Arrangement (other than Medical Evaluations or Mental Health Evaluations necessary to determine eligibility of the parties pursuant to Section 702 of this Act), the Intended Parent(s), the Genetic Surrogate, and Genetic Surrogate’s Legal Spouse, if any, shall commence a proceeding to obtain judicial pre-approval of a Genetic Surrogacy Agreement by filing a petition in the appropriate Court. A proceeding to obtain judicial pre-approval of a Genetic Surrogacy Agreement may not be maintained unless all parties to the Genetic Surrogacy Agreement join in the petition. A copy of the fully-executed Genetic Surrogacy Agreement must be filed with the petition.

2. If the requirements of paragraph 1 of this Section 706(B) are satisfied, the appropriate Court shall issue an order validating the Genetic Surrogacy Agreement and declaring that the Intended Parent(s) will, subject to the issuance of a final post birth order, be the sole Parent(s) of a Child born during the term of the Genetic Surrogacy Agreement.

3. The Court shall issue an order under this Section 706(B) only on finding that:

   (a) The requirements of Section 702 have been satisfied;
   (b) The requirements of Section 706(B) have been satisfied;
   (c) All parties have voluntarily entered into the Genetic Surrogacy Agreement meeting the requirements of Section 703 and understand its terms;
   (d) Adequate provision has been made for all reasonable health-care expenses associated with the Genetic Surrogacy Agreement, including responsibility for those expenses if the Genetic Surrogacy Agreement is terminated, as set forth in Section703(C)(6); and
   (e) The consideration, if any, to be paid to the Genetic Surrogate is reasonable.
C. PARENTAGE UNDER A JUDICALLY PRE-APPROVED GENETIC SURROGACY AGREEMENT

1. Upon birth of a Child pursuant to a judicially pre-approved Genetic Surrogacy Agreement, all parties shall jointly file a notice with the appropriate Court that a Child has been born as a result of the Assisted Reproduction procedure(s). Thereupon, the appropriate Court shall issue an order:

   (a) Confirming that the Intended Parent(s) are the Parent(s) of the Child;

   (b) If necessary, ordering that the Child be surrendered to the Intended Parent(s); and

   (c) Directing the agency maintaining birth records to issue a birth certificate naming the Intended Parent(s) as Parent(s) of the Child on an expedited basis.

2. If the parentage of a Child born to a Genetic Surrogate is alleged not to be the result of the Assisted Reproduction procedure(s), the appropriate Court shall order genetic testing to determine the parentage of the Child. If the child was not conceived as result of the Assisted Reproduction procedure(s), the Parent-Child Relationship shall be determined as provided under other applicable State law.

3. If the parties fail to comply with paragraph 1 of this Section 706(C), the appropriate State agency may, upon request of any party, file notice with the appropriate Court that a Child has been born to the Genetic Surrogate as a result of Assisted Reproduction. Upon proof of a Court order issued pursuant to Section 706(B) validating the Genetic Surrogacy Agreement, the appropriate Court shall order that the Intended Parent(s) are the sole legal Parent(s) of the Child and are financially responsible for the Child.

4. If a birth results under a Genetic Surrogacy Agreement that is not judicially pre-approved as provided in this Section 706, the Parent-Child Relationship shall be determined as provided under other applicable State law specifically taking into consideration the intent of the parties at the time of the execution of the Gestational Surrogacy Agreement and the best interests of the Child. An Intended Parent is a presumed parent who has standing to request and be awarded legal parentage of the Child for the purposes of this provisions and any parentage proceeding hereunder.

SECTION 707. FULL FAITH AND CREDIT

An establishment of parentage pursuant to Section 705 or 706 of this Act shall be given full faith and credit in another State if the establishment was in a signed Record and otherwise complies with the law of the other State.
SECTION 708. DUTY TO SUPPORT

A. Any individual who is considered to be the Parent of the Child pursuant to Section 705 or Section 706 of this Act shall be obligated to support the Child.

B. Intended Parents who are parties to a non-compliant Gestational Surrogacy Arrangement or an unapproved Genetic Surrogacy Agreement may be held liable for support of the resulting Child under other law.

C. Breach of the Surrogacy Agreement by the Intended Parent(s) shall not relieve such Intended Parent(s) of the support obligations imposed by this Act.

SECTION 709. EFFECT OF SURROGATE’S SUBSEQUENT MARRIAGE

A. Gestational Surrogacy

Subsequent marriage of the Gestational Surrogate after execution of a Surrogacy Agreement under this article does not affect the validity of the Surrogacy Agreement, consent to the Surrogacy Agreement from the Gestational Surrogate’s Legal Spouse is not required, and the Gestational Surrogate’s Legal Spouse is not a presumed Parent of the resulting Child.

B. Genetic Surrogacy

After the issuance of an order validating a Surrogacy Agreement between Intended Parents and a Genetic Surrogate under this article, subsequent marriage of the Genetic Surrogate does not affect the validity of a Surrogacy Agreement, consent to the Surrogacy Agreement from the Genetic Surrogate’s Legal Spouse is not required, and the Genetic Surrogate’s Legal Spouse is not a presumed Parent of the resulting Child.

SECTION 710. IRREVOCABILITY

No action to challenge the rights of parentage established pursuant to Section 705 or Section 706 of this Act or the relevant State parentage act provisions shall be commenced after twelve (12) months from the date of birth of the Child.

SECTION 711. NONCOMPLIANCE

Noncompliance occurs when a Gestational or Genetic Surrogate, and, if married, the Gestational or Genetic Surrogate’s Legal Spouse, or the Intended Parent(s) breach a provision of the Surrogacy Agreement or any party to or agreement for a Surrogacy Arrangement fails to meet any of the requirements of this Act.
SECTION 712. EFFECT OF NONCOMPLIANCE

In the event of noncompliance with this Article, the appropriate Court of competent jurisdiction shall determine the respective rights and obligations of the parties to any Surrogacy Arrangement based solely on evidence of the parties’ original intent.

SECTION 713. IMMUNITIES

Except as provided in this Act, no person shall be civilly or criminally liable under State law for non-negligent actions taken pursuant to the requirements of this Act. This provision shall not prevent liability or actions between or among the parties, including actions brought by or on behalf of the Child, based on negligent, reckless, willful, or intentional acts that result in damages to any party.

SECTION 714. DAMAGES

A. Except as expressly provided in the Surrogacy Agreement, the Intended Parent(s) shall be entitled to all remedies available at law or equity in the event of a breach of the Surrogacy Agreement.

B. Except as expressly provided in the Surrogacy Agreement, a Gestational or Genetic Surrogate shall be entitled to all remedies available at law or equity in the event of a breach of the Surrogacy Agreement.

C. There shall be no specific performance remedy available for a breach by a Gestational or Genetic Surrogate of a Surrogacy Agreement that limits the right of the Gestational or Genetic Surrogate to make decisions regarding the Gestational or Genetic Surrogate’s own health or forces the Gestational or Genetic Surrogate to undergo Assisted Reproduction for the purposes of becoming pregnant.

SECTION 715. INSPECTION OF RECORDS

The proceedings, records, and identities of the individual parties to a Surrogacy Agreement under this Article are subject to inspection by the parties and their attorneys of record under the standards of confidentiality applicable to adoptions as provided under other law of this State.

SECTION 716. EXCLUSIVE, CONTINUING JURISDICTION

During the period governed by the Surrogacy Agreement, the Court conducting a proceeding under this Act has exclusive, continuing jurisdiction of all matters arising out of the Surrogacy Agreement until the Child, delivered by the Gestational or Genetic Surrogate during the term of the Surrogacy Agreement, attains the age of ninety (90) days; however, nothing in this provision gives the Court jurisdiction over a child custody or a child support action where such jurisdiction is not otherwise authorized.
ARTICLE 8. PAYMENT TO DONORS AND GESTATIONAL CARRIERS

SECTION 801. REIMBURSEMENT

1. A Donor may receive reimbursement for economic losses resulting from the Retrieval or storage of Gametes or Embryos and incurred after the Donor has entered into a valid agreement in a Record to be a Donor.

2. Economic losses occurring before a Donor, Gestational Surrogate or Genetic Surrogate has entered into valid agreement in a Record may not be reimbursed unless subsequently agreed upon in the agreement, except as provided for in paragraph 3 hereof.

3. Premiums paid for insurance against economic losses directly resulting from the Retrieval or storage of Gametes or Embryos for donation may be reimbursed, even if such premiums have been paid before the Donor has entered into a valid agreement in a Record, so long as such agreement becomes valid and effective before the Gametes or Embryos are used in Assisted Reproduction in accordance with the agreement.

SECTION 802. COMPENSATION

1. The consideration, if any, paid to a Donor, Gestational Surrogate, or Genetic Surrogate must be reasonable and negotiated in good faith between the parties.

2. Compensation may not be conditioned upon the quantity, purported quality or genome-related traits of the Gametes or Embryos.

3. Compensation may not be conditioned on actual genotypic or phenotypic characteristics of the Donor or of the Child.

ARTICLE 9. HEALTH INSURANCE

SECTION 901. INFERTILITY AND EXPERIMENTAL PROCEDURES

1. The ASRM or other appropriate governmental regulatory authority may designate, from time to time, a list of ART procedures and treatments considered to be experimental.

SECTION 902. REQUIRED NOTICE

1. Each group health benefit plan that offers assisted reproductive health services shall provide notice in a Record to each enrollee in the plan of the specific coverage provided for those services.

2. The notice required under this Section must be prominently positioned in any literature, insurance application, or insurance policy plan description made available or distributed by the group health benefits plan to enrollees.
SECTION 903. QUALIFICATION OF PROVIDERS

A health insurer may require that any licensed Physician participating in the treatment of Infertility must be:

(a) Board certified in Obstetrics and Gynecology by the American Board of Obstetrics and Gynecology and have a practice comprised substantially of Infertility cases; or

(b) Board certified in both Obstetrics and Gynecology and in Reproductive Endocrinology by the American Board of Obstetrics and Gynecology, with a practice comprised substantially of Infertility cases; or

(c) Board certified in both Andrology and Urology by the American Board of Urology.

ARTICLE 10. QUALITY ASSURANCE

SECTION 1001. QUALIFICATIONS OF PROVIDERS

ART Providers and ART Storage Facilities (hereafter “Program”) shall assure the quality of their services by developing and complying with at least the following quality assurance measures:

(a) Personnel. The Program shall document that senior and supervisory staff are adequately trained, including formal training in genetics. Documentation shall also include staff participation in laboratory training programs and regular updating of staff skills and knowledge.

(b) Equipment. The Program shall develop, implement, and test regularly backup and contingency plans for cryopreservation systems, computer systems, and records.

(c) Testing. The Program shall use a laboratory that participates in proficiency testing and on-site inspection, in compliance with the requirements for certification promulgated by the State Department of Health, if any. If genetic diagnostic services are provided, the Program or the laboratory shall comply with the applicable guidelines of organizations otherwise recognized by ASRM, such as the College of American Pathologists and the American College of Medical Genetics.

SECTION 1002. DONOR AND COLLABORATIVE REPRODUCTION REGISTRIES

1. Donor and Collaborative Reproduction registries (or equivalent) created for the purpose of maintaining contact, medical, and psychosocial information about Donors, gestational
1. The Program shall maintain all records in compliance with State and Federal law.

2. The Provider:

(a) Shall attempt to maintain, contact information, including an address, of the Participants for contact by Patients, resulting Children, and Participants;

(b) Shall participate in a national Donor and Collaborative Reproduction registry, if established as described in Section 1002 of this Act, so that Intended Parents and Donors can provide the program with address information;

(c) Shall participate in a national Donor and Collaborative Reproduction registry, if established as described in Section 1002 of this Act, by collecting medical and genetic information and updated current health information, including change in health status of the Donor; and
(d) Shall maintain an accurate record of the disposition of all Gametes and Embryos.

3. The Program shall transfer all records involving Collaborative Reproduction to a national Donor and Collaborative Reproduction registry in compliance with its requirements, if established as described in Section 1002 of this Act.

4. Disclosure of Medical Information.

(a) Medical Information may be disclosed to an interested party or resulting Child only if an authorization is provided in accordance with applicable law;

(b) The Program may disclose aggregate, non-identifiable data for quality assurance and reporting requirements, for the limited purpose of:

   (i) Ensuring a standard for the maintenance of records on laboratory tests and procedures performed, including safe sample disposal;

   (ii) Maintaining records on personnel and facilities, schedules of preventive maintenance; and

   (iii) Ensuring minimum qualification standards for personnel.

SECTION 1004. PATIENT SAFETY

The program shall:

1. Conduct medical testing for sexually transmitted diseases in Gamete Providers, whether Donors or Intended Parents, and gestational carriers in compliance with the laws and regulations of or applying to appropriate governmental regulatory authorities; and

2. Conduct medical screening and genetic testing of Gamete and Embryo Donors for genetic disorders. The extent of such screening shall be in conformity with guidelines established by the ASRM. In the event that no such guidelines have been developed, the screening shall be in accordance with accepted standards of medical practice for ART Providers.

3. Establish procedures for the proper labeling of Embryos and Gametes in compliance with the laws and regulations of or applying to appropriate governmental regulatory authorities.

ARTICLE 11. ENFORCEMENT

SECTION 1101. DAMAGES
1. The failure of a Provider to comply with this Act shall constitute unprofessional conduct and may be reported to any controlling licensing authority.

2. In addition to other remedies available at law, including but not limited to causes of action under HIPAA, a Participant whose ART information has been used or disclosed in violation of this Act and who has sustained economic loss or personal or emotional injury therefrom may recover compensatory damages, reasonable attorney’s fees, and the costs of litigation.

3. Failure to account for all Embryos, misuse of Embryos, theft of Embryos, or unauthorized disposition of Embryos may subject a Provider or ART Storage Facility to criminal and civil penalties, including punitive damages, and reasonable legal fees to the prevailing party.

4. Any individual or entity not acting in accordance with this Act may be subject to civil and/or criminal liability.

ARTICLE 12. MISCELLANEOUS PROVISIONS

SECTION 1201. LIMITATION OF MEDICAL PROFESSIONAL LIABILITY

1. Licensed Providers rendering services in compliance with practice and ethical guidelines (contemporaneous to the time of alleged breach of the standard of care) or applicable State or federal regulations or statutes are presumed to have rendered care within accepted standards of care.

SECTION 1202. SEVERABILITY

The invalidation of any part of this legislation by a court of competent jurisdiction shall not result in the invalidation of any other part.
REPORT

Introduction & Summary

This ABA Model Act Governing Assisted Reproductive Technology (“2018 Model Act”) was developed by the American Bar Association Section of Family Law to replace the ABA Model Act Governing Assisted Reproductive Technology (2008) (“2008 Model Act”).

Significant social, legal, and medical advancements require modernization of the provisions of the 2008 Model Act. Many changes in the form, makeup, and reality of modern families affect how we form parental relationships and impose support obligations. Advances in medicine continue to expand the options for and genetic nuances of intended parents and their resulting children. To keep up with the modern realities of assisted reproductive technology and the modern realities of how families are formed, the Model Act must be updated as well.

The Section of Family Law circulated the substantive draft documents to the following ABA entities, who were also invited to take part in a working group session for review and additional feedback: Section of Business Law; Section of Civil Rights and Social Justice; Section of Health Law; Section of International Law; Section of Litigation, Real Property, Trust and Estate Law; Section of Science and Technology Law; the Solo, Small Firm and General Practice Division; Section of Tort, Trial and Insurance Practice; and the Young Lawyers Division.

That there is a need for such uniform legislation is expressed clearly in an appellate decision involving a dispute about parentage:

We join the chorus of judicial voices pleading for legislative attention to the increasing number of complex legal issues spawned by recent advances in the field of assisted reproduction. Whatever merit there may be to a fact-driven case-by-case resolution of each new issue, some over-all legislative guidelines would allow the participants to make informed choices and the courts to strive for uniformity in their decisions.” In re Marriage of Buzzanca, 61 Cal.App.4th 1410, 1428-29, 72 Cal. Rptr. 280 (Cal.App. 1998).

Background

The 2008 Model Act provided a framework to resolve contemporary controversies over parentage via assisted reproduction, a framework to resolve controversies yet to come but that were envisioned by the advancement in assisted reproductive technology, and a framework to guide the expansion of ways by which families are formed. See
However, in 2015, the Supreme Court ruled in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), that marriage is a fundamental right guaranteed to same-sex couples by both the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution. This advancement of marital rights for same-sex couples in and of itself dictates that the 2008 Model Act be modernized to remove gender- and sexual-orientation-based references. Courts around the country have already begun to expand the definition of parentage in light of *Obergefell*. Accordingly, the provisions of the 2008 Model Act must be replaced with gender-neutral definitions and language throughout to insure equal treatment of those children born through assisted reproduction to same-sex couples.

Additionally, the 2008 Model Act sections dealing with parentage were intended, as much as possible, to be consistent with and to track the corresponding provisions of the Uniform Parentage Act (“UPA”). The UPA addresses a wide variety of parentage issues, including parentage via assisted reproduction. However, the UPA as amended in 2002 was never widely adopted; only two of the eleven states that adopted the 2002 UPA to date adopted the Article 8 provisions governing surrogacy, and five of those eleven states enacted alternative regulatory schemes for surrogacy that are not based on the UPA. Likewise, since 2008, several other states have enacted surrogacy legislation, which borrowed only minimally from the UPA and the 2008 Model Act. This suggests that the substance of both the UPA and 2008 Model Act are not necessarily a preferred method of regulating surrogacy arrangements and that those provisions should be updated to make them more consistent with current surrogacy practice.

Finally, according to the last success rate updates issued by the Centers for Disease Control and Prevention on February 24, 2016, 1.6 percent of all infants born in the United States each year are conceived using assisted reproductive technology (ART). Thus, it is important to replace the 2008 Model Act to address the issue of the resulting children’s right to access information about their gamete (sperm or egg) donor.

**Major Overhaul to the 2008 Model Act Provided by 2018 Model Act**

With this background in mind, the major revisions to the 2008 Act are as follows:

1. **2018 Model Act includes new definitions and gender/sexual orientation neutral language throughout the Act** – New defined terms have been added to the 2018 Model Act and definitions have been updated throughout to allow for gender-neutral terminology. These updates leave behind the outdated notion that families

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1 The Uniform Parentage Act is a legislative act originally promulgated in 1973 by the National Conference of Commissioners of Uniform State Laws (now known as the Uniform Law Commission). It has since been amended and the most recent changes are reflected in the 2002 version of the Uniform Parentage Act; however, a 2017 version was approved by the Uniform Law Commission and is submitted for approval by the ABA House of Delegates in February 2018. The 2018 Model Act generally tracks with the new version of the UPA.
are created only by two, heterosexual parents, and render the Act equally applicable to children of all individuals building families through ART.

2. 2018 Model Act Addresses Traditional/Genetic Surrogacy - The 2008 Model Act addressed only gestational surrogacy and did not address traditional surrogacy.


4. 2018 Model Act Adds Parental Establishment Provisions via Traditional/Genetic Surrogacy Which Were Not Addressed in the 2008 Act - The 2018 Model Act substitutes “genetic surrogate” (a surrogate who contributes her own eggs in a surrogacy arrangement) for the more commonly used but vague term “traditional surrogate.” Addressing parentage through genetic surrogacy for the first time, the 2018 Model Act requires a judicial pre-approval process for genetic surrogacy along with a final, post-birth order confirming parentage assuming all parties are still in agreement. If agreement between the parties is lacking, or compliance with the Act is lacking, the 2018 Model Act requires parentage to be determined in accordance with existing parentage presumptions and procedures under applicable state law. Further, the provisions of the 2018 Model Act provide intended parents a right to reimbursement and/or damages if a surrogate breaches the surrogacy agreement.

5. 2018 Model Act Includes Baseline Best Practice and Eligibility Requirements for all Surrogacy - The 2018 Model Act also includes best-practice baseline requirements for both types of surrogacy in regard to eligibility for surrogates and intended parents as well as establishing foundational requirements that must be present in written surrogacy agreements.

Conclusion

The 2018 Model Act seeks to bring current parentage law up to speed with social, legal, and medical advancements and is a necessary step in the right direction in preparing for the future of parentage law. Note, as society and medicine continue to advance, the resulting Model Act is unlikely to be the last iteration.

Respectfully submitted,

Roberta S. Batley, Chair
Section of Family Law
August 2018
GENERAL INFORMATION FORM

Submitting Entity: Section of Family Law

Submitted By: Roberta S. Batley, Chair, Section of Family Law

1. **Summary of Resolution(s).** The Resolution adopts the Model Act Governing Assisted Reproductive Technology dated August 2018 and urges state, territorial, and tribal governments to enact the 2018 Model Act.

2. **Approval by Submitting Entity.** The ABA Section of Family Law approved submission of this Resolution on April 19, 2018.

3. **Has this or a similar resolution been submitted to the House or Board previously?**
   Yes, this Resolution was previously submitted for the 2018 Midyear Meeting and was subsequently withdrawn.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** The ABA Model Act Governing Assisted Reproduction Technologies was adopted by the ABA House of Delegates in 2008 (“Resolution 107”). See 2008M107. Social, legal, and medical advancements in the area of assisted reproductive technologies (“ART”) require modernization of the 2008 Model Act. These include making the language neutral as to gender- and sexual-orientation to insure equal treatment of those children born through assisted reproduction to same-sex couples. Second, the 2008 Model Act aimed to be consistent with and to track the corresponding provisions of the Uniform Parentage Act (“UPA”) (2000), as amended in 2002 (“2002 UPA”), and as the 2002 UPA provisions regulating surrogacy arrangements and ART-parentage have recently been updated for consistency with current practice, so too have the Model Act provisions. Finally, the proposed revisions address the issue of the resulting children’s right to access information about their gamete (sperm or egg) donor. This 2018 Model Act addresses those issues and is intended to replace the 2008 Model Act.

5. **If this is a late report, what urgency exists which requires action at this meeting of the House?** Not Applicable.

6. **Status of Legislation.** (If applicable). Not Applicable.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** If adopted, the Family Law Section, with the assistance of its Assisted Reproductive Technologies Committee, intends to submit the 2018 Model Act to state, territorial, and tribal governments as a model on which to enact their own assisted reproductive technology legislation.

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

10. Referrals. The Section of Family Law circulated the substantive draft documents to the following ABA entities, who were also invited to take part in a Working Group sessions in June 2017 and February, March and April of 2018:

- Section of Business Law
- Section of Civil Rights and Social Justice
- Commission on Sexual Orientation and Gender Identity
- Section of Health Law
- Section of International Law
- Section of Litigation
- Section of Real Property, Trust and Estate Law
- Section of Science and Technology Law
- Solo, Small Firm and General Practice Division
- Section of Tort, Trial and Insurance Practice
- Young Lawyers Division

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

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution
The Resolution adopts the Model Act Governing Assisted Reproductive Technology dated August 2018 and urges state, territorial, and tribal governments to enact the 2018 Model Act.

2. Summary of the Issue that the Resolution Addresses
The Section of Family proposes the Model Act Governing Assisted Reproductive Technology [2018] to replace the Model Act Governing Assisted Reproductive Technology [2008] previously approved by the House of Delegates. Social, legal, and medical advancements in the area of assisted reproductive technologies (“ART”) require modernization of the 2008 Model Act. These include making the language neutral as to gender- and sexual-orientation to insure equal treatment of those children born through assisted reproduction to same-sex couples. Second, the 2008 Model Act aimed to be consistent with and to track the corresponding provisions of the Uniform Parentage Act (“UPA”) (2000), as amended in 2002, and the 2002 UPA provisions regulating surrogacy arrangements and ART-parentage have recently been updated for consistency with current practice. Finally, the proposed revisions address the issue of the resulting children’s right to access information about their gamete (sperm or egg) donor.

3. Please Explain How the Proposed Policy Position will address the issue
The Model Act Governing Assisted Reproductive Technology [2018] includes new defined terms and updated definitions throughout to allow for gender-neutral terminology, updates provisions regulating surrogacy arrangements and ART-parentage for consistency with current practice and addresses children’s right to access information about their gamete (sperm or egg) donor. The Model Act [2018] brings current parentage law up to speed with social, legal, and medical advancements and is a necessary step in the right direction in preparing for the future of parentage law.

4. Summary of Minority Views
Concerns raised by the Sections of Health Law, Science and Technology and Real Property, Trusts and Estates were addressed in substantive working group meetings. The Section of Science and Technology is now a co-sponsor, whereas the Sections of Health Law and Real Property, Trusts and Estates have voted to support and/or not oppose the Resolution. Otherwise, the sponsors are aware of no other minority views, opposition or concerns with the Resolution.
RESOLUTION

1 RESOLVED, That the American Bar Association adopts the ABA Model Impairment Policy for Legal Employers (“Model Policy”) dated August 2018; and

2 FURTHER RESOLVED, That the American Bar Association urges legal employers to adopt the Model Policy.
MODEL IMPAIRMENT POLICY FOR LEGAL EMPLOYERS
(August 2018)

We recognize that well-being is essential to a lawyer’s duty of competence, and that impairment is antithetical to both competence and the quality of service expected by our clients. Unfortunately, it is well documented that the legal profession experiences impairment at disproportionately higher rates due to substance use and other mental health disorders. This Legal Employer\(^1\) is committed to the well-being of its personnel, as well as to the prevention of impairments and to assisting our staff in obtaining treatment when needed. Impairment of an individual, due to substance use or other mental health disorder\(^2\), including a physical illness or condition that would adversely affect cognitive, motor or perceptive skills, adversely affects not only the individual’s well-being, but also the Legal Employer’s ability to serve our clients capably and responsibly.

The goals of this Policy are: (1) early identification of impairment and proper intervention to assist with preventing, mitigating, or treating the impairment; and (2) preventing our professional standards and the quality of our work for our clients from being compromised by any Legal Employer personnel’s impairment. This Policy is intended to demonstrate compliance with those professional regulations which require legal employers to establish internal policies and procedures ensuring that all lawyers (including those who are impaired) conform to the jurisdiction’s applicable Rules of Professional Conduct (“RPC”), as well as state or federal rules, regulations or statutes.

I. Implementation

This Policy applies to all legal professionals, including, but not limited to, partners, managing attorneys, owners, shareholders, associates, staff attorneys, paralegals, administrators, and legal assistants, whether full-time, part-time, contract or temporary. This Policy will be publicized in the workplace and placed in the legal employers’ personnel handbook. A contact person, such as a managing partner, human resources director, or other designated person, will be responsible for implementing the Policy, but will not undertake/oversee counseling or treatment. The contact person should notify legal professionals of the availability of lawyer assistance programs which can refer impaired persons for assessment, counseling, treatment and other supportive services.

II. Definition of Impairment

For purposes of this Policy, the Legal Employer considers “impairment” to be a condition that materially and adversely affects a person’s judgment, memory, or reactions, or otherwise interferes with work performance and the rendering of legal

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\(^1\) The term “legal employer” is not limited to a traditional law firm setting, use of “legal employer” in this instance and throughout the Policy is intended to apply to any organization that employs lawyers, and may be substituted with the appropriate legal employer entity/designation, e.g., a corporate legal department, governmental or municipal agency, etc.

\(^2\) See [https://www.samhsa.gov/disorders](https://www.samhsa.gov/disorders) for descriptions of mental and substance use disorders.
services in a manner consistent with the Legal Employer’s standards and the RPC. The

diagnosis of an illness does not equate with impairment for purposes of this Policy. Illness is the existence of a physical or mental disease, while impairment is a functional classification that implies inability (perhaps resulting from a physical or mental disorder) to render services with reasonable skill and safety. Impairment may be caused by, but not limited to, the use of alcohol or drugs (prescribed or non-prescribed), a mental health disorder, or a physical illness or condition that would adversely affect cognitive, motor or perceptive skills. Determinations about impairment will be made carefully by the firm’s Executive Committee or those most qualified to evaluate impairment as designated by the Legal Employer, such as the Legal Employer’s Employee Assistance Program, following a thorough investigation and based on objective information. The privacy rights of all involved will be respected.

III. Professional Conduct Requirements and Illegal Activities

While this Policy emphasizes treatment of impaired personnel, it is not intended to condone or excuse illegal activities and/or unprofessional behavior. The Legal Employer expects all personnel to maintain a high level of competence and professionalism, appropriate to their position. This Policy is in effect during times and at places where personnel are in a position to be regarded or identified as representing the Legal Employer, such as traveling on business or participating in community, organizational, or professional meetings and affairs.

Legal Employer personnel who use, possess, distribute, sell (or attempt to sell), transfer, or purchase any illegal substance or controlled substance for which they do not have a physician’s prescription while at work or while performing in a work-related capacity may be subjected to internal disciplinary action, up to and including termination, and/or civil penalties and criminal penalties if appropriate. In the event of a criminal law or professional liability violation, the Legal Employer, in its sole discretion, may cooperate with courts and disciplinary agencies in the disposition of proceedings by affording treatment to the violator under the impairment procedures of this Policy, or under procedures established by the court or agency.

IV. Duty to Report

Lawyers shall not practice law or otherwise render legal services while impaired, and staff members of legal employers shall not assist in providing legal services while impaired. Legal Employer personnel shall not help a colleague conceal his or her impairment, including by knowingly assisting an impaired colleague in providing legal services.

A. Legal Employer personnel who:

1. believe they are themselves impaired or at risk of becoming impaired, or
2. reasonably believe that another Legal Employer lawyer or staff member may be impaired, shall report their concerns to at least one of the
following:

a. member of the Executive Committee;
b. General Counsel;
c. Chief Operating Officer;
d. leader of the Practice Group or head of the department in which the individual works; or
e. other person designated to receive such reports

B. All Legal Employer personnel shall have the obligation to report any incident in which they themselves or any other legal employer personnel has been arrested or charged with: driving while under the influence, public intoxication, possession or sale of any illegal substance. Such information may be reported to any member listed above in Section IV.A.

C. The Legal Employer will provide professional training programs to all personnel at regular intervals regarding signs and symptoms of substance use and mental health disorders, including cognitive impairment. The lawyer assistance program below may be consulted for assistance with this programming.

D. Upon learning of a lawyer’s or a staff member’s possible impairment, the Legal Employer will investigate the circumstances and undertake reasonable measures to assist that person on a confidential basis.

E. Anyone concerned about an impairment issue for themselves or for another employee of the Legal Employer are encouraged to also contact their state or local lawyer assistance program or the Legal Employer’s Employee Assistance Program for confidential assistance.3

F. The duty to report pursuant to this Policy is not intended to and does not supersede a lawyer’s reporting obligation in any circumstance that may exist under the applicable RPC. [See, e.g., state version of Model Rule 8.3.]

______________________________  ___________________________
State Lawyers Assistance Program  Phone number

______________________________  ___________________________
Legal Employer’s Employee Assistance Program  Phone number

3 The Legal Employer should include the name and phone number of the lawyer assistance program (LAP) in each state in which it operates. Most LAPs provide free consultations, assessments, brief counseling and education, peer support, intervention, monitoring and referrals. A directory of LAPs may be found at: https://www.americanbar.org/groups/lawyer_assistance/resources/lap_programs_by_state.html.
V. Confidentiality

The Legal Employer will treat all communications as confidential to the extent consistent with the Legal Employer’s duties to protect clients, as well as to comply with the RPC, state or federal rule, regulation or statute. All protected health information will be handled in accordance with state and federal laws. Communications include those by and between the potentially impaired lawyer and members of the Legal Employer assigned with responsibilities to investigate and assist, as well as any member of the Legal Employer who reports concerns regarding the potential impairment of another.

Please be advised that while the Legal Employer recognizes confidentiality is important for the successful implementation and operation of this Policy, certain matters may not remain confidential (e.g., a threat to harm yourself or others, future criminal conduct, child abuse, or other legal reporting obligations), but reasonable good-faith attempts will be made to keep personal issues confidential.

VI. Prohibition Against Retaliation or Discrimination

A report made in good faith under this Policy, and good-faith participation in the investigation of any report, will not result in adverse action against any reporting or participating person. Any concern about retaliation must be reported immediately to one of the individuals listed above in Section IV.A. The Legal Employer will investigate any report of retaliation and take such action as may be appropriate, including disciplinary action, against anyone found to have retaliated against a person for reporting a possible impairment or participating in the investigation of a report.

VII. Procedures Upon Determination of Impairment

The Legal Employer seeks early identification of impairment issues of its personnel in order to provide the impaired individual with qualified treatment services as soon as possible to facilitate that person’s recovery. At the same time, the Legal Employer will take such steps as may be necessary to protect the interests of its clients and to comply with the RPC and any state or federal rule, regulation or statute.

A. Leave of Absence: The Legal Employer will permit an impaired individual to use accrued paid leave time for treatment, and will provide accommodations upon a return to work as permitted under the Legal Employer’s leave policies and as required under state and federal law.

B. Referral and Treatment: The Legal Employer will make concerted efforts to assist the impaired individual in obtaining appropriate medical care and treatment. The state’s lawyer assistance program may be consulted for assistance with referrals, evaluations and/or monitoring of lawyers.

C. Restriction of Work Duties: The Legal Employer may restrict the impaired individual by removal from client or other work matters, supervision of work
activities, or any other reasonable restriction of activities on client matters deemed necessary to protect client interests and comply with the RPC.

D. Review of Lawyer’s Activity: After determining that a lawyer is, or has been, suffering from an impairment, the Legal Employer will determine if a review of all matters recently handled by the lawyer is warranted in order to take remedial action on client matters. This review may include: review of client files, the lawyer's time and billing records, electronic communications, telephone records, and interviews with others in the Legal Employer with whom the lawyer worked.

E. Remedial Action: The Legal Employer shall immediately take any remedial action on client matters deemed necessary to mitigate any violation, or potential violation, of the RPC or other adverse consequences arising as a result of the individual’s lawyer’s impairment. [See state version of Model Rule 5.1(c).] Disclosure to the client may be required and will be done in compliance with the RPC.

F. Reporting to Disciplinary Authorities: A report will be made to the appropriate professional disciplinary authorities as required by state or federal rule, regulation or statute. [See state version of Model Rule 8.3, ABA Formal Opinion 03-431; ABA Formal Opinion 03-429].

G. Conditional Employment: Continued employment with the Legal Employer, unless otherwise required by the Family and Medical Leave Act or the Americans with Disabilities Act, may be conditioned upon:

1. Taking a leave of absence;
2. Execution of a Return to Work Agreement (see Appendix A);
3. Evaluation by a healthcare professional approved by the Legal Employer;
4. Commitment to a treatment plan, if recommended by the healthcare professional;
5. Periodic alcohol or drug testing resulting in consistent negative results,
6. Ongoing participation in peer support recovery programs;
7. Continuing therapy or medication management;
8. Monitoring by a lawyer assistance program or other professional;
9. Disclosure of evaluation results and verification of participation in appropriate treatment and support programs; and/or
10. Any other condition deemed appropriate by the Legal Employer.

Cooperation in all such matters is required, and failure to cooperate may result in Legal Employer discipline, up to and including possible termination.

H. Termination: Personnel who fail or refuse to avail themselves of the opportunity to seek and follow through on treatment of impairment will be subject to internal discipline, up to and including termination.
VIII. Consequences of Policy Violations

Any person, including any staff or lawyer, who acts contrary to this Policy, or any other Legal Employer policy, or violates any standards hereby established, will be subject to disciplinary action up to and including termination. The Legal Employer may, however, in its discretion, offer personnel the opportunity to participate in a counseling, treatment or rehabilitation program in lieu of such discipline.

IX. Other Laws

This Policy is in no way intended to interfere with the Legal Employer’s obligations to provide reasonable accommodations to those who are disabled under the Americans with Disabilities Act. Please see the Legal Employer’s EEO and Reasonable Accommodation policies for further information.
The American Bar Association has been instrumental in developing recent research examining aspects of impairment among law students and attorneys. This research has quantified an alarming rate of problematic alcohol/substance use and mental health impairments, coupled with deficient help-seeking behaviors in the legal profession.\(^1\) For example, the research indicates that attorneys engage in problematic alcohol use at nearly twice the level of the general population and have higher rates of depression and anxiety throughout their legal careers. Complicating matters, attorneys are reluctant to seek help. They are concerned that available measures are not sufficiently private and confidential, are worried that others will learn of their circumstances, and that any indication of an issue will detrimentally impact their career or position in the legal employer setting.

In 2016, these studies were a catalyst for a coalition of entities within and outside of the ABA to form the National Task Force on Lawyer Well-Being. After analyzing the data and seeking input from numerous sources, the Task Force issued a report in August 2017, which presented a series of recommendations directed at a variety of stakeholders within the justice system, and more importantly, for the purpose of this report, legal employers and lawyers’ professional liability carriers.\(^2\) Both the Conference of U.S. Chief Justices\(^3\) (“CCJ”) and the American Bar Association\(^4\) have passed resolutions recommending further consideration of the Task Force recommendations.

To further examine these recommendations, in September 2017, American Bar Association President, Hilarie Bass, sought approval for the creation of the Working Group to Advance Well-Being in the Legal Profession (“the Working Group”), to study certain Task Force recommendations as related to law firms and legal employers, and to develop model policies and guidelines for well-being and impairment in this setting. As part of this effort, on April 25, 2018, law firm stakeholders such as law firm managing partners, Executive Committee members, senior risk managers, other law firm leaders, and the equivalent to Directors or above at insurance brokers, came together for a National Workshop in Washington, D.C. The purpose of the interactive Workshop was to create practical and workable law firm policies to reinforce lawyer well-being as a core

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\(^3\) See CCJ Resolution 6. The Resolution may be viewed using the following link: https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_conference_of_chief_justices_resolution_6.authcheckdam.pdf.

component of the ethical obligations of competence and diligence as well as professionalism, and to address impairment issues in the law firm setting. Using a collaborative process, participants, including subject matter experts, such as members of lawyer assistance programs, generated ideas, innovations, and tools to develop this national model. Based on all the data and research gathered, the Working Group drafted the Model Impairment Policy for Legal Employers (“the Policy”).

The foundation of this Policy is the recognition that well-being is essential to an attorney’s duty of competence, and that impairment is antithetical to both the competence and quality service expected by the clients of the legal employer. To support this duty, legal employers need to demonstrate a commitment to the well-being of their personnel, to the prevention of impairments, and to assisting their employees in obtaining treatment when needed. Impairment of a legal employee, due to substance use or other mental health disorder\(^5\), including cognitive impairment or dementia, adversely affects not only the individual’s well-being, but also the legal employer’s ability to serve clients capably and responsibly. This Policy deals directly with the impairment of a legal employee. Impairment is a sub-set of the overall well-being of a legal employee, and this Policy is not meant to encompass the panoply of all well-being initiatives that can be employed in the legal employer setting.

Recognizing that law firms, or legal entities that employ multiple practicing attorneys and other staff, are a broad and sizeable group with considerable diversity, this Policy applies fairly universally. However, the policy may need to be tailored to address the realities particular to each legal employer setting. We also recognize that the ABA adopted a Model Law Firm/Legal Department Personnel Impairment Policy and Guidelines. See 1990AM118. The current Policy reinforces, but does not duplicate, the 1990 policy. The 1990 policy primarily focused on “substance use/abuse and dependence,” terminology that is antiquated and no longer used. In fact, in the 2013 edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), the American Psychiatric Association updated the clinical diagnoses to “alcohol use disorder” and “substance use disorder” which may be described as mild, moderate, or severe. The prior clinical diagnoses of “substance abuse” and “substance dependence” were eliminated. Further, the 1990 Policy did not incorporate the current rates of mental health issues seen in the legal profession, and is not reflective of the current resources available to legal professionals in the treatment of problematic substance use and/or mental health disorders. The over-arching goals of the Policy are: (1) early identification of impairment and proper intervention to assist with preventing, mitigating, or treating the impairment; and (2) preventing professional standards and the quality of the work for clients from being compromised by the impairment of any legal personnel. The Policy is intended to demonstrate compliance with those professional regulations which require legal employers to establish internal policies and procedures ensuring that all lawyers (including those impaired) conform to the jurisdiction’s applicable Rules of Professional Conduct (“RPC”), as well as state or federal rules, regulations or statutes.

\(^5\) See https://www.samhsa.gov/disorders for descriptions of mental and substance use disorders.
Conclusion

Abraham Lincoln advised that “the best way to predict the future is to create it.” Right now, the leaders of our legal profession stand at a crossroads and must take action. To maintain the status quo is not an option. We can create our future. Too many in our profession are too exhausted, too impaired, or too disengaged to develop into their best selves. Many find themselves in a profession drained of civility and compassion and plagued by chronic stress, poor self-care, and high rates of depression and alcohol problems. The result is that the legal profession is not living up to its full potential as an institution in which attorneys can thrive, best serve their clients, and contribute to a better society. The research demonstrates the need, and the National Task Force on Lawyer Well-Being and key legal employer stakeholders have identified the solutions, one of which is a Model Impairment Policy for Legal Employers. We respectfully ask that the ABA adopt this Model Impairment Policy for Legal Employers, advance the path to lawyers’ well-being, and assure a legal system that deserves the public’s confidence.

Respectfully submitted,

Terry Harrell
Chair, The ABA Working Group to Advance Well-Being in the Legal Profession
August 2018
GENERAL INFORMATION FORM

Submitting Entity: The Working Group to Advance Well-Being in the Legal Profession

Submitted By: Terry Harrell

1. Summary of Resolution(s). The Resolution seeks to have the American Bar Association adopt the ABA Model Impairment Policy for Legal Employers (“Model Policy”) dated August 2018, and that the American Bar Association urges legal employers to adopt the Model Policy.


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

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

At the 1990 Annual Meeting, the House of Delegates passed the Model Law Firm/Legal Department Personnel Impairment Policy and Guidelines, which remains active policy. See 1990AM118. However, that 1990 policy primarily focused on “substance use and dependence,” terminology that is antiquated and no longer used, it did not incorporate the current rates of mental health issues seen in the legal profession, and is not reflective of the current resources available to legal professionals in the treatment of problematic substance use and/or mental health disorders.

The current Policy reinforces, but does not duplicate, the current policy.

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

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

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. The Working Group to Advance Well-Being in the Legal Profession was established by President Bass to, in part, advance the recommendations of the National Task Force on Lawyer Well-Being and to develop model policies on well-being and impairment in the legal employer setting. Therefore, efforts to implement this policy will come from ABA leadership and be advanced in collaboration with the participating entities that comprise the National Task Force.
8. **Cost to the Association. (Both direct and indirect costs)** None

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

10. **Referrals.** Prior to filing, the proposed resolution has been circulated to:
    Commission on Lawyer Assistance Programs
    National Organization of Bar Counsel

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

    Terry L. Harrell  
    Executive Director  
    Indiana Judges and Lawyers Assistance Program  
    320 North Meridian Street, Suite 606  
    Indianapolis, Indiana 46204  
    317/833.0370  
    terry.harrell@courts.in.gov

    Tracy L. Kepler  
    Director  
    ABA Center for Professional Responsibility  
    321 N. Clark St  
    Chicago, IL 60654  
    312/988.5294  
    tracy.kepler@americanbar.org

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.)**

    Terry L. Harrell  
    Executive Director  
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EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution seeks to have the American Bar Association adopt the ABA Model Impairment Policy for Legal Employers (“Model Policy”) dated August 2018, and that the American Bar Association urges legal employers to adopt the Model Policy.

2. Summary of the Issue that the Resolution Addresses

The resolution addresses the crisis of lawyer well-being that has been documented by research conducted and data compiled by the ABA Commission on Lawyer Assistance Programs and the ABA Working Group to Advance Well-Being in the Legal Profession. The research demonstrates that alcohol use, substance use and mental health disorders among lawyers far exceed other professions and populations. These circumstances undermine the ability of the legal profession to assure the public that the system of American justice is competent, fair and just.

The foundation of this Policy is the recognition that well-being is essential to an attorney’s duty of competence, and that impairment is antithetical to both competence and quality service expected for the clients of legal employers. To support this duty, legal employers need to demonstrate a commitment to the well-being of their personnel, to the prevention of impairments, and to assisting their employees in obtaining treatment when needed. Impairment of a legal employee, due to substance use or other mental health disorder, including cognitive impairment or dementia, adversely affects not only the individual’s well-being, but also the legal employer’s ability to serve clients capably and responsibly.

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

Implementation of the Policy will provide a mechanism within the legal employer setting to identify impairment and craft proper intervention to assist with preventing, mitigating, or treating the impairment; and (2) prevent professional standards and the quality of the work for clients from being compromised by any legal employer personnel’s impairment. The Policy is intended to demonstrate compliance with those professional regulations which require legal employers to establish internal policies and procedures ensuring that all lawyers (including those impaired) conform to the jurisdiction’s applicable Rules of Professional Conduct (“RPC”), as well as state or federal rules, regulations or statutes.

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

None.
RESOLUTION

RESOLVED, That the American Bar Association urges federal, state, local, territorial and tribal governments to adopt and enforce stronger fair lending laws targeted to discrimination in the vehicle sales market;

FURTHER RESOLVED, That the American Bar Association urges Congress to amend the Equal Credit Opportunity Act to require documentation and collection of the applicant’s race or national origin for non-mortgage credit transactions pertaining to vehicle transactions;

FURTHER RESOLVED, That the American Bar Association urges Congress and all state, local, territorial, and tribal legislative bodies and governmental agencies to adopt laws and policies that require a flat percentage fee for dealer compensation, and disclosure of dealer compensation for a vehicle loan;

FURTHER RESOLVED, That the American Bar Association urges federal, state, local, territorial and tribal governments to adopt legislation requiring the separate posting of pricing of add-on products by dealers on each vehicle before a consumer negotiates to purchase a vehicle; and

FURTHER RESOLVED, That the American Bar Association encourages state, local, territorial and tribal bar associations to offer programming to educate lawyers and consumers about abusive, deceptive, or fraudulent vehicle sales transaction financing and sales practices.
OVERVIEW

The resolution addresses the highly discriminatory practices and impact to many consumers of color, national origin, and low-income, that arise in the auto lending and sale of auto add-on products. Consumers are burdened with interest-rate markups on loans that have no relation to their credit-risk, and often-relate to prejudices and discriminatory actions. The Resolution also addresses the issue of insufficient data available on credit applicants to identify potential discriminatory impact. Such data is currently collected in the home mortgage market and this resolution would place the one trillion-dollar auto lending market on similar footing. Finally, the resolution addresses the lack of transparency in the auto lending market, which is unacceptable when it represents the third largest consumer debt in America.

BACKGROUND

More than 90% of American households have a vehicle, the auto is the lifeline to the American consumer to securing employment, accessing healthcare, and pursuing educational opportunities. As noted in a recent Consumer Financial Protection Bureau (CFPB) report, today there are almost 100 million auto loans outstanding totaling more than one trillion dollars. Auto loan debt represents the third largest type of consumer debt in America, trailing behind only mortgage and student debt. For consumers who do not own a home, true for many low-income consumers, it can constitute the largest debt they may have to pay back.

The Bureau’s Quarterly Consumer Credit Trends Report, “Growth in Longer-Term Auto Loans”, issued in November 2017, provides that while the rapid increase in automobile loans in the decade is slowly subsiding, an increase in longer-term loans is occurring. These longer-term loans (defined as six or more years) increased from 26 percent of auto loans originated in 2009 to 42 percent of 2017 originations. Also noteworthy is that the credit scores of borrowers taking out longer-term loans is significantly lower than borrowers who take out five-year loans, with six-year loans at 674, which is 39 points lower than five-year loans. Longer-term loans also result in higher loan balances, rising from $20,100 for a five-year loan, compared to $25,300 for a six-year loan. This has resulted in higher cumulative default rates for six-year loans as compared to five-year loans, as noted in trend data for loans originated from 2009 to 2015.

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2 Id.
3 Id.
4 Id.
6 Id., page 4.
7 Id., page 4.
8 Id., page 5.
9 Id., page 8.
When you look into the further composition of auto finance lending, the magnitude of touchpoints that impact on low-and moderate-income families is pervasive. The National Consumer Law Center (“NCLC”) issued a report in May 2016 on “New Ways to Understand the Impact of Auto Finance on Low-Income Families,” that looks at loan origination as the time when abuses occur or unnecessary costs are incurred. The report reflects that data for 2014 (the most recent time for student debt data at the time of the report), “there were almost three times as many families originating auto finance as borrowers originating student loans, and more than three times the number of auto finance originations as mortgage originations.” In 2014, there were almost 28.2 million auto finance originations.

In analyzing the data, there is a presumption that individuals with lower credit scores are at greatest risk for abusive loans and sale practices. Data on loan originations is not publicly available for mortgage and auto originations based on race or family income. However, consumer credit scores are available and earlier studies by the NCLC reflect a strong correlation with credit scores and applicant’s race, income, educational levels and other characteristics.

Experian, one of the three major credit reporting agencies, classifies consumer credit scores as prime (best score, includes super prime and prime). Consumers with a prime credit make up the largest contingent of auto loan originations. However, nonprime, subprime and deep subprime, collectively represented 30% of open finance in Q4 2015. Thus, the lower credit scores which represent 30% of the open finance market for vehicles and has the greatest risk for vehicle sale and financing transactions is falling disproportionately on persons of color and lower-income consumers.

In comparing total originations of mortgage and autos with Equifax risk score data, another of the three major credit reporting agencies, “those with High-Risk Equifax scores in Q4 2015 originated nearly 25% of auto finance transactions, but just 5% of mortgage transactions.” In absolute numbers, there were about 2 million mortgage originations and nearly 6.5 million auto originations during that period. Extrapolating the originations to the risk scores, the NCLC report observes that of “struggling consumers with High-Risk scores, more than 1.5 million (1,551,292) bought and financed a car, while just 100, 439 bought a house.” In short, struggling consumers are 15 times more likely to be engaged in a vehicle sale and financing transaction than a home mortgage transaction, and

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11 Id., page 5.
12 Id., page 5.
13 Id., page 6.
14 Id., pages 6-7. Credit score categories are based on the Experian Vantage Score 3.0 ranges: Super prime =781-850; Prime = 661-780; Nonprime = 601-660; Subprime = 501-600; Deep Subprime = 301-500.
15 Id., page 8. Equifax credit score categories are based on Low-Risk Equifax Risk Score (> or equal to 700); Average-Risk Score (620 < or equal to and < 700); and High-Risk Score (< 620).
16 Id., page 8.
17 Id., page 8.
highlights the critical need for protection of low-income consumers from deceptive sale and financing practices.

ISSUES

1. ENFORCEMENT OF DISCRIMINATION LAWS

The American Bar Association has a long tradition of actively opposing discrimination on the basis of classifications including race, gender, national origin, disability, age, sexual orientation, and gender identity and expression. This is evident in the Association’s adoption of policies that call upon federal, state and local lawmakers to prohibit such discrimination in housing, as well as in public accommodations, credit, education, and public funding, and in seeking to eliminate such discrimination in all aspects of the legal profession. The ABA’s fundamental position condemning such discrimination is based on its underlying commitment to the ideal of equal opportunity and advancement of human rights. These two principles united in August 2013, when the ABA adopted policy to urge governments to “promote the human right to adequate housing for all” and to “prevent infringement of that right.” In furtherance of that right, the Association in August 2017 also urged governments to “enact legislation prohibiting discrimination on the basis of lawful source of income.”

History of Discrimination in Auto Lending

The Equal Credit Opportunity Act (ECOA) makes it illegal for a “creditor” to discriminate in any aspect of a credit transaction because of race, color, religion, national origin, sex, marital status, age, receipt of income from any public assistance program, or the exercise, in good faith, of a right under the Consumer Credit Protection Act. As set forth in the Congressional Report, the ECOA is intended to ensure that “…no credit applicant shall be denied the credit he or she needs and wants on the basis of characteristics that have nothing to do with his or her creditworthiness.”

Notwithstanding the explicit language of the ECOA, the compelling need for the Association’s full support of enforcement of laws prohibiting discrimination in auto

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18 See, e.g., resolutions adopted 8/65 (addressing race, color, creed, national origin); 8/78 (race); 8/72, 2/74, 2/78, 8/74, 8/75, 8/80, 8/84 (gender); 8/86 (race and gender); 2/72 (sex, religion, race, national origin); 8/77 (“handicap”); 8/87 (condemning hate crimes related to race, religion, sexual orientation, or minority status); 8/89 (urging prohibition of sexual orientation discrimination in employment, housing and public accommodation); 9/91 (urging study and elimination of judicial bias based on race, ethnicity, gender, age, sexual orientation and disability); 2/92 (opposing penalization of schools that prohibit on-campus recruiting by employers discriminating on the basis of sexual orientation); 8/94 (requiring law schools to provide equal educational and employment opportunities regardless of race, color, religion, national origin, sex or sexual orientation); 8/06 (addressing gender identity and expression).


20 Resolution adopted 8/2013.


lending and sale practices is based on the repeated research studies documenting an extensive history of discrimination in car lending and sale practices, particularly in relation to non-white consumers and low-income consumers.

Yale Law Professor Ian Ayres conducted groundbreaking research in his seminal article *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations* in the Harvard Law Review. 24 The 1991 study documented whether testers, employing a uniform negotiating strategy for buying a new car in Chicago dealerships, would receive different treatment by auto retailers on dealer markups for auto loans when buyers differed solely on race or gender. 25 The result was black male testers had to pay more than twice the price of white male testers. Compared to white men, White women testers paid more than 40% than white men, and black women testers paid more than three times the markup of white male testers. 26

The 1991 study by Professor Ayres, although compelling, was not statistically significant and he therefore followed up the study in 1994. The expanded and retested results were similar in that white male testers were offered lower prices. The one distinction was that, unlike the original study, black male testers were charged higher prices than black female testers. 27

A recent investigative report by the National Fair Housing Alliance (NFHA) highlights the early history of discrimination in auto lending and further documents current discriminatory practices. 28 It highlights the 2003 study by Vanderbilt University Business Professor Mark A. Cohen, which investigated more than 1.5 million General Motors Acceptance Corporation (“GMAC”) loans made between 1999 and 2003. It was noted that “Black customers were three times as likely as equally qualified White customers to be charged an interest rate markup on their loans financed by GMAC.” 29

A separate 2004 abridged report prepared by Dr. Cohen in the *Matter of Terry Willis, Et. Al, v. American Honda Finance Corporation* (AHFC), found that African-American borrowers paid more than two times the subjective mark-up than white borrowers. Dr. Cohen notes that “My analysis in this case, as well as analysis I have conducted on other auto lenders including GMAC, NMAC and FMCC, provides strong evidence that the

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25 Id. at 818.
26 Id. at 819.
industry-wide practice of subjective credit pricing results in a disparate impact on minorities.” 30

The recent investigation conducted by the NFHA during the Fall of 2016 and Spring of 2017 utilized testing, a widely accepted methodology that has been accepted for use in various purposes, to include enforcement, public policy, and compliance monitoring purposes, among others.31 The use of fair housing testing evidence has been uniformly adopted by the courts, including the U.S. Supreme Court.32 The testing was conducted at new and used car dealers throughout Eastern Virginia. The findings over eight tests conducted in which non-white testers were always more creditworthy than their white counterparts resulted in five tests where “the Non-White testers received more expensive total overall payment quotes, paying on average $2,662.56 more than the White testers over the course of the loan, despite being more qualified.”33

Continued discriminatory treatment in the auto lending and sale practices imperils economic justice and frustrates the human and civil rights of many of our most vulnerable citizens. To root out such practices, the Resolution proposes to enforce the fair lending laws and the auto sale market practices should fully support the active enforcement at the federal level by the Federal Trade Commission (FTC), The Consumer Financial Protection Bureau (CFPB), and the Department of Justice. At the state and local level, vigorous enforcement by state Attorneys General of local lending and consumer protection laws prohibiting discrimination, either individually, or collectively, should be vigorously supported. Enforcement efforts should be addressed to direct and indirect lenders, as well as extended to car dealers, to advance protection to all consumers.

2. AMEND THE EQUAL OPPORTUNITY CREDIT ACT - COLLECTION OF DATA

Under current law, Regulation B, implementing the ECOA, prohibits non-mortgage lenders from asking about or documenting characteristics such as a consumer’s race or national origin.34 The National Consumer Law Center (NCLC), has noted the irony that in prohibiting non-mortgage lenders from asking about or documenting characteristics it has made it very difficult to determine if discrimination occurs.35 NCLC, in a 2008 letter to U.S. Congressman Mel Watt noted that “the problem is that without access to data similar in nature and type to that made available [through the HMDA [Home Mortgage Disclosure Act] for mortgage transactions, no one will have an easy time coding an aggregate pool of information sufficient to prove there has been disparate impact discrimination as a

31 Rice and Schwartz, Id. At 12.
32 Id. At 12. See e.g. Havens Realty Corp. v. Coleman, 455 U.S.363, 373-374 (1982).
33 Id. At 15.
34 12 C.F.R. Sec. 1002.5(b) 12 C.F.R. Sec. 12(a), (b).
matter of law under the ECOA.” A letter to the U.S. Government Accountability Office has also noted that requiring lenders to collect and report such data could actually assist in stopping discrimination.

This Regulation B provision frustrates the purpose of the ECOA, which is to “require that financial institutions and other firms engaged in the extension of credit make that credit equally available to all creditworthy customers without regard to [sex, marital status, race, age, religion, national origin, and age].” The NCLC and other commentators have argued that “if discrimination remains hidden, it, it will not be possible to end it.” Congress should amend ECOA directly to ensure the collection of data necessary to prevent discrimination. Although some commentators have argued Agency action by the Consumer Financial Protection Bureau (CFPB) to amend Regulation B to require documentation of the customer’s race or national origin for non-mortgage credit transactions is not prohibited by the ECOA and thus can be accomplished by Agency action, Congress should ensure by legislative action that proper collection of data is effectuated that would be consistent with home mortgage credit products today.

The actions proposed by this Resolution would be consistent with and facilitate furtherance of the Strategic Plan for the CFPB for FY2018-2022. Goal 2 of the CFPB is to implement and enforce the law consistently to ensure that markets for consumer financial products and services are fair, transparent, and competitive. It seeks to obtain this goal by achieving the following objectives, of which is Objective 2.1: Protect consumers from unfair, deceptive, or abusive acts and practices and from discrimination. The strategy to achieve this objective and goal is to “enhance compliance with federal laws intended to ensure the fair, equitable and nondiscriminatory access to credit for both individuals and companies and promote fair lending compliance and education.”

Collection of data to identify areas of discrimination will further the strategy, objective and goal of the CFPB in ensuring consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination. The collection of data will provide full transparency and fair lending compliance activities to all consumers.

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39 Auto Add-Ons, at 43.
40 Id. at 43. In the late 1990s The Federal Reserve Board, partly in response to comments by the Department of Justice and the federal financial enforcement agencies, proposed removing the prohibition on seeking information about an applicant’s race, color, religion, national origin, and sex for non-mortgage credit products. 64 Fed. Reg. 44,582, 44, 586 (Aug. 16, 1999).
42 Id. At 10.
43 Id. at 10.
44 Id. at 10.
3. DISCLOSURE OF DEALER MARK-UP ON LOANS

A common practice in the auto lending market that lacks a great deal of transparency and that has a long history of discriminatory impact is a “dealer markup”, which compensates auto dealers for originating automobile loans by allowing interest rate markups. As noted in CFPB Bulletin 2013-02, “If the dealer charges the consumer a higher interest rate than the lender’s buy rate, the lender may pay the dealer what is typically referred to as “reserve” (or “participation”) compensation, based upon the difference in interest rate revenues between the buy rate and the actual note rate charged to the consumer in the installment sale contract executed with the dealer.” Many studies noted above have documented the discriminatory impact and large public settlements initiated by the CFPB and the Department of Justice in recent years have resulted in restitution and fines to lenders in excess of $150 million to settle claims of discrimination.

The allegations of discrimination noted in the public settlements related to a pattern or practice of conduct in violation of the Equal Credit Opportunity Act, 15 U.S.C. Sections 1691-1691(f), by permitting dealers to charge higher interest rates to consumer auto loan borrowers on the basis of race and national origin. Parties have challenged the Bulletin on the basis of whether or not the discrimination that may result from dealer markup is intentional by dealers, or have challenged the bulletin on the basis of whether the CFPB exceeded its agency authority in issuing the bulletin. The General Accountability Office recently concluded in December 2017 that CFPB Bulletin 2013-02, did qualify as a rule, and thus was subject to the little used Congressional Review Act because it served as a general statement of policy.

Without addressing the reasonable legal merits of congressional and agency power matters from different viewpoints, the fundamental issue this resolution desires to address is the significant risk that currently exists in today’s auto lending market that pricing disparities may arise between auto lending customers with equal lending risk on the basis of race, national origin, and potentially other prohibited bases. One remedy to such matter offered in CFPB 2013-02 and supported by other commentators is that of eliminating the discretion of dealers in dealer markup buy rates. Compensating dealers fairly with another mechanism, such as a flat percentage fee of the auto loan amount, will not lead to discrimination and will promote economic justice and civil rights to all consumers.

Further, consumers today do not have any visibility into the amount of their loan interest rate that is solely a discretionary dealer markup based on the perception of their willingness to pay by the dealer. This portion of the dealer markup is not related at all to their credit risk as a consumer. As noted in a policy brief by the Center for Responsible

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Lending (CRL), “the add-on interest is hidden from the consumer, who assumes, inaccurately, the rate is based on their risk profile.” 48 Surveys cited by the policy brief show that two-thirds of Americans have no idea that the dealer is adding to the interest rate for compensation.49

The major thrust of this CRL study, however, was to evaluate whether the system of dealer interest-rate markups actually serve consumers better under a cost-benefit analysis approach, or whether consumers would benefit from a flat compensation system that would increase transparency and provide greater competition that would more benefit the consumer. The data from the Charles River Associates Report showed that consumers with higher credit scores would have access to multiple lending sources and thus have greater ability to obtain lower rates for credit. They would not therefore be likely subject to a higher cost under a flat rate compensation system. Whereas, consumers with lower credit scores, would be more likely to pay a markup due to having fewer lending options and thus would benefit from switching from a dealer markup system to a flat rate compensation system.50 It is important to further note that the Report showed that “borrowers of color were more likely to save money than white borrowers if the industry shifted to flat fees instead of discretionary interest rate markups.”51

4. TRANSPARENCY OF PRICING OF ADD-ON PRODUCTS

Add-on products, like service contracts, guaranteed asset protection, and window etching, significantly increase the price of the overall auto purchase and have vastly inconsistent pricing between consumers purchasing the same product with the same dealer. The pricing disparities, aided immensely by the lack of transparency of pricing, results in excessive pricing to consumers and discriminatory mark-ups of auto add-ons.

In October 2017, the NCLC issued a report, “Auto Add-Ons Add Up, How Dealer Discretion Drives Excessive, Arbitrary and Discriminatory Pricing.”52 This report is based on an analysis of almost 3 million add-on products from September 2009 through June 2015 based on a nationwide data set of 1.8 million car sale transactions involving over 3,000 card dealers.53 Major items sold included: Service contracts (representing 33% of the products sold), Guaranteed Asset Protection (GAP) products (26%), various warranty-type products (15%), and vehicle identification number (also referred to as “window”) Etching (Etch) (9%).54 Excluding warranty costs, which were not included in further NCLC analysis as these costs are typically not shown as a separate fee, but are rolled into the

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48 Delvin Davis and Chris Kukla, Road to Nowhere: Car Dealer Interest Rate Markups Lead to Higher Interest Rates, Not Discounts, Policy Brief, dated Nov. 2015.
49 Id., at 2.
50 Id. At 4.
51 Id at. 4.
52 Auto Add-Ons Add Up, How Dealer Discretion Drives Excessive, Arbitrary and Discriminatory Pricing, National Consumer Law Center, October 2017
53 Id., page 9.
54 Id., page 9.
price of the car\textsuperscript{55}, these categories are consistent with the CFPB Examination Procedures document for ancillary products and services.\textsuperscript{56}

Service contracts typically cover an item not covered under a typical manufacturer warranty, or they extend the warranty by having a longer duration. Guaranteed asset protection (GAP) contracts, are designed to cover the “gap” between the debt on the car and what the car is worth, also referred to as “negative-equity” or “under-water.” Finally, window etching (Etch) products, is where dealers will etch in typically the vehicle identification number (VIN) on one or multiple windows to deter theft or aid in finding a stolen car.\textsuperscript{57}

The wide disparities in pricing can be evidenced when comparing to insurance products, which have similar characteristics and are also not tangible in nature. However, insurance pricing is often reviewed by state regulators, pricing discretion is not given to the selling agent, and the insurance agent’s commission is not based on charging different consumers a different price for the same product, as is the case in dealers selling add-ons.\textsuperscript{58}

It is very significant to note that the finding of the NCLC data set was that “looking collectively at service contracts, GAP products and etch products, the combined average rate markup was 170%\textsuperscript{59} To put in perspective, The NCLC report compared the markups for other retail products, which varies greatly by industry. Brick and mortar retailers such as big box office supply or sporting goods stores may mark up their goods by 40% to 50%,\textsuperscript{60} clothing retailers may mark up at 50% to 100%, subject to lower markups for sales,\textsuperscript{61} jewelry stores have markups between 25% to 125%,\textsuperscript{62} and most relevant, car dealer markups on autos for new cars in a 2015 National Association of Automobile Dealers Association Report reflect 3.4% markup for new cars and 8.6% markup for used cars.\textsuperscript{63}

Another important comparison to look at add-on pricing markups is to commissions independent insurance agents receive when they sell insurance to consumers. The equivalent markup for insurance agents is 11% to 18%.\textsuperscript{64} In 2012, the average dealer markup for Etch sales in the data set was 325% (an average markup of $189 over the dealer’s average cost of $58), the average for GAP was 151% (an average markup of $378 over the dealer’s average cost of $251), and the average dealer markup for service

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\textsuperscript{55}Id., page 9.
\textsuperscript{56}CFPB “Automobile Finance Examination Procedures”, dated June 2015, pages 4-5.
\textsuperscript{57}Auto Add-Ons Add Up, at pgs. 7 to 8.
\textsuperscript{58}Id. at 11.
\textsuperscript{59}Auto Add-Ons, NCLC report, Id. Page 10. Note this Report consistently uses markup as the ratio of gross profit to the wholesale price.
\textsuperscript{60}Id. Page 10.
\textsuperscript{61}Id. Page 10.
\textsuperscript{62}Id. Page 10.
\textsuperscript{63}Id. Page 11.
\textsuperscript{64}Id. Page 12.
\end{flushleft}
contracts was 83% (an average markup of $859 over the dealer’s average cost of $1,032).65

Vehicle Identification Number (Window) Etching pricing by dealers in theory should be consistent in price as the price as the cost to the dealer for Etch products generally does not vary by the price of the car, whether a car is new or used, or other characteristics that vary from car to car.66

The NCLC Report identified a subset in 2012 that sold Etch products that had just one dealer cost for every Etch product they sold and thus represented an excellent review of pricing disparity. The report noted that “only 19 of those 105 dealers sold the Etch product to each of their customers for the same price. 82% of dealers did not have a single fixed price for their Etch products, but established a different price depending on the customer. These extreme pricing inconsistencies cannot be explained by different costs to the dealer, different products being sold, or different time periods.”67

Very large variations with no rationale could also be seen in service contracts, where there is disparity in the dealer cost due to factors such as the value of car, new or used, cost of repair and length of coverage.68 The NCLC data set reflected wide variations on pricing unrelated to the cost of the service contracts and different pricing methodologies, such as a set fixed add-on price to cost (markup), a set fixed sales price unrelated to cost of the service contract, and at widely varying pricing based on the dealers whim.69

New York City in 2015 successfully implemented a new rule that requires the price of both the car and any add-on products offered with the car to be posted on each car offered for sale by a used car dealer in the city.70 Additionally, New York City proposed in early 2018 new rules under Local Laws 197 and 198 in 2017 on second-hand car dealers that would benefit consumers by 1) requiring dealers to provide financing disclosures to consumers, 2) clarify the automobile contract cancellation options that dealers offer to consumers, 3) create a consumer bill of rights that dealers must display, and 4) clarified requirements related to record-keeping by dealers.71 The Consumer Bill of Rights, among other provisions, would inform the consumer he or she has the right to receive an itemized price for each add-on product, the consumer would have the right refuse any add-on product by the dealer, and further advises the consumer they have the right to be free from discrimination when applying for credit.

To strengthen consumer protection and promote economic justice, this resolution urges legislators to adopt legislation that requires the posting of nonnegotiable pricing of add-on products by dealers on each vehicle to promote full transparency of available add-ons and prevent discriminatory practices.

65Id. Pages 12 and 13.
66 Id. Pages 19 and 20.
67 Id., Pages 19 and 20.
68Id., Page 22.
69 Id., Pages 22-26.
70 NYC Admin. Code Section 20-271 (Local Laws of the City of New York for the Year 2015, No. 44).
71 Amendments to Subchapter K of Chapter 2 of Title 6 of the Rules of the City of New York.
5. EDUCATION OF LAWYERS AND CONSUMERS

Consumer protections would be strengthened by enhancing educational opportunities for members of the Bar so they can identify and effectively address the issues facing consumers in the auto lending and sale practices customarily faced today. The magnitude of over 100 million transactions and the substantial economic harm inflicted upon millions of low-income to moderate-income consumers, for whom many the auto is the single-largest debt, makes it imperative that the Association vigorously address the legal and consumer needs of lawyers and consumers.

Lawyer education, such as the recent webinar in March 2018, “Abusive Car Loan and Sale Practices: Scope and Potential Remedies to Strengthen Consumer Protections,” sponsored jointly by the economic justice committee of the Civil Rights and Social Justice Section and the State Attorneys General and Department of Justice Issues Committee of the State and Local Government Law Section is an excellent example of expanding timely and relevant information to lawyers. Additional educational materials include further training, seminars, and various publications on relevant topics to arm the lawyer with the skills that provide a level playing field for all consumers in making such a large financial purchase.

Finally, the Association needs to enhance its efforts to help all citizens in understanding their legal rights and addressing situations where those rights are violated. A starting point is communicating a model “Consumer Bill of Rights” so that all taxpayers are aware of their rights to receive an auto loan free of discrimination, based solely on their financial credit-risk, and full transparency prior to entering negotiations for an auto purchase as to all relevant terms of the loan being offered, including discretionary dealer markup above the risk-based price of the loan, as well as the price each available add-on product.

Conclusion

This policy will affirm the ABA’s commitment to actively opposing discrimination on the basis of protected classifications as articulated in the EOCA, will strengthen consumer protections for all, and will promote economic justice. By adopting this resolution, this policy will advance the work of consumer advocates, legislators, public attorneys and litigators who seek to advance justice and fairness for all consumers, particularly low-income consumers and consumers who suffer discrimination based on color, national origin, or some other protected class.

Respectfully submitted,

Robert N. Weiner
Chair, Section of Civil Rights and Social Justice
August 2018
GENERAL INFORMATION FORM

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

1. Summary of Resolution(s). The resolution urges Congress to amend the Equal Credit Opportunity Act to require documentation and collection of the applicant’s race or national origin for non-mortgage credit transactions pertaining to vehicle transactions; it urges Congress and all state, local, territorial, and tribal legislative bodies and governmental agencies to adopt laws and policies that require a flat percentage fee for dealer compensation, and disclosure of dealer compensation for a vehicle loan; and adopt legislation requiring the separate posting of pricing of add-on products by dealers on each vehicle before a consumer negotiates to purchase a vehicle; and to offer programming to educate lawyers and consumers about abusive, deceptive, or fraudulent vehicle sales transaction financing and sales practices.


The Section of State and Local Government Law approved co-sponsorship of the Resolution during its Spring Meeting in Detroit, Michigan, on Sunday, April 22, 2018.

3. Has this or a similar resolution been submitted to the House or Board previously? No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? The American Bar Association has a long tradition of actively opposing discrimination on the basis of classifications including race, gender, national origin, disability, age, sexual orientation, and gender identity and expression. The Association has adopted policies calling upon local, state, and federal lawmakers to prohibit such discrimination in housing, as well as in public accommodations, credit, education, and public funding and has sought to eliminate such discrimination in all aspects of the legal profession. The ABA’s fundamental position condemning such discrimination is based on its underlying commitment to the ideal of equal opportunity and advancement of human rights. These two principles united in August 2013, when the ABA adopted policy to urge governments to “promote the human right to adequate housing for all” and to “prevent infringement of that right.”

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

6. Status of Legislation. Currently, New York City requires both the price of the car and the price of any add-on products to be posted on each car offered by a used car dealer in the city, and has proposed a rule requiring dealers to provide financing disclosure
to dealers. This Resolution will allow the ABA to encourage other jurisdictions to adopt similar laws.

Additionally, on May 21, 2018, President Trump signed into law S.J. Res. 57 – a measure passed by Congress to reject a Washington bureaucracy's rule which could have eliminated the ability of car dealerships to discount loans for their customers.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** We will work with relevant stakeholders within and outside of the American Bar Association and the Governmental Affairs Office to implement the policy.

8. **Cost to the Association.** Adoption of this proposed resolution would result in only minor indirect costs associated with Section staff time devoted to the policy subject matter as part of the staff members' overall substantive responsibilities.

9. **Disclosure of Interest.** There are no known conflicts of interest.

10. **Referrals.** By copy of this form, the Report with Recommendation will be referred to the following entities:

    - Section of Business Law
    - Section of Infrastructure and Regulated Industries Section
    - Section of Public Contract Law
    - Section of Taxation
    - Section of State and Local Government Law
    - Government and Public Sector Lawyers Division
    - Commission of Racial and Ethnic Diversity in the Profession
    - Commission of Hispanic Legal Rights and Responsibilities
    - Standing Committee on Public Education
    - Law Student Division
    - Young Lawyers Division
    - Commission on Sexual Orientation and Gender Identity
    - Solo, Small Firm and General Practice Division

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

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

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EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   The resolution urges Congress to amend the Equal Credit Opportunity Act to require documentation and collection of the applicant’s race or national origin for non-mortgage credit transactions pertaining to vehicle transactions; it urges Congress and all state, local, territorial, and tribal legislative bodies and governmental agencies to adopt laws and policies that require a flat percentage fee for dealer compensation, and disclosure of dealer compensation for a vehicle loan; and adopt legislation requiring the separate posting of pricing of add-on products by dealers on each vehicle before a consumer negotiates to purchase a vehicle; and to offer programming to educate lawyers and consumers about abusive, deceptive, or fraudulent vehicle sales transaction financing and sales practices.

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

   The resolution addresses the highly discriminatory practices and impact to many consumers of color, national origin, and low-income, that arise in the auto lending and sale of auto add-on products. Consumers are burdened with interest-rate markups on loans that have no relation to their credit-risk, and often-relate to prejudices and discriminatory actions. The Resolution also addresses the issue of insufficient data available on credit applicants to identify potential discriminatory impact. Such data is currently collected in the home mortgage market and this resolution would place the one trillion-dollar auto lending market on similar footing. Finally, the resolution addresses the lack of transparency in the auto lending market, which is unacceptable when it represents the third largest consumer debt in America.

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

   This policy will reaffirm the ABA’s commitment to ensuring the enforcement of fair lending laws to protect against discrimination, strengthen consumer protections in the auto lending and sale market, and promote economic justice. It will assist the work of consumer advocates, lawmakers, and litigators who diligently work to provide a fair and transparent economic market for all consumers, regardless of race, color, national origin, or economic position.
4. **Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified**

At the federal level, various legislators have taken opposing viewpoints on the powers of the Consumer Protection Financial Bureau and whether expressions of policy articulated by the CFPB should be subject to congressional rule making authority. As noted in the report, see the General Accountability Office Letter, B-329129, dated Dec. 5, 2017, addressed to U.S. Senator Patrick J. Toomey, with respect to CFPB Bulletin 2013-02, which provided guidance on the use of discretion in dealer interest mark-up rates.
RESOLVED, That the American Bar Association urges federal, state, local, tribal, and territorial governments to enact legislation providing employees with job-guaranteed paid sick days and job-guaranteed paid family and medical leave.
There is a growing consensus that current workplace structures do not recognize the realities of the family and work lives of workers today, most notably the fact that most families no longer have one partner who is able to stay at home and care for the family and household. As of 2012, 42% of women were sole or primary breadwinners, earning at least half of family earnings. Twenty-two point four percent of women were co-breadwinners, bringing home 25% to 49% of family earnings. In addition, the vast majority of adults with custodial children are in the labor force. Working men and women struggle to meet the caregiving needs of their children and parents while maintaining employment. U.S. labor standards and workplace policies must be updated to reflect the reality of the 21st century workforce and to ensure that the nation’s public policies are in line with the needs of today’s working families. Adoption of this resolution will put the ABA on record in support of legislation that provides paid and job-guaranteed sick leave and paid, job-guaranteed family and medical leave legislation to enable caregivers to meet the needs of their families, and to guarantee paid sick leave when employees themselves are ill.

In 1993, President Bill Clinton signed the Family and Medical Leave Act (FMLA) into law. The FMLA entitles employees who have worked for at least one year and a minimum of 1250 hours in the past year for an employer with at least 50 employees working within a 75 mile radius of the employee, to take unpaid, job-guaranteed leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. An eligible employee working for a covered employer may take up to 12 workweeks of leave in a 12-month period for any of the following circumstances: the birth of a child and to care for the newborn child within one year of birth; the placement with the employee of a child for adoption or foster care and to care for the newly placed child within one year of placement; to care for the employee’s spouse, child, or parent who has a serious health condition; a serious health condition that makes the employee unable to perform the essential functions of his or her job; any qualifying exigency arising out of the fact that the employee’s spouse, son, daughter, or parent is a covered military member on “covered active duty.” The FMLA also provides for 26 workweeks of leave during a single 12-month period to care for a covered service member with a serious injury or illness if the eligible employee is the service member’s spouse, son, daughter, or parent or next of kin.

For those who are eligible, the FMLA has provided significant assistance, enabling workers to avoid job loss when they need to take time off work to care for a family member or for their own illness. However, less than 50% of workers are eligible for FMLA leave, and many more who are eligible are unable to take FMLA leave because they cannot afford unpaid leave. Only 14% of workers in the U.S. have access to paid family leave through their employers, and less than 40% have access to personal medical leave through employer-provided short-term disability insurance.

Recognizing the need for workers to have access to paid leave from work for family and medical caregiving needs, California (2002), Rhode Island (2013), New Jersey (2008) and New York (2016) have adopted legislation providing paid family and medical leave
that enables workers to receive partial income replacement when they take time away from work to address a serious health condition, including pregnancy, care for a family member with a serious health condition, or care for a newborn, newly-adopted, or newly-placed foster child. In addition, Washington state and the District of Columbia have passed paid family and medical leave laws that will go into effect in 2020. These laws provide up to 12 weeks of leave for these purposes in a 12 month period.

A 2011 study found that workers and businesses report positive effects of the California law providing paid family and medical leave. Following this lead, Representative Rosa DeLauro (D-CT) and Senator Kirsten Gillibrand (D-NY) introduced the Family and Medical Insurance Leave Act (S. 337/H.R. 947), which would provide workers with up to 12 weeks of partial income replacement when they take time away from work to care for their own serious health conditions, including pregnancy and childbirth recovery; the serious health condition of a child, parent, spouse, or domestic partner; the birth or adoption of a child; and/or for particular military caregiving and leave purposes.

Separately, there has been a very fast-spreading movement in support of paid sick and safe days legislation. Beginning with the Healthy Families Act which was first introduced by Senator Kennedy in 2005, many states and localities have now adopted similar legislation that would mandate that employers of a certain size or larger provide up to 7 days of job guaranteed paid sick leave per year to employees. The length of this leave and its purposes complements the paid, job guaranteed family and medical leave laws described above because it is for different purposes and shorter time spans – more for short term emergencies rather than longer term medical needs and family caregiving responsibilities.

As of January 2018, ten states (Arizona, California, Connecticut, Maryland, Massachusetts, New Jersey, Oregon, Rhode Island, Vermont and Washington) and the District of Columbia have adopted legislation requiring employers to provide paid sick leave to their employees. These laws vary in terms of the size of employer, the type of employee (part-time, full-time, years of employment, among others), and the amount of leave time allowed the employee. All of the laws permit the worker to take the paid sick leave to care for their own illness or that of specified family members, including children and spouses, same-sex domestic partners, domestic partners, and a person with whom the worker has a committed relationship, depending on the state. Some of these laws are considered “Paid Sick and Safe Day” laws because a worker is also permitted to use the leave to address the impacts of domestic violence, sexual assault, and/or stalking suffered by the worker, and in some states, where the worker’s family member is the victim.

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In addition, at least 30 cities and counties have adopted paid sick leave ordinances or laws that require employers to provide similar types of leave to their workers.³

On September 7, 2015, President Barack Obama signed Executive Order (EO) 13706, Establishing Paid Sick Leave for Federal Contractors and on September 30, 2016, the U.S. Department of Labor issued regulations to implement the EO.⁴ The EO requires certain employers that contract with the federal government to provide their employees with up to 7 days of paid sick leave annually. The employee may use the paid sick leave if s/he is absent because of his/her own physical or mental illness, injury, or medical condition; to obtain a diagnosis, care, or preventive care from a health care provider; to care for his or her child, parent, spouse, domestic partner, or any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship, who has any of the conditions or need for diagnosis, care, or preventative care described, or is otherwise in need of care; or to address the impact of domestic violence, sexual assault, or stalking victimization on themselves to obtain additional counseling, seek relocation, seek assistance from a victim services organization, take related legal action, including preparation for or participation in any related civil or criminal legal proceeding, or to assist an individual related to the employee as defined.

Paid, job guaranteed sick leave and paid, job guaranteed family and medical leave legislation each have broad popular support and are the logical and necessary to ensure maximum opportunities for all workers to maintain employment and meet their family, medical, and caregiving responsibilities.

The American Bar Association has a long history of supporting equality in the workplace through laws and policies that promote gender equality and equal opportunity in employment.

The ABA supports the Paycheck Fairness Act to strengthen gender-based pay discrimination protection under the Equal Pay Act of 1964. The ABA also adopted a resolution endorsing the Model Workplace Policy on Employer Responses to Domestic Violence, Sexual Violence, Dating Violence and Stalking, and encouraged all employers to enact workplace policies that address, prevent, and provide assistance to employees who experience violence and to hold perpetrators accountable. At the 2018 Midyear Meeting, the House of Delegates overwhelmingly adopted a resolution urging employers to adopt and enforce policies and procedures that prohibit, prevent, and promptly redress harassment and retaliation based on sex, gender, gender identity, sexual orientation, and the intersectionality of sex with race and/or ethnicity.

In light of its long history of supporting equitable employment practices, particularly when the burdens fall disproportionately on women, the ABA should be at the forefront of advocacy for this long overdue legislation.

Respectfully submitted,

Robert N. Weiner  
Chair, Section of Civil Rights and Social Justice  
August 2018
GENERAL INFORMATION FORM

Submitting Entity: Section of Civil Rights and Social Justice

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

1. **Summary of Resolution(s).** The resolution urges federal, state, local, territorial, and tribal governments to enact legislation providing employees with paid sick days and paid family and medical leave.

2. **Approval by Submitting Entity.** The Council of the Section of Civil Rights and Social Justice approved the Resolution on April 20, 2018.

3. **Has this or a similar resolution been submitted to the House or Board previously?** No.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** The American Bar Association has a long history of supporting equality in the workplace through laws and policies that promote gender equality and equal opportunity in employment.

   Specifically, the ABA supports the Paycheck Fairness Act to strengthen gender-based pay discrimination protection under the Equal Pay Act of 1964. The ABA also adopted a resolution endorsing the Model Workplace Policy on Employer Responses to Domestic Violence, Sexual Violence, Dating Violence and Stalking, and encouraged all employers to enact workplace policies that address, prevent, and provide assistance to employees who experience violence and to hold perpetrators accountable. And at the 2018 Midyear Meeting, the House of Delegates overwhelmingly adopted a resolution urging employers to adopt and enforce policies and procedures that prohibit, prevent, and promptly redress harassment and retaliation based on sex, gender, gender identity, sexual orientation, and the intersectionality of sex with race and/or ethnicity.

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

6. **Status of Legislation.** The adopted and pending legislation in state, local, and federal governments is addressed within the Report. See specifically notes 3 and 4 of the Report.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** We will work with relevant stakeholders within and outside of the American Bar Association and the Governmental Affairs Office to implement the policy.
8. **Cost to the Association.** (Both direct and indirect costs) Adoption of this proposed resolution would result in only minor indirect costs associated with Section staff time devoted to the policy subject matter as part of the staff members’ overall substantive responsibilities.

9. **Disclosure of Interest.** (If applicable) There are no known conflicts of interest.

10. **Referrals.** By copy of this form, the Report with Resolution will be referred to the following entities:
   - Section of Administrative Law and Regulatory Practice
   - General Practice, Solo and Small Firm Division
   - Section of Litigation
   - Section of State and Local Government Law
   - Commission on Mental and Physical Disability Law
   - Section of Business Law
   - Section of Health Law
   - Section of Family Law
   - Section of Labor and Employment
   - Client Protection Committee
   - Joint Committee on Employee Benefits

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 federal, state, local, territorial, and tribal governments to enact legislation providing employees with paid sick days and paid family and medical leave.

2. Summary of the Issue that the Resolution Addresses

There is a growing consensus that current workplace structures do not recognize the realities of the family and work lives of workers today, most notably the fact that most families no longer have one partner who is able to stay at home and care for the family and household. U.S. labor standards and workplace policies must be updated to reflect the reality of the 21st century workforce and to ensure that the nation’s public policies are in line with the needs of today’s working families.

Paid sick leave and family and medical leave have broad popular support and are the logical and long-awaited extension of the Family and Medical Leave Act, which was signed in 1993—25 years ago. The FMLA has provided many workers with job security in challenging times, but paid leave will enable many more workers to actually take leave and will address one of the contributors to the pernicious gender and racial wage gap.

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

The ABA, with its long history of supporting equitable employment practices, particularly when the burdens fall disproportionately on women, should be at the forefront of advocacy for this long overdue legislation.

Adoption of this resolution will put the ABA on record in support of legislation that provides paid and job-guaranteed family and medical leave to enable caregivers to meet the needs of their families, and to guarantee paid sick leave when employees themselves are ill.

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

No minority views or opposition have been identified.
RESOLVED, That the American Bar Association urges providers of domestic and international dispute resolution to expand their rosters with minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities ("diverse neutrals") and to encourage the selection of diverse neutrals; and

FURTHER RESOLVED, That the American Bar Association urges all users of domestic and international legal and neutral services to select and use diverse neutrals.
Report

Background

The American Bar Association has set forth four Goals of equal weight and importance to supporting the ABA Mission. Goal III, adopted in 2008, is to “eliminate bias and enhance diversity,” and is derived from and expanded on former Goal IX, which, as amended, was “to promote the full and equal participation in the profession by minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities.” Goal III (and former Goal IX) recognizes that clients and the public are better served when organizations are diverse and inclusive at every level. Goal III also recognizes the well-established business case for diversity and inclusion, and demonstrates that clients, the legal profession and society are best served when lawyers reflect the broader community in which they serve.

It is well established that, despite significant efforts, the legal profession as a whole lags behind other professions regarding diversity and inclusion. As of 2012, African Americans and Hispanics comprised 16.5% of accountants and auditors, 18.9% of financial managers, 12.3% of physicians and surgeons, but only 8.4% of attorneys. Women, members of racial and ethnic groups, members of LGBTQ groups, and attorneys with

1 Goal III: Eliminate Bias and Enhance Diversity. Objectives:
   1. Promote full and equal participation in the association, our profession, and the justice system by all persons.

2 Of course, definitions of diversity differ around the world and include categories such as religious diversity, age diversity, regional diversity, cultural diversity, and geographic diversity, as well as categories of underrepresented groups on a country-by-country basis. See White & Case, 2018 International Arbitration Survey at 16-18. Without prejudice to any potentially positive impact on diversity and inclusion, this resolution seeks only to address diversity as set forth in Goal III, as amplified by former Goal IX.


4 Raising the Bar: An analysis of African American and Hispanic/Latino diversity in the legal profession, Microsoft Study, (2013). For an event broader view of diversity in many professions, see Demographic Summary, Elizabeth Chamblis, ILLP Review (2014) at 13 (“Aggregate minority representation [defined as African American, Asian American, Hispanic and Native American] among lawyers is significantly lower than minority representation in most other management and professional jobs. Based on Department of Labor statistics, minority representation among lawyers was 14.4% in 2013, compared to 27.8% among accountants and auditors, 38.2% among software developers, 24.3% among architects and engineers, 31.8% among physicians and surgeons, and 25.8% within the professional labor force as a whole.”) See also The Diversity Crisis: What is Wrong with This Picture?, American Lawyer, May 29, 2014.
disabilities continue to be underrepresented in the legal profession. Data as a whole show some progress over time—as of December 2016, minorities represented 16% of law firm associates, partners and counsel and 35% of all law firm attorneys were female. However, data at more senior levels of the profession and for certain diverse groups present a bleaker picture. In the words of the 2017 Vault/MCCA Law Firm Diversity Report, even as firms have become more diverse and minority representation is at an all-time high, “the demographic shifts are both incremental and uneven” and “composition of the partnership ranks highlights the slow rate of change”:

Even though one in four law firm associates is a person of color, more than 90 percent of equity partners are white. Among women, the figures are especially stark: women of color represent 13 percent of associates but less than 3 percent of equity partners.”

In support of implementing Goal III to eliminate bias and enhance diversity, in August 2016 the House of Delegates of the American Bar Association adopted Resolution 113 urging that “all providers of legal services, including law firms and corporations expand and create opportunities at all levels of responsibility for diverse attorneys,” and further urging “clients to assist in the facilitation of opportunities for diverse attorneys, and to direct a greater percentage of the legal services they purchase, both currently and in the future, to diverse attorneys.”

Summary

This Resolution addresses elimination of bias and enhancing diversity in Dispute Resolution—a segment of “legal” services that has been described as “arguably the least diverse corner of the profession.” As set forth below, the available data show that diversity within Dispute Resolution significantly lags the legal profession as a whole. Despite significant efforts on the part of institutional providers of dispute resolution services to increase the diversity of their rosters, see n. 11 infra, diverse neutrals remain underrepresented (the “roster issue”). The roster issue is compounded by the fact that qualified diverse neutrals are less likely to be selected due to the network-based and confidential nature of the profession, which in combination, results in selection of neutrals taking place in relative obscurity, enabling implicit bias to play a greater role in selection (the “selection problem”). This lack of transparency also undermines potential efforts to address the selection problem. By leaving recommendations and referrals largely in the hands of outside counsel and established neutrals, it reduces the role that clients can play in addressing the problem by including Dispute Resolution in their larger efforts to improve diversity in the legal profession. In addition, the lack of transparency reduces

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6 Id. See Debra Cassens Weiss, Law lags other professions in minority hiring; which group is most dramatically underrepresented?, ABA Journal, December 11, 2013.
7 See Daniella Isaacson, Diversity in Big Law Means More Than Gender, Law.com, June 17, 2017 (“It is no secret that Big Law remains painfully stagnant.”)
8 Unlike other “legal” services, dispute resolution services are provided by both lawyers and non-lawyers.
9 Ben Hancock, ADR Business Wakes Up to Glaring Deficit in Diversity, Law 360 (2016) at 4.
public awareness of lack of diversity in Dispute Resolution, and thus also reduces the incentive of stakeholders such as outside counsel, institutional service providers and established neutrals to take proactive steps without client pressure. By raising awareness of the lack of diversity in Dispute Resolution, the proposed resolution will encourage all stakeholders to take action.

I. Data demonstrate that diversity within Dispute Resolution is significantly below that of the legal profession as a whole.

It is to be expected that diversity and inclusion issues faced by the legal profession as a whole would be largely reflected in subsets of the profession. Unfortunately, for the Dispute Resolution community of diverse mediators, arbitrators, and other dispute resolution practitioners (collectively, “diverse neutrals”), “ADR has been a stubborn enclave of homogeneity”\(^\text{10}\) and simply achieving the “incremental and uneven” advances achieved by the legal profession as a whole would be a great leap forward.\(^\text{11}\) Despite significant efforts by organizations and individuals within the Dispute Resolution community to address the lack of diversity,\(^\text{12}\) the Dispute Resolution profession lags significantly behind the legal profession as a whole.

A. Representation of diverse groups on the rosters of dispute resolution providers is significantly lower than representation of diverse groups in the legal profession as a whole.

Due to the confidentiality and privacy issues that are integral to most dispute resolution processes, data on the diversity of neutrals within Dispute Resolution are scarce. In fact, yearly statistics of the type collected for the legal profession as a whole are almost non-

\(^{10}\) Id.


\(^{12}\) For over a decade, certain Dispute Resolution institutions and diverse neutrals, cognizant of the diversity issues, have worked to improve diversity in the profession. For example, in 2006, the International Institute of Conflict Prevention and Resolution (the “CPR Institute”) convened the National Task Force on Diversity in ADR and, in 2007, the Diversity Task Force, created an ADR Diversity Survey to assist corporations in holding their law firms accountable for improving diversity in Dispute Resolution. In 2013, CPR created a “Diversity Matters Pledge,” allowing companies and individuals to recognize the value of diversity and inclusion not only in their workforce, but also providers of services including arbitration and mediation. The American Arbitration Association established its Leon Higginbotham Fellowship in the early 2000’s to train and promote diverse neutrals, and requires its case managers to create neutral candidate lists for parties that are at least 20% diverse. See also nn. 14, 22 and 32, infra.
existent. The data that can be found consistently reveal that representation of women and members of racial and ethnic groups on rosters of neutrals is below that of the legal profession as a whole.

As of 2015, FINRA became the only dispute resolution service provider that gathers and publishes comprehensive demographic data regarding its roster on a year-over-year basis. FINRA has made a strong commitment to enhancing diversity on its roster. However, FINRA itself describes this process as “incremental,” in part because in 2015, its roster as a whole, based on responses by FINRA neutrals to an outside survey, was 75% male and 86% Caucasian. Less comprehensive data from other dispute resolution service providers show lower levels of diversity. JAMS, a nationwide provider of dispute resolution services, reports on its website that 22% of the neutrals on its roster are women and 9% are persons of color. The American Arbitration Association, another major ADR provider, reported that women and minorities comprised 25% of its roster in 2017. In a 2012 survey, the National Arbitration and Mediation (NAM), another nationwide ADR provider, found that its roster was 16% female and 14% nonwhite. In 2016, the New York-based CPR Institute reported that its roster of more than 550 neutrals worldwide was approximately 15% female and 14% nonwhite.

Viewed in the context of the Vault/MCCA Law Firm Diversity Survey, the roster data available from FINRA, JAMS, AAA, NAM and CPR indicate that gender and racial/ethnic diversity of institutional providers of dispute resolution services is likely to be less than one-half that of law firms.

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13 See, e.g., Andrea Schneider, The Business of ADR—And Lack of Diversity, indisputably.org, October 5, 2016 (“Statistics are hard to come by and most ADR organizations are reluctant to provide data on their panels.)

14 As a result of FINRA’s efforts to increase the diversity of its roster, the FINRA survey results show that of the new arbitrators who joined the roster in 2016, 26% were members of racial and ethnic minorities (29% in 2015) and 33% were women (26% in 2015). Our Commitment to Achieving Arbitrator and Mediator Diversity at FINRA https://www.finra.org/arbitration-and-mediation/diversity-and-finra-arbitrator-recruitment.

15 Id.

16 https://www.jamsadr.com/diversity/.

17 AAA 2017 B2B Dispute Resolution Infographic.

18 Hancock at 12.

19 Id.

20 Vault/MCCA Survey data indicate that 2.5 % of law firm attorneys are openly gay, lesbian, bisexual or transgender. Roster data for members of LGBTQ groups within Dispute Resolution is unavailable. According to the Vault/MCCA Survey, reliable data for attorneys with disabilities in the legal profession as a whole is unavailable and that is also the case for Dispute Resolution. See Benjamin G. Davis, Diversity in International Arbitration, Dispute Resolution Magazine (Winter 2014) (“there are an infinitesimal number of American lawyers with disabilities or American LGBTQ lawyers in international arbitration”). https://www.mcca.com/wp-content/uploads/2017/12/2017-Vault-MCCA-Law-Firm-Diversity-Survey-Report.pdf.

21 It has been suggested that Dispute Resolution suffers from a “chronological lag” and “reflects a legal industry not as it looks today, but as it appeared a decade or more ago.” See Hancock at 6. However, law school and law firm diversity data show greater diversity than that seen in Dispute Resolution for decades. Data from the ABA Commission on Women in the Profession shows, for example, that women have comprised close to 50% of JDs awarded for well over a decade.
B. Qualified diverse neutrals are less likely to be selected.

The challenges faced by diverse neutrals go beyond significant underrepresentation on rosters. Available data demonstrate that, even when they succeed in being added to rosters, qualified women and members of racial and ethnic groups are selected to serve as neutrals at levels below their representation in the profession. For example, in its 2015 Key Statistics, the AAA reported that 26% of arbitration cases had a diverse arbitrator. Low as that number is, if you look behind the aggregate numbers to the distribution of cases for which diverse neutrals are selected, the problem is actually worse:

[A]vailable statistics mask the true extent of the problem. Even if providers have a diverse roster of people to choose from, what matters is who ultimately wins the work from attorneys and clients. Many sources agreed that, within the realm of business disputes, there is a small pool of ‘repeat players’ who are predominantly white and male.

In July 2017, a report by the Commercial & Federal Litigation Section of the New York State Bar Association noted, in particular, the low rate of selection of female neutrals for high-value cases:

It should come as no surprise that much has been written about the lack of diversity among ADR neutrals, especially for high-value cases. As a 2017 article examining gender differences in dispute resolution practice put it, ‘the more high-stakes the case, the lower the odds that a woman would be involved.’ [Citation omitted.] Data from a 2014 ABA Dispute Resolution Section survey indicated that for cases with between one and ten million dollars at issue, 82% of neutrals and 89% of arbitrators were men. [Citation omitted.] Another survey estimated that women

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22 Berwin Leighton Paisner, Diversity in International Arbitration: Are We Getting There? (Feb. 2017). Data from the international arbitration arena supports this conclusion as well. International Chamber of Commerce (“ICC”) statistics for 2015 indicate that women represented 10% of all appointments and confirmations. ICC data on arbitral appointments for 2016 shows that, as of November 2016, only 20% of arbitrators appointed were women. London Court of International Arbitration (“LCIA”) statistics show that, in 2015, the number of female candidates selected by the LCIA was 28.2% (compared to 19.8% in 2014). Statistics from the Chartered Institute of Arbitrators indicate that, of the 222 arbitrators qualified to be on the panel from which presidential appointments are made, only 16 (7%) are women. As the overwhelming number of men appointed are Caucasian, there are few statistics on minority ethnic and racial representation on international tribunals. http://www.biplaw.com/media/download/FINAL-Arbitration_Survey_Report.pdf. In recognition of the under-representation of women on international arbitral tribunals, members of the international arbitration community drew up an “Equal representation in Arbitration” pledge (“the Pledge”) to take action. The Pledge seeks to increase, on an equal opportunity basis, the number of women appointed as arbitrators in order to achieve a fair representation as soon practically possible, with the ultimate goal of full parity. This Pledge has been signed by the Section on Dispute Resolution, as well as the Section of International Law and the Section of Litigation. http://www.arbitrationpledge.com/about-the-pledge.  

23 Hancock at 8.
arbitrators were involved in just 4% of cases involving one billion dollars or more.”
[Citation omitted.]^{24}

The 2014 survey by the ABA’s Section on Dispute Resolution is particularly revealing. Data from that survey show an inverse relationship between the amount of money in dispute and the proportion of women selected as a neutral.^{25} The survey also shows that selection rates for male neutrals are exceptionally high (and, conversely, low for female neutrals) for corporate and commercial matters (82% male) and class actions (79% male).^{26} In contrast, only 42% of neutrals involved in cases that were primarily nonmonetary were male.^{27}

This selection problem has at least two major ripple effects. First, it exacerbates the roster issue because it is difficult to increase the diversity of rosters when potential recruits are aware that they are less likely to be selected, particularly for the higher paying cases. It simply may not be economically rational to invest in the requisite training and developing the experience to become a neutral in the face of reduced opportunity to build an economically viable practice. Second, low levels of diversity in neutral selection “show the profession falling significantly short of federal courts,”^{28} which can call into question the legitimacy of the private justice process:

> Neutrals in both arbitration and mediation serve a role that is often a substitute for (and sometimes annexed to) the judicial process. Therefore, it becomes an issue of fairness that the decision-makers or facilitators should be representative of the individuals, institutions and communities that come before them.^{29}

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25 See Gina Viola Brown and Andrea Kupfer Schneider, Gender Differences in Dispute Resolution Practice, Report on the ABA Section of Dispute Resolution Practice Survey, (January 31, 2014), at Chart 17.
26 Hancock at 5 (“Diversity is especially paltry in high-stakes disputes where neutrals can command rates topping $25,000 a day.”)
27 Brown and Schneider at 14-16.
28 Hancock at 7; See also Laura Kaster, Why and How Corporations Must Act Now to Improve ADR Diversity, Corporate Disputes (January-March 2015) (“[S]tate and federal courts, which are still struggling to improve, have close to 30 percent women (although fewer minority) judges.”)
29 David H. Burt and Laura A. Kaster, Why Bringing Diversity to ADR Is a Necessity, ACC Docket (October 2013) at 41. See also ADR Conversations – Increased Diversity in ADR Essential to Keep Up With Evolving Global Marketplace, JAMS Dispute Resolution Alert Winter 2012, at 4 (“When a dispute is resolved in the court system, the jury and the judge available to resolve the dispute are diverse. The private justice system that provides mediation and arbitration services must be just as, if not more, diverse if it is to maintain credibility.”); see also Volpe at 122 (“Studies show that individuals involved in dispute resolution processes feel more comfortable when they share some aspect of their identity with those guiding the process.”) See also What Works in District Court Day of Trial Mediation: Effectiveness of Various Mediation Strategies on Short- and Long- Term Outcomes, Maryland Judiciary Administrative Office of the Courts, Court Operations. (2016). What Works in District Court Day of Trial Mediation: Effectiveness of Various Mediation Strategies on Short- and Long-Term Outcomes. Annapolis, MD: Author (“Having at least one ADR practitioner in the session who matches the race of the responding participant was positively associated with participants reporting that they listened and understood each other in the ADR session and jointly controlled the outcome and an increase in a sense of self-efficacy (ability to talk and make a difference) and an increase in the sense that the court cares from before to
For these reasons, the individual and societal impacts of the low level of diversity in Dispute Resolution cannot be remedied by addressing the roster issue alone. Simply put, despite the underrepresentation of diverse neutrals on provider rosters, qualified diverse neutrals are practicing today and can be easily identified. To improve diversity in Dispute Resolution, it is essential to create an environment in which we can address the drivers behind the low levels of selection of diverse neutrals.

II. A network-based culture, reinforced by implicit bias and cloaked in confidentiality, reduces selection of diverse neutrals.

Commentators have identified two issues in particular that appear to be primary drivers of low levels of selection of diverse neutrals for cases. First, the practical reality is that Dispute Resolution is largely a network-based profession in that: (1) many neutrals are chosen or at least vetted through the networks of equity law firm partners, and (2) established neutrals are often asked to make referrals to other neutrals. In both cases, the networks are largely white and male, and the recommendations and referrals subject to implicit bias. Second, the confidentiality and privacy that are integral elements of most dispute resolution processes reduce public awareness of the scope of the problem, most notably awareness on the part of the stakeholders in the best position to bring about change—clients.
A. The network-based culture broadens the impact of implicit bias.

Neutral appointment and selection processes vary by dispute resolution providers, and are often customized by the parties. Regardless of the formal process applicable to a dispute, however, neutrals are predominantly hired based on the consent of the parties. Thus, they are often informally vetted and selected through a classic informal "old boy network" through which colleagues consult one another for recommendations:

Companies largely continue to outsource both the drafting of dispute resolution clauses and the actual neutral selection to outside counsel, abdicating these fundamental strategic decisions to others. Far too much reliance is placed on established networks, word-of-mouth, and the recommendations of the same 'usual suspects,' leading to a reluctance to try out someone new and an attendant loss of opportunity to broaden the company’s roster of preferred neutrals.33

It is natural and indeed common for people to recommend and select those with whom they are most familiar. However, it has been suggested that “[t]his dynamic, flows at least partly from a sense among attorneys that retired judges and veteran litigators, a largely older, white and male cohort, are the most palatable figures to clients when pursuing a dispute outside of the courtroom.”34 Unfortunately, this tendency is reinforced by implicit biases to which we are all subject and that often lead even well-meaning individuals to pass over those who are “different.”35 The network-based culture and implicit bias, operating in tandem, are key drivers of the low levels of diverse neutrals actually selected for better-paying commercial matters—levels that are much lower than diversity in Dispute Resolution, as well as diversity in the legal profession as a whole.36

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33 Cheng at 19. See Gender Diversity in Arbitrator Selection, Deborah Rothman, Dispute Resolution Magazine, (Spring 2012) at 24 ("Even when women manage to get recruited to the arbitration panels of major ADR providers, they are not as likely to be selected as their male counterparts. When they receive a strike list of ten potential arbitrators, the law firm drill is to circulate an internal memo to get feedback on the names on the list.") See also 2018 International Arbitration Survey at 20 (survey responses show “how important it is for parties and their in-house or external counsel to be part of a sophisticated network of peers so that all relevant information is potentially just a few phone calls away.”)

34 See Implicit Bias and the Legal Profession’s ‘Diversity Crisis’: A Call for Self Reflection, Nicole Negowetti, Nevada Law Journal, 432, at 436-442 and 447-451, 2015. See also Debra Cassens Weiss, Partners in study gave legal memo a lower rating when told the author wasn’t white, ABA Journal (April 21, 2014) (Leadership consulting firm Nextion conducted an experiment to demonstrate implicit bias in evaluation of legal work by recruiting partners from a large number of firms to review a legal memo in a “writing analysis survey.” All of the partners were given the same memo, in which Nextion inserted errors. Half of the reviewers were told that the memo was written by a white man named Thomas Meyer and half were told that it was written by a black man named Thomas Meyer. The reviews gave the memo supposedly written by the white Thomas Meyer an average rating of 4.1 out of 5, and generally praised his work. Reviewers gave the memo written by the black Thomas Myer an average rating of 3.2 out of 5, and criticized the memo as average at best and needing a lot of work.)

35 Hancock at 10.

36 While implicit bias is an issue for all diverse groups, it has been suggested that the risk of implicit bias increases at lower levels of representation. See Isaacson at 1 (“Take minorities, for instance. As seen in the graph below, the threat of implicit bias for minority groups is even higher than it is for women, due to their lack of representation.”)
B. Confidentiality and lack of transparency inhibit effective solutions to the lack of diversity in Dispute Resolution.

The effects of a network-based culture and implicit bias are compounded by the confidentiality and privacy that are important elements of mediation, arbitration and other dispute resolution processes. Confidentiality (often cited as the reason for the lack of data) inherently reduces public awareness of the low level of diversity and inclusion in Dispute Resolution, and thus, public pressure for change. But the problem extends beyond lack of public awareness. The tendency of companies to outsource neutral selection to outside counsel creates a functional lack of transparency to clients regarding diversity issues in Dispute Resolution. That lack of transparency, in turn, undermines the ability of clients to act as agents of change. Consequently, clients often fail to focus on enhancing opportunities for diverse neutrals as part of their broader and influential efforts to enhance diversity in the legal profession. This is particularly harmful because inside counsel have a special ability to require greater diversity—for example, through the use of tools such as Outside Counsel Guidelines.\textsuperscript{37} Greater client focus and willingness to require change are essential to driving the changes necessary to improving diversity in Dispute Resolution:

Achieving real progress will not only require continued attention from providers in terms of recruiting and supporting women and minority mediators and arbitrators, but also clients who are willing to ask questions that perhaps they haven’t in the past. This includes questions from corporate counsel to their law firms and from outside counsel to ADR providers. It will take willingness for clients to go beyond using the same people from the same short list. It will take ensuring that there is a sufficient pipeline of women and minorities that know what it takes to prepare for a career as a successful mediator or arbitrator.\textsuperscript{38}

\begin{footnotesize}
\textsuperscript{37} ADR Conversations – Increased Diversity in ADR Essential to Keep Up With Evolving Global Marketplace", JAMS Dispute Resolution Alert (Winter 2012), at 4 (“As legal departments enter into professional relationships with law firms and other legal vendors, they include diversity as a criterion for engagement, and the policy should be extended to requiring consideration and selection of mediators and arbitrators with diverse backgrounds”); see also Mark Smalls, A Fresh Look at Diversity in ADR, Law360 (December 13, 2012) (“One need only look at the pressure that various corporate clients put on their outside counsel in recent years regarding hiring, promotion and case assignments to see how paying attention to diversity can lead to securing (or losing) business.”)

\textsuperscript{38} Smalls at 2.
\end{footnotesize}
Conclusion

To enhance diversity and inclusion in Dispute Resolution, it is essential to shine a spotlight on the low level of diverse representation on neutral rosters and the special challenges created by the combination of the network-based culture within the profession, implicit bias, and the confidentiality that tends to obscure the degree to which Dispute Resolution lags behind the legal profession as a whole. By explicitly linking ABA Goal III to Dispute Resolution, this Resolution provides precisely the spotlight needed to encourage active engagement on the part of all stakeholders with the ability to move the needle to increase representation of diverse neutrals on rosters, and to enhance their likelihood of success in the selection process.

Respectfully Submitted,

Section Chair, Ben Davis
Dispute Resolution Section
August, 2018
GENERAL INFORMATION FORM

Submitting Entity: Section of Dispute Resolution
Submitted By: Benjamin G. Davis, Chair of the Section of Dispute Resolution

1. **Summary of Resolution:** The resolution urges (a) providers of domestic and international dispute resolution to expand their rosters with diverse and to encourage the selection of diverse neutrals; and (b) users of domestic and international legal and neutral services to select and use diverse neutrals.

2. **Approval by Submitting Entity:** This Resolution and Report was formally approved by a vote of the Section of Dispute Resolution Council during its meeting in Washington, D. C. on February 9, 2018.

3. **Has this or a similar resolution been submitted to the House or the Board Previously?**
   This specific resolution has not been previously submitted. In 2016, however, the HOD adopted a resolution for the ABA to urge (a) all providers of legal services, including corporations and law firms, to expand and create opportunities at all levels of responsibilities for diverse attorneys; and (b) clients to assist in the facilitation of opportunities for diverse attorneys, and to direct a greater percentage of the legal services they purchase, both currently and in the future, to diverse attorneys. In addition, in 1986, the HOD adopted a resolution for the ABA to “take concrete actions with regard to the hiring, recruitment, promotion and advancement of minority lawyers.” The instant resolution is the logical progression of the 1986 and 2016 resolutions passed by the HOD and is necessary to further advance diversity and inclusion in Dispute Resolution.

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

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

6. **Status of Legislation.** (If applicable) N/A
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The Dispute Resolution Section is developing tools for systematic collection of data addressing the issues set forth in the Report in order to provide a foundation to identify, develop, and implement more effective approaches to enhancing diversity. In addition, the Section intends to seek opportunities to collaborate with both the Commission on the Status of Women in the Profession and the Commission on Racial and Ethnic Diversity to better assure that diversity in Dispute resolution is an integral element of efforts to enhance diversity in the legal profession as a whole.

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

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

10. Referrals.
All SDFs and All Commissions
National Bar Association
Hispanic National Bar Association
National Asian Pacific Bar Association
National Native American Bar Association

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

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution focuses on expanding representation of diverse neutrals on the rosters of providers of domestic and international dispute resolution and encourages users of domestic and international dispute resolution legal and neutral services to promote and support the selection thereof. The Resolution is a continuation of the policies adopted previously by the American Bar Association addressing the need for diversity in the selection and use of diverse individuals in the provision of professional dispute neutral services in Resolution 113 and in furtherance of Goal III.

2. Summary of the Issue that the Resolution Addresses

This Resolution encourages and supports the selection of diverse dispute neutrals.

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

This proposed policy position addresses the issue through the encouragement and support of hiring diverse dispute neutrals by lawyers, law firms, and dispute resolution service providers.

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

The Section of Dispute Resolution is unaware of any minority views or opposition, either internal or external, to this proposed policy.
RESOLVED, That the American Bar Association adopts the *American Bar Association Model Code of Judicial Conduct for State Administrative Law Judges* dated August 2018, as applied to members of the administrative judiciary. For purposes of this resolution, the administrative judiciary includes all individuals whose exclusive role in the administrative process is to preside and make decisions in judicial or quasi-judicial capacity in evidentiary proceedings, but does not include agency heads, members of agency appellate boards, or other officials who perform the adjudicative functions of an agency head; and

FURTHER RESOLVED, That the American Bar Association urges state, local, and territorial governments to enact and adopt ethical principles applicable to the administrative judiciary, as defined herein, in accordance with the *Model Code*. 
Most of the text herein is based on the 2007 American Bar Association Model Code of Judicial Conduct which was approved by the House of Delegates of the American Bar Association and represents the policy of the American Bar Association. Please bear in mind that modifications to address the functions of administrative law judges have not been approved by the House and, thus, are not yet the policy of the American Bar Association.

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In 1989, following 12 years of effort, the Conference endorsed a Model Code for Federal Administrative Law Judges which was published by the ABA and has been circulated. Because of the widely differing systems of administrative adjudications at the state level, it was recognized that a separate Model Code for State Administrative Law Judges should be developed. The 1995 Model Code of Judicial Conduct for State Administrative Law Judges reflected the culmination of the efforts of the National Conference of the Administrative Law Judiciary (NCALJ), State Practices Committee (attached) chaired by Judge Edwin L. Felter, Jr., then Chief Administrative Law Judge of the Central Panel of the State of Colorado, and the NCALJ Committee on Ethics and Responsibility, chaired by Judge Ronnie Yoder (Federal), Judge Felter, Vice-Chair (State).

The 1995 Model Code was endorsed by the Executive Committee of the National Conference of Administrative Law Judges at the 1995 annual meeting in Chicago, Illinois. The conference approved the distribution of the code to state administrative law judges as a reference for them in considering their own conduct and for others in considering the Code of Judicial Conduct appropriately applicable to state administrative law judges. The Code was based upon the 1990 Model Code of Judicial Conduct of the American Bar Association (ABA) and the 1989 Model Code for Federal Administrative Law Judges, with modifications considered appropriate in adapting the Code for state administrative law judges. The 1995 Code assumed decisional independence by the covered administrative law judges and served as an aspirational code for hearing officers who are not guaranteed such decisional independence.

The first ABA Code was adopted in 1972 and amended in 1982 and 1984. Neither the model ABA code nor the Model Code for State Administrative Law Judges would apply to any judge unless adopted by the responsible adjudicatory agency. The 1990 ABA Code for the judicial branch was adapted and adopted by 47 states and the District of Columbia: Adoption and endorsement of the 1995 Model Code for State Administrative Law Judges by NCALJ did not make that Code applicable to any administrative law judge but was intended to reflect the considered judgment of the Conference on appropriate provisions in adapting the ABA Code for state administrative law judges.

As noted in the Preface of the Model Code for federal administrative law judges:

"The Code has not been adapted to apply to state administrative law judges and hearing officers, because of the wide variations in the nature of those positions. See ABA Informal Opinion 86-1522 dated December 24, 1986, holding that, if the applicability of the ABA Model Code to federal administrative law judges is assumed, then they are 'judges' within the meaning of the Code and that applicability of the Code to state administrative law judges 'depends upon the facts of the particular case.'"
Most states have adopted some version of the State Model Administrative Procedure Act, but administrative adjudications are conducted within agencies by a wide variety of hearing officers, including attorneys and non-attorneys, with a variety of titles and various degrees of decisional independence. In addition, twenty-five states, three cities and one county\(^1\) have central panel systems where ALJs in central panels hold hearings for a variety of agencies.

In 2007, the ABA, after years of efforts, adopted a new Model Code of Judicial Conduct, which represented a significant change from the 1990 Code. The most important paradigm shift in the 2007 Code was that the Canons enunciated general principles, and each Canon is broken down into enforceable rules. The ABA House of Delegates resoundingly approved the 2007 Code, which has now been adopted (almost “lock, stock and barrel”) by more than a majority of states. The Application Section of the 2007 Model Code [I (A)] states that the code applies to all full-time judges. Section I (B) of the Application Section defines “judge” as including “member(s) of the administrative law judiciary.” Thirty-Three states have approved a revised Judicial Code for the judicial branch, based on the 2007 ABA Model Code and forty-seven states have initiated or completed review of their judicial codes in light of the 2007 ABA Model Code (Appendix A).

**AD HOC COMMITTEE TO REVISE AND UPDATE 1995 MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMINISTRATIVE LAW JUDGES**


The Ad Hoc Committee consists of:

- Lorraine Lee, Chief Administrative Law Judge, Washington State Office of Administrative Hearings (Member, NCALJ Executive Committee);
- John Allen, former Chief Administrative Law Judge, Cook County, Illinois (Member, NCALJ Executive Committee);
- Edwin L. Felter, Jr., Senior Administrative Law Judge, Colorado Office of Administrative Courts;
- Julian Mann III, Chief Administrative Law Judge, North Carolina / Chair of NCALJ (2015/2016), Ex-Officio;
- Amanda Banninga, Staff Director, NCALJ.

\(^{1}\)New York City; Washington, D.C; Chicago; and, Cook County, Illinois
PREAMBLE

The Model Code of Judicial Conduct for State Administrative Law Judges (hereinafter “Model Code”) is intended to establish basic ethical standards for administrative law judges or any other hearing officials, whatever their title, in any state. The Code is intended to govern the conduct of these administrative law judges (hereinafter “ALJs”) and to provide guidance to assist administrative law judges in establishing and maintaining high standards of judicial and personal conduct. This Code is based upon the Model Code of Judicial Conduct as adopted by the ABA in 2007.

The text of the rules under the canons is intended to be authoritative and enforceable. The commentary, by explanation and example, provides guidance with respect to the purpose and meaning of the rules. The commentary is not intended as a statement of additional rules. When the text uses shall or shall not, it is intended to impose binding obligations, the violation of which can result in disciplinary action. When should or should not is used, the text is a statement of what is or is not appropriate conduct, but not as a binding rule under which a judge may be disciplined. When “may” is used, it denotes permissible discretion or, depending on the context, it refers to action that is not covered by specific proscriptions.

The terms administrative law judge or judge are intended to include all hearing officers, referees, trial examiners or any other person holding office to whom the authority to conduct an administrative adjudication has been delegated by the agency or by the governmental entity, or by statute and who exercises independent and impartial judgment in conducting hearings and in issuing initial or final decisions containing findings of fact and conclusions of law in accordance with the applicable statutes or agency rules and without ex parte communication or instruction as proscribed in Canon Rule 2.9. Such decisions should be binding on all parties to the action, including the agency, unless modified—or reversed by the agency as authorized by law. An administrative law judge should be removable for good cause.

The canons and rules thereunder are rules of reason. They should be applied consistently with constitutional requirements, statutes, administrative rules, and decisional law and in the context of all relevant circumstances. The Code is to be construed so as not to impinge on the essential independence of judges in making judicial decisions.

The code is designed to provide guidance to an ALJ and to provide a structure for regulating conduct. However, it is not intended, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned
application of the text and should depend on such factors as the seriousness of the
transgression, whether there is a pattern of improper activity, and the effect of the
improper activity on others or on the administrative law system. The Code is not
designed or intended as a basis for civil liability or criminal prosecution. Furthermore,
the purpose of the code would be subverted if the Code were invoked by lawyers for
mere tactical advantage in a proceeding.

CANON I

AN ADMINISTRATIVE LAW JUDGE SHALL UPHOLD AND PROMOTE THE
INDEPENDENCE, INTEGRITY, AND IMPARTIALITY OF THE ADMINISTRATIVE LAW
JUDICIARY AND AVOID THE APPEARANCE OF IMPROPRIETY.

Rule 1.1: Compliance with the Law

An ALJ shall comply with the law, including the Code of Conduct for Administrative Law
Judges.

Comment

None.

Rule 1.2: Promoting Confidence in the Administrative Law Judiciary

An ALJ shall act at all times in a manner that promotes public confidence in the
independence, integrity, and impartiality of the administrative law judiciary, and shall
avoid impropriety and the appearance of impropriety.

Comment

[1] An independent and honorable administrative law judiciary is indispensable to justice
in our society. An ALJ should participate in establishing, maintaining, and enforcing high
standards of conduct and shall personally observe those standards so that the integrity
and independence of the administrative law judiciary is preserved. The provisions of this
code shall be construed and applied to further that objective.

[2] Deference to the judgments and rulings in administrative proceedings depends upon
public confidence in the integrity and independence of ALJs. The integrity and
independence of ALJs depends in turn upon their acting without fear or favor. Although
ALJs should be independent, they must comply with the law, including the provisions of
this Code. Public confidence in the impartiality of the administrative law judiciary is
maintained by the adherence of each ALJ to this responsibility. Conversely, violation of
this code diminishes public confidence in the administrative law judiciary and thereby
does injury to our system of government.
Rule 1.3: Avoiding Abuse of Prestige of Judicial Office

An administrative law judge shall not abuse the prestige of office to advance the personal or economic interests of the judge or others, or allow others to do so.

Comment

[1] It is improper for an ALJ to use or attempt to use their position to gain personal advantage or deferential treatment of any kind. For example, an ALJ must not use judicial letterhead to gain an advantage in conducting their personal business.

[2] A judge may provide a reference or recommendation for an individual based upon the ALJ’s personal knowledge, using official letterhead if there is no likelihood that the use of the letterhead would reasonably be perceived as an attempt to exert pressure by reason of the judicial office.

[3] Special considerations arise when ALJs write or contribute to publications of for-profit entities, whether related or unrelated to the law. An ALJ should not permit anyone associated with the publication of such materials to exploit the ALJ’s office in a manner that violates this Rule or other applicable law. The ALJ should retain sufficient control over the advertising to avoid such exploitation.

CANON 2

AN ADMINISTRATIVE LAW JUDGE SHALL PERFORM THE DUTIES OF OFFICE IMPARTIALLY, COMPETENTLY, AND DILIGENTLY.

Rule 2.1: Giving Precedence to the Duties of Office

The duties of office, as prescribed by law, shall take precedence over all of an ALJ’s personal and extrajudicial activities.

Comment

[1] To ensure that ALJ’s are available to fulfill their judicial duties, ALJ’s must conduct their personal and extrajudicial activities to minimize the risk of conflicts that would result in frequent disqualification. See Canon 3.

[2] Although it is not a duty of office unless prescribed by law, ALJs are encouraged to participate in activities that promote public understanding of and confidence in the administrative justice system.
Rule 2.2: Impartiality and Fairness

An ALJ shall uphold and apply the law and shall perform all duties of office fairly and impartially.

Comment

[1] To ensure impartiality and fairness to all parties, an ALJ must be objective and open-minded.

[2] Although each ALJ comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the ALJ approves or disapproves of the law in question.

[3] When applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law. Errors of this kind do not violate this Rule.

[4] It is not a violation of this Rule for an ALJ to make reasonable accommodations to ensure self-represented litigants are afforded the opportunity to have their matters fairly heard.

Rule 2.3: Bias, Prejudice and Harassment

(A) An ALJ shall perform the duties of office, including administrative duties, without bias or prejudice.

(B) An ALJ shall not, in the performance of official duties, by words or conduct manifest bias or prejudice, or engage in harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit support staff, or others subject to the ALJ’s direction and control to do so.

(C) An ALJ shall require lawyers in proceedings before the ALJ to refrain from manifesting bias or prejudice, or engaging in harassment, based on attributes or factors enumerated in (B) above, against parties, witnesses, lawyers, or others.

Comment

[1] An ALJ who manifests bias or prejudice impairs the fairness of proceedings and brings the administrative judiciary into disrepute.

[2] Examples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based on stereotypes; threatening; intimidating; or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal
characteristics. Even facial expressions and body language can convey to parties and
lawyers, the media, and others an appearance of bias or prejudice. An ALJ must avoid
conduct that may reasonably be perceived as prejudiced or biased.

[3] Harassment, as referred to in paragraphs (B) and (C) is verbal or physical conduct
that denigrates or shows hostility or aversion toward a person on bases such as the
factors enumerated in (2) above.

[4] Sexual harassment includes but is not limited to sexual advances, requests for
sexual favors, and other verbal or physical conduct of a sexual nature that is
unwelcome.

Rule 2.4: External Influences on Judicial Conduct

(A) An ALJ shall not be swayed by public clamor or fear of criticism.

(B) An ALJ shall not permit family, social, political, financial, or other interests or
relationships to influence the ALJ’s judicial conduct or judgment.

(C) An ALJ shall not convey or permit others to convey the impression that any person
or organization is in a position to influence the ALJ.

Comment

An independent administrative law judiciary requires that judges decide cases according
to the law and facts, without regard to whether particular laws or litigants are popular or
unpopular. Confidence in the administrative law judiciary is eroded if decision making is
perceived to be subject to inappropriate outside influences.

Rule 2.5 Competence, Diligence, and Cooperation

(A) An ALJ shall perform judicial and administrative duties competently and diligently.

(B) An ALJ shall cooperate with other ALJs, legal professionals and other officials in the
administration of official business.

Comment

[1] Competence in the performance of judicial duties requires the legal knowledge, skill,
thoroughness, and preparation reasonably necessary to perform judicial responsibilities.

[2] An ALJ should seek the necessary docket time and resources to discharge all
adjudicative and administrative responsibilities.
[3] Prompt disposition of the ALJ’s business requires the ALJ to devote adequate time to judicial duties, to be punctual in attending hearings and expeditious in determining matters, and to take reasonable measures to ensure that staff, litigants, and their lawyers or lay representatives cooperate with the ALJ to that end.

[4] In disposing of matters promptly, an ALJ must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. An ALJ should monitor and supervise cases in ways that reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs. Attention to prompt resolution of the ALJ’s docket, and issuing decisions without undue delay, is critical to the effectiveness and efficiency of administrative justice organizations. To quote William Penn, “To delay Justice is Injustice.”

Rule 2.6: Ensuring the Right to Be Heard

(A) An ALJ shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer or lay representative, the right to be heard according to law.

(B) An ALJ may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.

Comment

None.

Rule 2.7 Responsibility to Decide

An ALJ shall hear and decide matters assigned to the ALJ, except where disqualification is required by Rule 2.11 or other law.

Comment

None.

Rule 2.8: Decorum and Demeanor

(A) An ALJ shall require order and decorum in proceedings before the ALJ.

(B) An ALJ shall be patient, dignified, and courteous to litigants, witnesses, lawyers, staff and others with whom the ALJ deals in an official capacity, and shall require similar conduct of lawyers, staff, officials, and others subject to the ALJ’s direction and control.

Comment

None.
Rule 2.9: Ex Parte Communications

(A) An ALJ shall not initiate, permit, or consider ex parte communications, or consider other communications made to the ALJ outside the presence of the parties or their lawyers, concerning a pending or impending matter, including communications from an agency/litigant, except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

(a) the ALJ reasonably believes that no party will gain a procedural, substantive or tactical advantage as a result of the ex parte communication; and,

(b) the ALJ makes provision to promptly notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

(2) An ALJ may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the ALJ, if the ALJ gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.

(3) An ALJ may consult with staff and officials whose functions are to aid the ALJ in carrying out the ALJ’s adjudicative responsibilities (this excludes agency personnel with regard to a pending or impending matter before the ALJ), or with other ALJs or Law Clerks under the direction and control of the ALJ, provided the ALJ makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility to personally decide the matter.

(4) An ALJ may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle some issues pending before the ALJ.

(5) An ALJ may initiate, permit, or consider any ex parte communications when expressly authorized by law to do so.

(B) If an ALJ inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the ALJ shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.
(C) An ALJ shall not investigate facts in a matter independently, and shall consider only
the evidence presented and any facts that may properly be subject to administrative
notice. This prohibition includes independent internet research.

(D) An ALJ shall make reasonable efforts, including providing appropriate supervision,
to ensure that this Rule is not violated by staff, law clerks, and others subject to the
ALJ’s direction and control.

Comment

None.

Rule 2.10: Statements on Pending and Impending Cases

(A) An ALJ shall not make any public statement that might reasonably be expected to
affect the outcome or impair the fairness of a matter pending or impending in any
tribunal, or make any non-public statement that might substantially interfere with a fair
hearing.

(B) An ALJ shall not, in connection with cases, controversies, or issues that are likely to
come before the ALJ, make pledges, promises, or commitments that are inconsistent
with the impartial performance of the adjudicative duties of office.

(C) An ALJ shall require staff and others subject to the ALJ’s direction and control to
refrain from making statements that the ALJ would be prohibited from making by
paragraph (A) and (B).

(D) Notwithstanding the restrictions in paragraph (A), an ALJ may make public
statements in the course of performing their official duties, may explain tribunal
procedures, and may comment on any proceeding in which the ALJ is a litigant in a
personal capacity.

(E) Subject to the requirements of paragraph (A), an ALJ may respond directly or
through a third party to allegations in the media or elsewhere concerning the ALJ’s
conduct in a matter.

Comment

None.

Rule 2.11: Disqualification

(A) An ALJ shall disqualify himself or herself in any proceeding in which the ALJ’s
impartiality might reasonably be questioned, including but not limited to the following
circumstances:
(1) The ALJ has a personal bias or prejudice concerning a party or party’s lawyer, or personal knowledge of facts that are in dispute in the proceeding.

(2) The ALJ knows that the ALJ, the ALJ’s spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such person is:

(a) a party to the proceeding, or an officer, director, general partner, major shareholder, managing member, or trustee of a party;

(b) acting as a lawyer in the proceeding;

(c) a person who has more than a de minimis interest that could be substantially affected by the proceeding; or,

(d) likely to be a material witness in the proceeding.

(3) The ALJ knows that they, individually or as a fiduciary, or the ALJ’s spouse, domestic partner, parent or child, or any other member of the ALJ’s family residing in the ALJ’s household, has an economic interest in the subject matter in controversy or in a party to the proceeding.

(4) The ALJ has made a public statement, other than in a tribunal proceeding, adjudicative decision, or adjudicative opinion, that commits or appears to commit the ALJ to reach a particular result or rule in a particular way in the proceeding or controversy.

(5) The ALJ:

(a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;

(b) served in government employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed an opinion concerning the merits of the particular matter in controversy;

(c) was a material witness concerning the matter; or

(d) previously presided as an ALJ or judge over the matter in another tribunal or court.

(B) An ALJ shall keep informed about the ALJ’s personal and fiduciary economic interests, and make reasonable effort to keep informed about the personal economic
interests of the ALJ's spouse or domestic partner and minor children residing in the ALJ's household.

(C) An ALJ subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the ALJ's disqualification and may ask the parties and their lawyers to consider, outside the presence of the ALJ and staff, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the ALJ or staff, that the ALJ should not be disqualified, the ALJ may participate in the proceeding. The agreement should be incorporated into the record of the proceeding.

Comment
None.

Rule 2.12: Supervisory Duties

(A) An ALJ shall require staff and others subject to the ALJ's direction and control to act in a manner consistent with the ALJ's obligations under this Code.

(B) An ALJ with supervisory authority for the performance of other ALJs shall take reasonable measures to ensure that those ALJs properly discharge their adjudicative responsibilities, including the prompt disposition of matters before them.

Comment

[1] A judge is responsible for their own conduct and for the conduct of others, such as staff, when those persons are acting at the judge's direction or control. A judge may not direct court personnel to engage in conduct on the judge's behalf or as the judge's representative when such conduct would violate the Code if undertaken by the judge.

[2] Public confidence in the judicial system depends upon timely justice. To promote the efficient administration of justice, a judge with supervisory authority must take the steps needed to ensure that judges under their supervision administer their workloads promptly.

[3] A supervisory ALJ should not interfere with the decisional independence of other ALJs. Reasonable docket control, case assignments, logistical matters and other administrative concerns are appropriate; provided, that these are done in an impartial manner and in no way operate to favor any particular outcome in any case.

Rule 2.13: Disability and Impairment

An ALJ having a reasonable belief that the performance of a lawyer or another ALJ is impaired by drugs or alcohol, or by a mental, emotional, or physical condition, shall take
appropriate action, which may include a confidential referral to a lawyer or judicial assistance program.

Comment
None.

Rule 2.14: Responding to Judicial and Lawyer Misconduct

(A) An ALJ having knowledge that another ALJ has committed a violation of this Code that raises a substantial question regarding the ALJ’s honesty, trustworthiness, or fitness as an ALJ in other respects shall inform the appropriate authority.

(B) An ALJ having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority.

(C) An ALJ who receives information indicating a substantial likelihood that another ALJ has committed a violation of this Code shall take appropriate action.

(D) An ALJ who receives information indicating that a lawyer has committed a violation of the Rules of Professional Conduct shall take appropriate action.

Comment
None.

Rule 2.15: Cooperation with Disciplinary Authorities

(A) An ALJ shall cooperate and be candid and honest with judicial and lawyer disciplinary and other official investigatory agencies, in a manner consistent with judicial confidentiality provisions provided by law.

(B) An ALJ shall not retaliate, directly or indirectly, against a person known or suspected to have assisted or cooperated with an investigation of the ALJ or a lawyer.

Comment
Cooperation with investigations and proceedings of judicial and lawyer disciplinary agencies, as required in paragraph (A), instills confidence in ALJs’ commitment to the integrity of the administrative law adjudication system and the protection of the public.
CANON 3

AN ADMINISTRATIVE LAW JUDGE SHALL CONDUCT PERSONAL AND EXTRAJUDICIAL ACTIVITIES IN A MANNER THAT WILL MINIMIZE THE RISK OF CONFLICT WITH THE OBLIGATIONS OF THE ALJ’S OFFICE

Rule 3.1: Extrajudicial Activities in General

An ALJ may engage in extrajudicial activities, except as prohibited by law or this Code; however, when engaging in extrajudicial activities, an ALJ shall not:

(A) Participate in activities that will interfere with the proper performance of the ALJ’s judicial duties;

(B) Participate in activities that will lead to frequent disqualification of the ALJ;

(C) Participate in activities that would appear to a reasonable person to undermine the ALJ’S independence, integrity, or impartiality;

(D) Engage in conduct that would appear to a reasonable person to be coercive; or

(E) make use of court premises, staff, stationery, equipment, or other resources, except for incidental use for activities that concern the law, the legal system, or the administration of justice, or unless such additional use is permitted by law.

Comment

The actions, participation or engagements that are prohibited under this Rule include any such activity within the realm and use of social media.

Rule 3.2: Appearance before Governmental Agencies and Consultation with Government Officials

An ALJ shall not appear voluntarily at a public hearing before, or otherwise consult with, a legislative body or official, except:

(A) In connection with matters concerning the law, the legal system, or the administration of justice;

(B) In connection with matters about which the ALJ acquired knowledge or expertise in the course of the ALJ’s official duties; or

(C) When the ALJ is acting in a self-represented capacity involving the ALJ’s legal or economic interests, or when the ALJ is acting in a fiduciary capacity.

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Rule 3.3: Testifying as a Character Witness

An ALJ shall not testify as a character witness in a judicial, administrative, or other adjudicatory proceeding or otherwise vouch for the character of a person in a legal proceeding, except when duly summoned.

Comment

An ALJ who, without being subpoenaed, testifies as a character witness abuses the prestige of the ALJ’s office to advance the interests of another. See Rule 1.3. Except in unusual circumstances where the demands of justice require, an ALJ should discourage a party from requiring the ALJ to testify as a character witness.

Rule 3.4: Appointment to Governmental Positions

An ALJ shall not accept appointment to a governmental committee, board, commission, or other governmental position, unless such appointment does not conflict with the ALJ’s official duties and there is no appearance of conflict, bias or prejudice concerning the ALJ’s official position.

Comment

None.

Rule 3.5: Use of Nonpublic Information

An ALJ shall not intentionally disclose or use nonpublic information acquired in an official capacity for any purpose unrelated to the ALJ’s adjudicative duties.

Comment

None.
Rule 3.6: Affiliation with Discriminatory Organizations

(A) An ALJ shall not hold membership in any organization that practices discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation.

(B) An ALJ shall not use the benefits or facilities of an organization if the ALJ knows or should know that the organization practices invidious discrimination or one or more of the bases identified in paragraph (A). An ALJ's attendance at an event or facility of an organization that the ALJ is not permitted to join is not a violation of this Rule when the ALJ's attendance is an isolated event that could not reasonably be perceived as an endorsement of the organization's practices.

Comment

None.

Rule 3.7: Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities

(A) Subject to the requirements of Rule 3.1, an ALJ may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities:

(1) assisting such an organization or entity in planning related to fund-raising, and participating in the management and investment of the organization's or entity's funds;

(2) soliciting contributions for such an organization or entity, but only from members of the ALJ's family, or from ALJs over whom the ALJ does not exercise supervisory or appellate authority;

(3) soliciting membership for such an organization or entity, even though the membership dues or fees generated may be used to support the objectives of the organization or entity, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice;

(4) appearing or speaking at, receiving an award or other recognition at, being featured on the program of, and permitting their title to be used in connection with an event of such an organization or entity, but if the event serves a fund-raising purpose, the ALJ may participate only if the event concerns the law, the legal system, or the administration of justice.
(5) making recommendations to such a public or private fund-granting organization or entity in connection with its programs and activities, but only if the organization entity is concerned with the law, the legal system, or the administration of justice; and

(6) serving as an officer, director, trustee, or non-legal advisor of such an organization or entity, unless it is likely that the organization or entity:

(a) will be engaged in proceedings that would ordinarily come before the ALJ; or

(b) will frequently be engaged in adversary proceedings in the tribunal of which the ALJ is a member, or in any tribunal subject to the appellate jurisdiction of the tribunal of which the ALJ is a member.

(B) An ALJ may encourage lawyers to provide pro bono public legal services.

Comment

None.

Rule 3.8: Appointments to Fiduciary Positions

An ALJ acting in a fiduciary capacity shall be subject to the same restrictions on engaging in financial activities that apply to an ALJ personally.

Comment

None.

Rule 3.9: Service as Arbitrator or Mediator

(A) A full-time ALJ should not act as an arbitrator or a mediator or perform other judicial functions apart from the ALJ’s official duties unless expressly authorized by law.

(B) A part time ALJ shall not act as an arbitrator or a mediator or perform other judicial functions apart from their official duties as a part-time ALJ if their impartiality might reasonably be questioned because of such work.

Comment

None.
Rule 3.10: Practice of Law

If the law of the jurisdiction permits, an ALJ may have a non-conflicting practice of law (e.g., drafting wills) so long as the duties of the ALJ’s office take precedence.

Comment

[1] In some jurisdictions, the compensation for ALJs is so low that well qualified individuals would not serve unless the ALJ could maintain a non-conflicting practice of law.

[2] Certain local governments hire ALJs on a contract basis with the expectation and understanding that the ALJ shall maintain a separate source of income such that the attorney performing ALJ duties is expected to earn income to support themselves through legal work outside their duties as an ALJ, as long as that work does not conflict or appear to conflict with their work as an ALJ.

[3] Rule 3.10 is optional and may be unacceptable in some jurisdictions.

Rule 3.11 Financial, Business, or Remunerative Activities

(A) An ALJ may hold and manage investments of the ALJ and members of the ALJ’s family.

(B) An ALJ shall not serve as an officer, director, manager, general partner, advisor, or employee of any business entity except that an ALJ may manage or participate in:

(1) a business closely held by the ALJ or members of the ALJ’s family; or

(2) a business entity primarily engaged in investment of the financial resources of the ALJ or members of the ALJ’s family.

(C) An ALJ shall not engage in financial activities permitted under paragraphs (A) and (B) if they will:

(1) interfere with the proper performance of judicial duties;

(2) lead to frequent disqualification of the ALJ;

(3) involve the ALJ in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the tribunal on which the ALJ serves; or

(4) result in violation of other provisions of this Code.
Comment
None.

Rule 3.12: Compensation for Extrajudicial Activities
An ALJ may accept reasonable compensation for extrajudicial activities permitted by this Code or other law unless such acceptance would appear to a reasonable person to undermine the ALJ's independence, integrity, or impartiality.

Comment
None.

Rule 3.13: Acceptance of Gifts, Loans, Bequests, Benefits, or Other Things of Value
(A) An ALJ shall not accept any gifts, loans, bequests, benefits, or other things of value, if acceptance is prohibited by law or would appear to a reasonable person to undermine the ALJ's independence, integrity, or impartiality.

(B) Unless otherwise prohibited by law or by paragraph (A), an ALJ may accept the following:

(1) items with little intrinsic value, such as plaques, certificates, trophies, and greeting cards;

(2) gifts, loans, bequests, benefits, or other things of value from friends, relatives, or other persons, including lawyers, whose appearance or interest in a proceeding pending or impending before the ALJ would in any event require disqualification of the ALJ under Rule 2.11;

(3) ordinary social hospitality;

(4) commercial or financial opportunities and benefits, including special pricing and discounts, and loans from lending institutions in their regular course of business, if the same opportunities and benefits or loans are made available on the same terms to similarly situated persons who are not ALJs or judges;

(5) rewards and prizes given to competitors or participants in random drawings, contests, or other events that are open to persons who are not ALJs or judges;

(6) scholarships, fellowships, and similar benefits or awards, if they are available to similarly situated persons who are not ALJs or judges, based upon the same terms and criteria.
(7) books, magazines, journals, audiovisual materials, and other resource materials supplied by publishers on a complimentary basis for official use; or

(8) gifts, awards, or benefits associated with the business, profession, or other separate activity of a spouse, a domestic partner, or other family member of an ALJ residing in the ALJ’s household, but that incidentally benefit the ALJ.

(C) Unless otherwise prohibited by law or by paragraph (A), an ALJ may accept the following items:

(1) gifts incidental to a public testimonial;

(2) invitations to the ALJ and the ALJ’s spouse, domestic partner, or guest to attend without charge;

   (a) an event associated with a bar-related function or other activity relating to the law, the legal system, or the administration of justice; or

   b) an event associated with the ALJ’s educational, religious, charitable, fraternal or civic activities permitted by this Code, if the same invitation is offered to non-ALJs and non-judges who are engaged in similar ways in the activity as is the ALJ.

Comment

None

Rule 3.14: Reimbursement of Expenses and Waivers of Fees or Charges

(A) Unless otherwise prohibited by Rules 3.1 and 3.13 (A) or other law, an ALJ may accept reimbursement, if necessary, and reasonable expenses for travel, food, lodging, or other incidental expenses, or a waiver or partial waiver of fees or charges for registration, tuition, and similar items, from sources other than the ALJ’s employing entity, if the expenses or charges are associated with the ALJ’s participation in extrajudicial activities permitted by this Code.

(B) Reimbursement of expenses for necessary travel, food, lodging, or other incidental expenses shall be limited to the actual costs reasonably incurred by the ALJ and, when appropriate to the occasion, by the ALJ’s spouse, domestic partner, or guest.

Comment

None
CANON 4

AN ADMINISTRATIVE LAW JUDGE SHALL NOT ENGAGE IN POLITICAL OR CAMPAIGN ACTIVITY THAT IS INCONSISTENT WITH THE INDEPENDENCE, INTEGRITY, OR IMPARTIALITY OF THE ADMINISTRATIVE LAW JUDICIARY

Rule 4.1 Political and Campaign Activities of ALJs in General

(A) Except as permitted by law or by Rules 4.2 and 4.4, an ALJ shall not:

(1) act as a leader in, or hold office in, a political organization;

(2) make speeches on behalf of a political organization;

(4) publicly endorse or oppose a candidate for any partisan public office;

(4) publicly identify himself or herself as a candidate of a political organization;

(5) seek, accept, or use endorsements from a political organization;

(6) knowingly, or with reckless disregard of the truth, make any false or misleading statement;

(7) make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any tribunal; or

(8) in connection with cases, controversies, or issues that are likely to come before the tribunal, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of office.

(B) An ALJ shall take reasonable measures to ensure that other persons do not undertake, on behalf of the ALJ, any activities prohibited under paragraph (A).

Comment

[1] Certain portions of this Rule may be too stringent in local jurisdictions where an ALJ is hired through contract; therefore, some provisions may be considered optional.

Rule 4.2: Candidates for Appointive ALJ Positions

A candidate for appointment to an ALJ position may:

(A) Communicate with the appointing or confirming authority, including any selection, screening, or nominating commission or similar organization and
(B) Seek endorsements for the appointment from any person or organization other than a partisan political organization.

Comment

None.

Rule 4.3: Activities of ALJs Who Become Candidates for Nonjudicial Office

(A) Upon becoming a candidate for a non-judicial elective office, an ALJ shall resign from the ALJ office, unless permitted by law to continue to hold the ALJ office.

(B) Upon becoming a candidate for a non-judicial appointive office, an ALJ is not required to resign as an ALJ, provided that the ALJ complies with the other provisions of this Code.

Comment

None

EFFECTIVE DATE OF COMPLIANCE

A person to whom this Code becomes applicable should arrange their affairs as soon as reasonably possible to comply with it.
I. Summary

This is the first time the House has adopted the Model Code and no previous versions of the Model Code were adopted by the House. The Resolution is necessary in order to protect the public interest in independent, impartial, and responsible decision-making in the administrative law adjudication process, by providing (1) that members of the administrative law judiciary be held accountable under appropriate uniform ethical standards provided in the Model Code of Judicial Conduct for State Administrative Law Judges (hereinafter “Model Code,” or “Code”) and in light of the unique characteristics of particular positions in the administrative judiciary. For purposes of this recommendation, the administrative judiciary includes all individuals whose exclusive role in the administrative process is to preside and make decisions in judicial or quasi-judicial capacity in evidentiary proceedings, but does not include agency heads, members of agency appellate boards, or other officials who perform the adjudicative functions of an agency head.

The Resolution calls for state jurisdictions to adopt the Model Code in order to uniformly establish high standards of ethical accountability and to ensure decisional independence of administrative law adjudicators and freedom from improper agency influence. It shores up and supports the partial balance that State Legislatures have struck in their respective Administrative Procedure Acts to assure fair adjudicative hearings to the public by eliminating pro-agency bias and appropriately protecting administrative law judge and hearing officer independence from agency encroachment and interference while still preserving agency control over policy, and consistency in the application of the law, in those matters over which the respective legislatures have given the agency jurisdiction.

II. Introduction

State Administrative Procedure Acts are not adequate to ensure adjudicator accountability because their focus is on administrative procedures, not ethical conduct. A uniform code of judicial conduct, which closely follows the 2007 American Bar Association Model Code of Judicial Conduct for the judicial branch is an appropriate protection of administrative law judge and hearing officer independence and accountability. The Model Code will make administrative law judges and hearing officers accountable to appropriate ethical standards for adjudicators, while ensuring their decisional independence and freedom from improper agency influences. The Model Code uniformly protects administrative law judges and hearing officers from

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3 See Butz v. Economou, 438 U.S. 478 (1978) [the U.S. Supreme Court recognized ALJ adjudicatory functions as being the same as judicial branch adjudicatory functions]. Also see Federal Maritime Commission v. South Carolina port Authority, 535 U.S. 743 (2002) [regarding administrative law adjudicatory proceedings compared to judicial branch proceedings, the Court observed that “if it walks, talks and squawks like a lawsuit, it is a lawsuit”].
improper influences and permits them to engage in appropriate activities, with due regard for certain discreet differences between administrative law judges and judicial branch judges. The Model Code is necessary because administrative law judges and hearing officers are in the Executive Branch of Government and cannot be subject to a code for the judicial branch because of the separation of powers doctrine. Only one known jurisdiction, Colorado, has made its code of judicial conduct for the judicial branch applicable, by statute, to Colorado’s central panel of administrative law judges. The provision is made in the organic act for the Division of Administrative Hearings (now the Office of Administrative Courts).

III. The Problem

Because there is no uniformly adopted code of judicial conduct for administrative law adjudicators, their accountability to ethical standards varies widely. In some jurisdictions, the only code of conduct is the code for state employees. In jurisdictions where the adjudicators are licensed attorneys, they are accountable, as licensed attorneys, to the rules of professional conduct in effect for lawyers. Judicial and quasi-judicial conduct and misconduct differs substantially from standards for lawyer conduct. Judges are held to a higher standard of ethical conduct than lawyers. One of the few commonalities is that neither lawyer nor judge should break the law. For example, the rules of professional conduct for lawyers do not address an “appearance of impropriety” arising in cases. Indeed, in jurisdictions where administrative law adjudicators are charged with misconduct unique to adjudicating cases, and they are licensed attorneys, the attorney disciplinary authorities use the code of judicial conduct for the judicial branch as a measuring stick. If the administrative law adjudicator is not a licensed attorney, the disciplinary authorities have no jurisdiction over the individual and ordinary rules of conduct for government employees would apply and be administered by the governmental appointing authority. Such a system is inadequate to address judicial misconduct by an administrative law adjudicator.

The public expects decisional independence of administrative law adjudicators within the executive branch of government—in the same way it expects it from the judicial branch. There have been examples of egregious agency interference with the decisional independence of administrative law adjudicators.

III. Cases

A Michigan Corrections hearing officer had to resort to a discrimination claim in the U.S. Courts to vindicate his decisional independence. In Harrison v. Coffman, an Arkansas

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5Section 24-30-1003 (4) (a), Colorado Revised Statutes.
7See Perry v. McGinnis, supra; [Perry, a Michigan Corrections hearing officer, who was African-American, was disciplined for minor items such as typographical errors, while no one else was so disciplined.]
administrative law judge (an at-will judge) was terminated because the Arkansas Workers’ Compensation Commission was not pleased with the outcomes in her cases. To vindicate her decisional independence, she filed a civil rights suit in the U.S. District Court. The U.S. District Court for the Eastern District of Arkansas, analogized the issue to teacher “free speech” rights and found that Judge Harrison was entitled to absolute immunity under the First Amendment for her quasi-judicial work product.  

IV. Similar Resolution

The most similar resolution, unanimously passed by the House of Delegates was the 2007 Model Code of Judicial Conduct (for the judicial branch), which is amended and reiterated year-to-year. The Model Code of Judicial Conduct for State Administrative Law Judges closely tracks the 2007 ABA Model Code in providing high ethical standards for administrative law adjudicators. Because administrative law adjudicators are in the executive branch, the judicial branch does not have jurisdiction over the ethical conduct of administrative law adjudicators, other than appellate jurisdiction in specific cases; or, jurisdiction insofar as the administrative law judge is a licensed attorney.

In 2001, the House of Delegates adopted Resolution 01A101B concerning the accountability and decisional independence of administrative law adjudicators. Resolution 01A101B was co-sponsored by numerous named entities, including the Administrative and Regulatory Practice Section of the ABA, and state bar associations.

V. Conclusion

In the majority of jurisdictions in the United States, there are no uniform accountability measures for administrative law adjudicators. As illustrated in the two cases referenced above, resort to civil rights remedies may be the most effective mechanism to vindicate decisional independence. The Model Code of Judicial Conduct for State Administrative

Depositions of non-minority hearing officers illustrated more errors than Perry's errors. Ultimately, it was revealed that the supervisors were not pleased with Perry's not guilty/dismissal rate. Perry filed a discrimination claim and the Court of Appeals held that his decisions were “communicative acts” protected by the Constitution]. A uniform code of judicial conduct would be more direct.


9See ABA Resolution 01A101B, which passed the House of Delegates by a vote of 297 to 2. In addition to the Administrative and Regulatory Practice Section, co-sponsors were the Standing Committee on Judicial Independence, the Dispute Resolution Section, Government and Public Sector Lawyers Division, the real Property, Probate and Trust Law Section, Senior Lawyers Division, Colorado Bar Association, Denver Bar Association, New York State Bar Association, and the Tennessee Bar Association.
Law Judges offers a simple, effective and uniform code of ethical standards to ensure accountability and decisional independence in administrative law adjudications. Many states look to the American Bar Association for guidance. The best example is that in 1997, the House of Delegates adopted the Model Act Creating a State Central Hearing Agency. At the time, there were approximately 12 state central hearing agencies and two city central panels. Now, there are 28 state central hearing agencies, three city central panels, and one county central hearing agency (Cook County, Illinois). Many of these central hearing agencies, created after 1997, are patterned after the 1997 ABA Model Act Creating a State Central Hearing Agency.

Respectfully submitted,

Hon. Mary E. Kelly
Chair, National Conference of the Administrative Law Judiciary

August 2018
GENERAL INFORMATION FORM

Submitting Entity: National Conference of the Administrative Law Judiciary, Judicial Division, American Bar Association

Submitted By: Hon. Mary E. Kelly, Chair

1. Summary of Resolution

The Model Code of Judicial Conduct for State Administrative Law Judges (hereinafter the “Model Code” or “Code”), as American Bar Association Policy, will make administrative law judges and hearing officers accountable to appropriate ethical standards for adjudicators, while ensuring their decisional independence and freedom from improper agency influences. The Code uniformly protects administrative law judges and hearing officers from improper influences and permits them to engage in appropriate activities, with due regard for certain discreet differences between administrative law judges/hearing officers and judicial branch judges. This resolution adopts the Model Code which is necessary because administrative law judges and hearing officers are in the executive branch of government and cannot be subject to a code for the judicial branch, unless imposed on the executive branch judiciary by statute, because of the separation of powers doctrine. In many important parts, the judicial branch code is not relevant to executive branch judges, e.g., provisions concerning running for election (in partisan and non-partisan elections) or retention; campaign financing provisions. Consequently, the Model Code for State Administrative Law Judges is completely relevant for these executive branch judges. Agency heads, members of agency appellate boards, or other officials who perform the adjudicative functions of the agency head are not included as members of the administrative law judiciary.

2. Approval by Submitting Entity

The Judicial Division’s National Conference of the Administrative Law Judiciary voted on May 6, 2018 in approval of this resolution.

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

No.

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

The Resolution is consistent with American Bar Association policies supporting judicial independence and accountability for administrative law judges. The Resolution is compatible with and would not affect existing American Bar
Association policies. Past American Bar Association resolutions stressing the need for competent well-trained administrative law judges, operating with a large degree of independence from agency supervision to provide fair hearings consistent with due process include 88A112 (1988); 94A109 (1994); 95A115 (1995); 99A101 (1999); 01A101B (2001); 03A103 (2003); 05M114 (2005); 05A106A (2005); 09M112 (2009); and 11M124 (2011).

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 Resolution adopts a uniform Model Code of Judicial Conduct for State Administrative Law Judges (August 2018); and, it will be highly persuasive with legislative bodies for the purpose of their adoption of legislation consistent with the Model Code.

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

It is anticipated that the costs of disseminating the Model Code to administrative law adjudication agencies will be de minimis (printing and postage).

9. Disclosure of Interest

The only interest the National Conference of the Administrative Judiciary has is improving the quality of administrative justice in the United States.

10. Referrals

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.
11. **Contact Persons (Prior to the meeting.)**

Hon. Mary E. Kelly  
Chair, National Conference of the Administrative Law Judiciary  
California Unemployment Insurance Appeals Board  
300 South Spring Street  
Los Angeles, CA 90013-1259  
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Hon. Edwin L. Felter, Jr.  
Member, National Conference of the Administrative Law Judiciary  
Senior Administrative Law Judge  
Office of Administrative Courts  
1525 Sherman Street, 4th Floor  
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(303) 866-5676 - direct

12. **Contact Person (Who will present the Resolution and Report to the House?)**

Hon. Larry J. Craddock  
National Conference of the Administrative Law Judiciary Delegate to the House of Delegates  
Administrative Law Judge (retired)  
Craddock and Noelke, PLLC  
P.O. BOX 5667  
Austin, TX 78763  
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EXECUTIVE SUMMARY

1. Summary of Resolution

The Model Code of Judicial Conduct for State Administrative Law Judges (hereinafter the “Code”), as American Bar Association Policy, will make administrative law judges and hearing officers accountable to appropriate ethical standards for adjudicators, while ensuring their decisional independence and freedom from improper agency influences. The Code uniformly protects administrative law judges and hearing officers from improper influences and permits them to engage in appropriate activities, with due regard for certain discreet differences between administrative law judges/hearing officers and judicial branch judges. The Code is necessary because administrative law judges and hearing officers are in the executive branch of government and cannot be subject to accountability under a code for the judicial branch because of the separation of powers doctrine, unless a legislature, by statute, makes it applicable. In many important parts, the judicial branch code is not relevant to executive branch judges, e.g., provisions concerning running for election (in partisan and non-partisan elections) or retention; campaign financing provisions. Consequently, the Model Code for State Administrative Law Judges is completely relevant for these executive branch judges. Agency heads, charged with managing the agency, are not subject to this code.

2. Summary of the Issue that the Resolution Addresses

State administrative law judges and hearing officers perform administrative law adjudications in basically the same manner as judicial branch judges. Nationwide, there are differing codes of conduct applicable to these adjudicators, including codes of conduct, generally applicable to government employees, and rules of professional conduct for attorneys, if the adjudicators are licensed attorneys. These differing codes of conduct provide standards of ethical conduct that in many instances are lesser than the high standards of ethical judicial conduct provided in the 2007 American Bar Association Model Code of Judicial Conduct (adopted as American Bar Association Policy in 2007). The diverse ethical codes for administrative law adjudicators adversely affects public expectations of decisional independence and public perceptions of impartiality and fairness. Adoption of a uniform model code of judicial conduct (the Model Code of Judicial Conduct for State Administrative Law Judges) as the policy of the American Bar Association would be highly persuasive to legislative bodies at all levels, including state and local bodies, as a way to improve public perceptions of administrative justice.

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

An American Bar Association policy urging legislative bodies to adopt the Model Code of Judicial Conduct for State Administrative Law Judges will be highly persuasive and offer the governmental entities a viable alternative for improving
public perceptions of fairness, impartiality and decisional independence in administrative justice by uniformly elevating standards of judicial conduct to a uniform code that carefully tracks the 2007 American Bar Association Model Code (in relevant part), applicable to judicial branch judges

4. Summary of Minority Views or Opposition Internal and/or External to the ABA that have been identified

None.
RESOLVED, That the American Bar Association urges Congress to amend the Air Carrier Access Act ("ACAA"), 49 U.S.C. § 41705 (1986), to establish a private right of action for violations of the ACAA and to provide equitable and legal relief, including compensatory and punitive damages, as well as reasonable attorneys’ fees, reasonable expert fees, and costs to plaintiffs who prevail in such actions.
I. Introduction

In today’s global economy, air travel is essential for individuals with disabilities to fully participate in society, compete in the job market, and enjoy the many opportunities available to other Americans, such as traveling for recreation and visiting family members. The U.S. Census Bureau estimates that approximately 56.7 million people in the United States have one or more disabilities—18.7 percent of the population. Yet, people with disabilities routinely report problems in gaining equal access to travel by commercial aviation.

The most recent report from the Department of Transportation (DOT) indicates that in 2016, 32,445 complaints were filed with 184 domestic and foreign air carriers regarding disability-related incidents. The 34 U.S. carriers reported receiving 27,842 disability-related air travel complaints for the 2016 calendar year; the 150 foreign carriers, 4,603 complaints. This compares with the previous year’s report showing 26,401 complaints to 176 domestic carriers and 4,429 complaints to foreign carriers—an increase of approximately 5 percent. Nearly half of the complaints reported in 2016 (14,591) concerned the failure to provide adequate assistance to persons using wheelchairs. Other top complaints received by domestic carriers included seating accommodations and service animals.

In 1986, Congress passed the Air Carrier Access Act (ACAA), which prohibits disability-based discrimination in air travel. The Act was passed as a result of the U.S. Supreme Court’s ruling in *Department of Transportation v. Paralyzed Veterans of America* that air carriers are not subject to Section 504 of the Rehabilitation Act of 1973, as amended, unless they receive direct federal financial assistance. The need for widespread civil rights protections for people with disabilities in air travel led the

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Paralyzed Veterans of America and the broader disability community to advocate for the passage of a statute that would end disability-based discrimination.

Four years after the ACAA’s passage, the DOT promulgated regulations implementing the Act.7 As interpreted by the regulations, the ACAA “prohibits both U.S. and foreign carriers from discriminating against passengers on the basis of disability; requires carriers to make aircraft, other facilities, and services accessible; and requires carriers to take steps to accommodate passengers with a disability.”8 The ACAA and its regulations further prohibit carriers, either directly or indirectly, from:

(1) requiring individuals with disabilities to accept special services that are not requested;
(2) excluding individuals with disabilities, or denying such individuals, the benefit of air transportation services available to others (with limited exceptions); and
(3) taking adverse action against individuals with disabilities as a result of their assertion of rights protected by this part of the ACAA.9

Although the ACAA improved the air travel experience of people with disabilities, widespread discrimination against people with disabilities continues. Individuals continue to encounter frequent and significant violations of their civil rights when they travel by air.10 Substantial barriers include:

- damaged assistive devices,
- inaccessible aircraft, lavatories, and communication media,
- poorly trained and delayed assistance,
- inequitable treatment of service animals,
- inadequate disability cultural competency, and
- a lack of suitable seating accommodations.11

For many years, federal courts recognized an implied private right of action to enforce the ACAA. However, this changed in 2001 when the U.S. Supreme Court decided Alexander v. Sandoval.12 This decision served as the catalyst for several federal circuit courts to find that the ACAA does not provide for a private right of action.

However, a private right of action under the ACAA is essential to effectively enforcing the civil rights of persons with disabilities by providing them with meaningful redress for their losses.13 Civil penalties levied against an airline do nothing for individuals who have suffered a loss as a result of discrimination. Further, plaintiffs who

8 Id. § 382.1.
9 Id. § 382.11.
11 Id. at 2.
13 NATIONAL COUNCIL ON DISABILITY, LEX FRIEDEN, POSITION PAPER ON AMENDING THE AIR CARRIER ACCESS ACT TO ALLOW FOR PRIVATE RIGHT OF ACTION 2, 4-6 (July 8, 2004), https://ncd.gov/publications/2004/July82004.
prevail in a civil action brought under the ACAA should be entitled to obtain equitable and legal relief, including compensatory and punitive damages. For the private action to benefit claimants, it must be accompanied by a statutory right to reasonable attorneys’ fees, reasonable expert fees, and costs in order to minimize the cost of litigation to plaintiffs and maximize the incentive of potential defendants to stop discriminatory policies and practices.

This resolution urges Congress to amend the ACAA to establish a private right of action and provide equitable and legal relief, including compensatory and punitive damages, as well as reasonable attorneys’ fees, reasonable expert fees, and the costs to plaintiffs who prevail in such actions. These amendments are necessary in order to bring the ACAA in line with its original spirit and purpose: the protection of the civil rights of air travelers with disabilities.

II. Current System for ACAA Enforcement

Under the ACAA, the Aviation Consumer Protection Division (ACPD)—part of the DOT’s Office of the Assistant General Counsel for Aviation Enforcement and Proceedings (Enforcement Office)—is primarily responsible for enforcing the ACAA. The Act provides that aggrieved individuals may seek informal resolution of a complaint by contacting an airline carrier’s complaint resolution official, filing a complaint with the airline, or filing a complaint either online or via letter with the ACPD.14 Air travelers who want to file a formal complaint with the DOT must do so in accordance with 14 C.F.R. Part 302’s administrative enforcement procedure.15 Those dissatisfied with the DOT’s response may file a petition for review with a federal circuit court.16

If the DOT finds that the airline has violated the ACAA on the basis of disability, the agency is authorized to issue a cease and desist order proscribing the unlawful conduct by the carrier in the future, require prompt corrective action by the airline, and/or assess civil penalties up to $11,000 per violation payable to the government.17 Civil fines are rare and typically invoked only in cases involving a pattern or practice of discrimination.18 However, the DOT is not authorized to award monetary damages to the party who has been subjected to discrimination in violation of the ACAA.

15 14 C.F.R. § 382.159(b); 14 C.F.R. pt. 302.
16 See, e.g., Love v. Delta Airlines, 310 F.3d 1347, 1356 (11th Cir. 2002).
18 Letter from Paralyzed Veterans of America and Allied Organizations (American Council of the Blind, Bazelon Center for Mental Health Law, Disability Rights Education & Defense Fund, Easterseals, National Council on Independent Living, National Disability Rights Network, National Multiple Sclerosis Society, United Spinal Association) to The Honorable Frank LoBiondo, Chairman, and Honorable Rick Larsen (Ranking Member), House Transportation and Infrastructure Committee, Subcommittee on Aviation, at 2-3 (Mar. 23, 2017).
Initially, federal courts interpreted the ACAA as providing individuals with disabilities aggrieved by the actions of air carriers with an implied private right of action. However, that changed in 2001 when the U.S. Supreme Court decided \textit{Alexander v. Sandoval}, which restricted the circumstances in which a court could determine the existence of an implied private right of action under a federal statute. \textit{Sandoval} held that private rights of action to enforce federal law must be created by Congress, and statutory intent is determinative in deciding whether a statute creates not just a right, but also a private remedy.

Based on \textit{Sandoval}, the Eleventh Circuit held that the ACAA does not grant litigants a private right of action. The Tenth Circuit agreed with the Eleventh Circuit’s reasoning and found no private right of action under the ACAA. The Second Circuit and Fifth Circuit have also held that the ACAA does not provide a private right of action. Thus, unless federal law is changed, passengers with disabilities are limited to seeking remedies, if any, that may be available under state law.

\section*{III. Need for Resolution}

\textit{Private Right of Action}

Although a complaint to the DOT may eventually result in the airline being fined, it does not reimburse the complainant for his or her loss. In contrast to the ACAA, other federal civil rights statutes include both a private right of action by aggrieved individuals, as well as a fee-shifting provision to serve as incentive for the enforcement of important legal rights.

Plaintiffs who prevail under the ACAA should be entitled to obtain equitable and legal relief, including punitive damages. By providing aggrieved travelers with disabilities with a legal vehicle to obtain a remedy for violations of their civil rights, Congress will not only strengthen the protection of civil rights of persons with disabilities, but also bring the ACAA into conformity with similar civil rights laws. As the National Council on Disability aptly noted in 1999, “[t]he ultimate test of any civil rights law is the extent to

\begin{itemize}
  \item \textit{See, e.g.,} Shinault v. Am. Airlines, Inc., 936 F.2d 796 (5th Cir. 1991); Tallarico v. Trans World Airlines, Inc., 881 F.2d 566 (8th Cir. 1989).
  \item 532 U.S. 275 (2001).
  \item Id. at 286.
  \item Love v. Delta Air Lines, 310 F.3d 1347, 1359 (11th Cir. 2002).
  \item Boswell v. Skywest Airlines, Inc., 361 F.3d 1263, 1265 (10th Cir. 2004).
  \item Lopez v. Jet Blue Airways, 662 F.3d 593 (2d Cir. 2011).
  \item Stokes v. Southwest Airlines, 887 F.3d 199 (5th Cir. 2018).
  \item See Gilstrap v. United Air Lines, Inc., 709 F.3d 995 (9th Cir. 2013) (holding that the ACAA did not preempt a negligence claim under state law, even though it preempted the standard of care owed).
  \item Id.
\end{itemize}
which people in the protected class can count on the law for real protection.”29 By amending the ACAA to allow for a private right of action, “Congress will be ensuring that meaningful redress is available to victims of discrimination,” and that disability-based discrimination by air carriers will be deterred.30

There are currently efforts underway to amend the ACAA in order to create a private cause of action. Legislation introduced in the 115th Congress (January 3, 2017-January 3, 2019) includes a private right of action for any person aggrieved by the violation by an air carrier of the ACAA or its regulations, and allows a court that finds in favor of the plaintiff to award equitable and legal relief, including compensatory and punitive damages, as well as reasonable attorneys’ fees, reasonable expert fees, and the cost of the action to the plaintiff.31

Fee-Shifting Provision

More than 150 federal statutes include provisions entitling a successful plaintiff in litigation to recover attorneys’ fees in order to encourage lawsuits considered in the public interest.32 “If successful plaintiffs were routinely forced to bear their own attorneys’ fees, few aggrieved parties would be in a position to advance the public interest by involving the injunctive powers of the federal courts.”33 In the civil rights context, fee-shifting statutes provide for complete enforcement of rights Congress has deemed worthy of special protection.

Absent amendment of the ACAA to authorize an award of reasonable attorneys’ fees, reasonable expert fees, and costs to prevailing plaintiffs, consumers with disabilities will be deterred from filing ACAA lawsuits due to the expense of doing so. “The importance of private rights of action as a means of implementing and enforcing public policy has long been recognized in a wide variety of areas. Where the interests advanced by private litigation vindicate important public policies, Congress often authorizes attorney fee awards to remove some of the disincentives for public interest litigation.”34

30 NATIONAL COUNCIL ON DISABILITY, supra note 13, at 4.
34 Percival & Miller, supra note 32, at 239.
Civil rights lawsuits of this nature often involve significant legal issues, but relatively small monetary amounts. As a result, despite the importance of the rights at issue, lawyers have little financial incentive to take such cases on a contingency basis, absent an ability by a prevailing plaintiff to recover attorneys’ fees. Amendment of the ACAA to include a provision allowing a successful complainant to recover reasonable attorneys’ fees, reasonable expert fees, and costs would not only encourage individuals protected by the ACAA to enforce their civil rights, but also create a credible threat of enforcement against airlines, encouraging them to comply with the requirements of the ACAA.

IV. Now Is Time for Action

There is a dire need for Congress to amend the ACAA, and the ABA can play an instrumental role toward that end by adopting this Resolution. As the world’s national representative of the legal profession, the ABA has a long history of championing equal rights. In particular, the ABA has a policy that all Americans should have access to the courts. One of the ABA’s missions is to advance the rule of law, which it carries out in part by “assur[ing] meaningful access to justice for all persons”, including access to the courts, “promot[ing] full and equal participation in the justice system by all persons,” and eliminating bias in the justice system.35

The ABA has a responsibility to take a leadership role on the important civil rights issues that are the subject of this resolution. Adoption of this resolution would demonstrate the Association’s commitment to the protection of the civil rights of individuals with disabilities and set a strong example for other organizations to support legislation to strengthen enforcement of the ACAA. Adoption would also foster the ABA’s goal of increasing diversity in the legal system by championing the right under federal law for individuals with disabilities to be free from discrimination during air travel and to have meaningful redress for violations of the ACAA.

Respectfully submitted,

Robert T. Gonzales, Chair
Commission on Disability Rights

August 2018

35  www.americanbar.org/about_the_aba/aba-mission-goals.html.
GENERAL INFORMATION FORM

Submitting Entity: Commission on Disability Rights

Submitted By: Robert T. Gonzales, Chair, Commission on Disability Rights

1. Summary of Resolution(s).
   This resolution calls on Congress to amend the Air Carrier Access Act, 49 U.S.C. § 41705 (1986), to establish a private right of action and to provide equitable and legal relief, including compensatory and punitive damages, as well as reasonable attorneys’ fees, reasonable expert fees, and costs to plaintiffs who prevail in such actions.

2. Approval by Submitting Entity.
   Approved by Commission on Disability Rights on March 23, 2018.

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?
   N/A

6. Status of Legislation
   N/A

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.
   The policy will allow the ABA to comment on and encourage current and proposed legislation amending the Air Carrier Access Act, as well as interpretations thereof.

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

   None

10. Referrals.
    • Section of Civil Rights and Social Justice
    • Commission on Law and Aging
    • Tort Trial and Insurance Practice Section
11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address.)

Amy Allbright, Director  
ABA Commission on Disability Rights  
1050 Connecticut Ave., NW, Ste. 400  
Washington, DC 20036  
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amy.allbright@americanbar.org

12. **Contact Name and Address Information.** 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.)

Robert T. Gonzales, Chair  
Commission on Disability Rights  
410-547-0900  
r.gonzales@hyltongonzales.com
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   This resolution calls on Congress to amend the Air Carrier Access Act, 49 U.S.C. § 41705 (1986), to establish a private right of action and to provide equitable and legal relief, including compensatory and punitive damages, as well as reasonable attorneys’ fees, reasonable expert fees, and costs to plaintiffs who prevail in such actions.

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

   People with disabilities routinely report problems in gaining equal access to travel by commercial aviation. For many years, federal courts recognized an implied private right of action to enforce the ACAA. This changed in 2001 when the U.S. Supreme Court decided *Alexander v. Sandoval*. This decision served as the catalyst for several federal circuit courts to find that the ACAA does not provide for a private right of action.

   However, a private right of action is essential to effectively enforcing the civil rights of persons with disabilities who suffer discrimination by providing them with meaningful redress for their losses. Civil penalties levied against an airline do nothing for individuals who have suffered a loss as a result of discrimination. Plaintiffs who prevail in a civil action brought under the ACAA should be entitled to obtain equitable and legal relief, including compensatory and punitive damages. Further, for the private action to benefit claimants, it must be accompanied by a statutory right to reasonable attorneys’ fees, reasonable expert fees, and costs in order to minimize the cost of litigation to plaintiffs and maximize the incentive of potential defendants to stop discriminatory policies and practices.

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

   The policy position will allow the ABA to comment on and encourage current and proposed legislation amending the Air Carrier Access Act, as well as interpretations thereof.

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

   Some members of the ABA Tort Trial & Insurance Practice Section and Forum on Air & Space Law do not support a private right of action under the ACAA.
RESOLVED, That the American Bar Association urges all courts and other appropriate government entities to interpret Titles II and III of the Americans with Disabilities Act (ADA) to apply to technology, and goods and services delivered thereby, regardless of whether the technology exists solely in virtual space or has a nexus to a physical space;

FURTHER RESOLVED, That the American Bar Association urges all courts and other appropriate government entities to interpret Titles II and III of the ADA to ensure that technology is accessible to, and usable by, individuals with disabilities in a manner that protects their privacy and independence; and

FURTHER RESOLVED, That the American Bar Association urges that all technology relating to the provision of legal services be equally accessible to people with a wide range of abilities and disabilities and, in particular, be accessible through assistive technologies that permit individuals with visual, hearing, manual, and other disabilities to meaningfully use this technology.
REPORT

I. Introduction

Ever-emerging technologies are transforming the way we live and work in the 21st century—connecting billions of people through the internet; improving access to goods and services; and redefining commerce, education, governance, and the workplace. However, technology is only beneficial if it reflects the diversity of everyone, and is useable by and accessible for people of all abilities.

Accessibility “refers to development, design, business processes and training that allow people who have disabilities to consume and interact with websites, mobile applications and other digital technology.”¹ Despite the fact that one in five Americans has a disability, websites, mobile applications, kiosks, and other technologies are frequently inaccessible. Individuals with disabilities are excluded from taking advantage of employment, educational, and commercial opportunities, engaging in social activities, and keeping abreast of what is happening in the world. Accordingly, digital accessibility is a civil rights issues.

With commerce shifting to the internet and mobile technologies, many litigants are asking courts to apply the Americans with Disabilities Act (ADA)² to the digital realm, which was in its infancy when Congress enacted the Act in 1990. Courts are divided on the ADA’s applicability to the internet and other technology. In 2010, the U.S. Department of Justice (DOJ) began the process of developing accessibility guidelines for public websites under Title III³ of the ADA. These regulations would have clarified accessibility requirements for websites of public accommodations and state and local governments. However, in July 2017, the DOJ rulemakings were placed on the department’s “inactive list,” and on December 26 officially withdrawn.⁴

It is against this backdrop of continuing uncertainty surrounding the ADA’s application to technology that we bring this resolution urging all courts and other appropriate government entities to interpret Titles II⁵ and III of the ADA to apply to technology, and goods and services delivered thereby, regardless of whether it exists solely in virtual space or has a nexus to a physical establishment. We further urge all courts and appropriate government entities to interpret Titles II and III to ensure that technology is accessible to, and usable by, individuals with disabilities in a manner that protects their privacy and independence.

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² 42 U.S.C. § 12101 et seq.
³ Id. §§ 12181-189.
⁵ 42 U.S.C. §§ 12131-165.
For purposes of the resolution, “technology” is defined as all new hardware, software, applications, websites, e-commerce and sharing economy entities, and other innovations, goods, or services arising therefrom. This resolution should not be construed in a limiting manner. As innovation is unpredictable, it is reasonable to assume that new and currently unforeseen technologies, software, and various tech-based goods and services will develop and emerge in the coming years. It is essential that the ADA and corresponding rights be understood to cover not only the technology of 1990, but also modern technology and new developments as they arise in the future.

The legal profession faces the same disruption from technology as other service professions, and new developments will profoundly impact the profession and the clients it serves. As technology changes the way legal services are accessed and delivered, innovation must be digitally inclusive for lawyers, their clients, law students, judges, and everyone else within the legal ecosystem. Accordingly, this resolution urges that all technology relating to the provision of legal services be equally accessible to people with a wide range of abilities and disabilities and, in particular, be accessible through assistive technologies that permit individuals with visual, hearing, manual, and other disabilities to meaningfully use this technology.

II. Need for the Resolution

Technology is evolving at an exponential rate. The need for digital inclusiveness is greater than ever. According to the U.S. Census Bureau, more than 56 million Americans have a disability. Yet, for many people with disabilities the internet, mobile applications, and other technologies are frequently inaccessible. Technology has enormous potential for promoting social inclusion for individuals with disabilities, from facilitating telework and online education to keeping abreast of what is happening in the world. Accordingly, we must eliminate the virtual barriers that have been built, ensuring that people with disabilities can fully enjoy the goods, services, privileges, and advantages available to other members of the general public and are not marginalized by society.

The ADA & Websites

In 1990, Congress passed the ADA to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” The ADA prohibits discrimination in all aspects of society—from employment to government services to businesses to telecommunications. Throughout the last two decades, there has been a debate about whether the ADA’s non-discrimination requirements apply to websites.

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7 Id.
8 42 U.S.C. § 12101(b)(1).
The ADA ensures equal access to goods and services from “places of public accommodation,” which the Act defines as private entities that affect commerce and that fall into one of 12 business categories, including retail stores, hotels, restaurants, entertainment venues, and offices of lawyers.9 However, since the internet as we know it today was functionally nonexistent when the ADA was drafted and enacted, the Act is unsurprisingly silent regarding the online and “cloud”-based provision of goods and services. Most cases involving the ADA and website accessibility arise under Title III of the ADA and turn on whether a website should be considered a “place of public accommodation.”

Throughout the country, courts have expressed differing opinions about whether Title III applies to the internet. The DOJ, the federal agency charged with promulgating regulations and enforcing Titles II and III of the ADA, has taken the position that Title II covers Internet web site access,10 and that Title III covers access to web sites of public accommodations.11 To date the DOJ’s position has manifested primarily in the forms of settlement agreements, amicus briefs, and statements of interest. For enforcement actions, the DOJ uses the World Wide Web Consortium’s Web Accessibility Content Guidelines (WCAG) 2.0, the most widely accepted standards for digital accessibility,12 as a baseline for compliance with the ADA.

In 2010, the DOJ began the process of developing accessibility guidelines for public websites under Title III. These regulations would have clarified accessibility requirements for websites of public accommodations and state and local governments. However, in July 2017, the DOJ rulemakings were placed on the department’s “inactive list,” and on December 26 officially withdrawn, leaving courts and litigants—who had hoped for DOJ guidance—in a state of uncertainty.

The U.S. Courts of Appeals for the Third,13 Sixth,14 Ninth,15 and Eleventh16 Circuits interpret “places of public accommodation” under the ADA to only apply to places with physical structures. Therefore, in website accessibility cases arising in those jurisdictions, plaintiffs must establish that websites with goods or services are tied to a physical location, such as a retailer that sells its products in both an online store and a brick-and-mortar store. Under this view, the ADA would not govern businesses operating solely on the internet without any physical locations.

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9 Id. § 12181(7).
10 https://www.ada.gov/regs2010/titleII_2010/titleII_2010_regulations.htm (under “Public Comments and Other NPRM issues” heading there is a “Web site accessibility” subheading); https://www.ada.gov/regs2010/titleII_2010/titleII_2010_regulations.htm (under “Public Comments and Other NPRM issues” heading there is a “Web site accessibility” subheading).
11 http://www.w3.org/TR/WCAG20/.
14 Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114 (9th Cir. 2000).
By contrast, the First\textsuperscript{17} and Seventh\textsuperscript{18} Circuits do not require that “places of public accommodation” involve a business with a physical structure, reasoning that the site of a sale is irrelevant; what matters is whether goods or services are offered to the public. In those jurisdictions, the ADA applies if that business meets one of the 12 categories the ADA considers a “place of public accommodation.” The ADA would therefore apply to businesses operating only on the internet.

Cases involving digital inclusiveness can also involve Title II of the ADA. Under Title II, qualified individuals with disabilities shall not be excluded from “participation in or be denied the benefits of the services, programs, or activities of a public entity.”\textsuperscript{19} Title II’s requirements are commonly referred to as “program accessibility.” Unlike Title III, there is little dispute that covered websites, such as the websites of state and local governments, are subject to the ADA, and as previously mentioned the DOJ’s position on this question has been clear for some time.

In 2003, the DOJ published a technical assistance document called “Accessibility of State and Local Government Websites to People with Disabilities,” which states that under Title II state and local governments must provide equal access to programs, services, or activities, subject to the ADA’s standard exception.\textsuperscript{20} The DOJ explains that one way for state and local governments to comply with the ADA is to ensure that a government website is accessible to people with disabilities. More recently, in 2010 the DOJ stated in its Advance Notice of Proposed Rulemaking, “There is no doubt that the Web sites of state and local government entities are covered by [T]itle II of the ADA.”\textsuperscript{21}

Without further DOJ regulations, especially regarding Title III, courts will have to decide if and how the ADA applies to the accessibility of websites and other digital technology. To aid the courts, the first resolved clause would make the ABA’s position clear that the ADA should apply to websites and other digital technology, whether accessed over computers, mobile devices, or other means, under Titles II and III. The second resolved clause would ensure that, in removing barriers to access, courts and other appropriate government entities protect the privacy and independence of individuals with disabilities. The proposed resolved clauses work in tandem to balance accessibility and privacy in opening the digital frontier to everyone.

\begin{flushright}
\textsuperscript{17} Carparts Distribution. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc., 37 F. 12, 19 (1st Cir. 1994).
\textsuperscript{19} 42 U.S.C. § 12132.
\end{flushright}
**Digital Barriers for Attorneys with Disabilities**

The legal profession evolves with the technology that transforms it, as legal technology companies forge the tools essential for lawyers to ply their trade. Unfortunately, many attorneys with disabilities do not have equal access to the digital tools so vital to their profession. Now and in the future, technology will define how lawyers find clients (and vice-versa); interact with them, other attorneys, and courts; practice law; and manage their businesses. The final resolved clause is intended to help dismantle these digital barriers by encouraging legal tech companies and law firms to ensure equal access to all attorneys and the public.

Attorneys and consumers must have equal access to all these tools, regardless of their abilities. To that end, the final resolved clause encourages lawyers, law firms, legal technology companies, or other entities involved in the delivery of legal services, to ensure accessibility. The resolution promotes the creation of technology equally accessible to people with a wide range of abilities and disabilities, including through assistive technologies that permit individuals with visual, hearing, manual, and other disabilities to meaningfully use this technology.

As the ABA Commission on the Future of Legal Services found, “[a]dvancements in technology and other innovations continue to change how legal services can be accessed and delivered.” Failing to promote full and equal participation in the profession (ABA Goal III) or assure meaningful access to justice for all persons (ABA Goal IV) undermines the Association’s mission. These goals can only be accomplished if the legal profession and organizations that provide technology for the delivery of legal services are committed to digital accessibility and inclusion.

### III. Existing ABA Policy

In August 2007, the ABA House of Delegates adopted policy urging all those in the legal profession to make their websites accessible to persons with visual, hearing, manual, and other disabilities. A decade later, technology has transformed the world significantly, requiring the ABA to broaden its perspective on digital inclusiveness. Commerce through technology is no longer restricted to websites, as people now, more than ever before, use mobile technologies to buy goods and service or to ply their trades.

When the House adopted this policy, lawyers primarily provided legal services to the public and used technology far less extensively than today to deliver their services. Since then, many other legal services providers have used technology to create self-help tools for those needing legal help and gateways for more affordable legal advice.

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22 *Id.* at 18.
Moreover, technological tools have made lawyers more competent, economical, and efficient.

The proposed resolution is consistent with long-standing ABA policies articulated in the report accompanying this resolution. In February 1991, the ABA’s House of Delegates made member benefits accessible to members with disabilities “to the maximum extent feasible,” creating a task force to best implement the ADA within the ABA and the legal profession and making the ABA’s programs and activities accessible to lawyers with disabilities.24 In 1999, the ABA amended Goal IX—later changed to Goal III—to add lawyers with disabilities and to commit to the “full and equal participation” of lawyers with disabilities in the legal profession.

Thus, just as the ADA was enacted for a different time, so too was this policy. The surge in website accessibility lawsuits is trying to keep the ADA relevant and responsive to today’s digitally-dependent world. The proposed resolution is meant to keep the ABA’s position on the importance of digital inclusiveness, inside and out of the courts, current as well.

IV. The Path to Digital Accessibility and Inclusion

Although the DOJ has not promulgated web or digital accessibility standards, it has looked primarily to standards from the World Wide Web Consortium (W3C) for guidance. The W3C is an international body that develops web standards through its staff, member organizations, and the public. In 1997, the W3C launched the Web Accessibility Initiative (WAI) to achieve web functionality for people with disabilities by developing software protocols and technologies, creating guidelines for the use of technologies, educating the industry, and conducting research and development. Since then, the WAI has developed web and mobile technology standards, the WCAG 2.0, the most widely accepted standards for digital accessibility.25

WCAG 2.0 offers a vast array of recommendations to create web content more usable in general and more accessible to a people with disabilities, “including blindness and low vision, deafness and hearing loss, learning disabilities, cognitive limitations, limited movement, speech disabilities, photosensitivity and combinations of these.” A technical standard, the WCAG has 12 guidelines organized under four principles: perceivable, operable, understandable, and robust. Each guideline has the levels, A, AA, and AAA, of testable success criteria.26 WCAG 2.0 AA is the level most widely followed.

While the WCAG standards initially focused upon the accessibility of websites, WAI working groups have expanded WCAG 2.0 AA to include guidance for mobile

25 http://www.w3.org/TR/WCAG20/.
26 https://www.w3.org/WAI/intro/wcag.php#whatis2.
technologies. Through an online guidance, “Mobile Accessibility: How WCAG 2.0 and Other W3C/WAI Guidelines Apply to Mobile,” the WAI explains how WCAG 2.0 applies to mobile web content, mobile web apps, native apps, and hybrid apps using web components inside native apps. Thus, law firms and legal tech companies that build law-related websites and apps for the legal profession and consumers have ample guidance to ensure digital inclusion for everyone.

However, having the means to achieve digital accessibility and inclusion and the desire to do so are not the same thing. Businesses in general, and law firms and legal tech companies specifically, have been slow to embrace the principles of WCAG 2.0 AA and the moral imperative that is digital accessibility and inclusion. Through the proposed resolution, the ABA must urge courts and appropriate government entities to apply the ADA to attain maximum digital accessibility and inclusion—not only for websites, but also for all digital technology used in commerce and other spheres—and urge the legal profession and its technology partners to pledge their commitment to achieving this goal. As the world evolves through technology, no one in the profession—or the public it serves—should be left behind.

Respectfully submitted,

Robert T. Gonzales, Chair
Commission on Disability Rights

August 2018
116C

GENERAL INFORMATION FORM

Submitting Entity: Commission on Disability Rights
Submitted By: Robert T. Gonzales, Chair, Commission on Disability Rights

1. Summary of Resolution(s).

This resolution urges all courts and other appropriate government entities to interpret Titles II and III of the Americans with Disabilities Act (ADA) to: (1) apply to technology, and goods and services delivered thereby, regardless of whether the technology exists solely in virtual space or has a nexus to a physical space, and (2) ensure that technology is accessible to and usable by individuals with disabilities in a manner that protects their privacy and independence. The resolution further urges that all technology relating to the provision of legal services be equally accessible to people with a wide range of abilities and disabilities.

2. Approval by Submitting Entity.

Approved by Commission on Disability Rights on March 23, 2018.

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

Yes.

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

In August 2007, the ABA House of Delegates adopted policy urging all those in the legal profession to make their websites accessible to persons with visual, hearing, manual, and other disabilities. American Bar Association Resolution 07A108, https://www.americanbar.org/content/dam/aba/directories/policy/2007_am_108.authcheckdam.pdf. A decade later, technology has transformed the world significantly, requiring the ABA to broaden its perspective on digital inclusiveness. Commerce through technology is no longer restricted to websites, as people now, more than ever before, use mobile technologies to buy goods and service or to ply their trades.

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

N/A.


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

The policy will allow the ABA to comment on and encourage current and proposed legislation and administrative interpretation and guidance regarding the applicability of the Americans with Disabilities Act and other disability rights legislation to technology.

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

None.

9. Disclosure of Interest. (If applicable)

None.

10. Referrals.

- Section of Civil Rights and Social Justice
- Section of Science & Technology Law
- Law Practice Division
- Business Law Section

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

Amy Allbright, Director
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1050 Connecticut Ave., NW, Ste. 400
Washington, DC 20036
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amy.allbright@americanbar.org

12. Contact Name and Address Information. 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.)

Robert T. Gonzales, Chair
Commission on Disability Rights
410-547-0900
rgonzales@hyltongonzales.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges all courts and other appropriate government entities to interpret Titles II and III of the Americans with Disabilities Act to: (1) apply to technology, and goods and services delivered thereby, regardless of whether the technology exists solely in virtual space or has a nexus to a physical space, and (2) ensure that technology is accessible to and usable by individuals with disabilities in a manner that protects their privacy and independence. The resolution further urges that all technology relating to the provision of legal services be equally accessible to people with a wide range of abilities and disabilities.

2. Summary of the Issue that the Resolution Addresses

The need for digital inclusiveness is greater than ever. According to the U.S. Census Bureau, more than 56 million Americans have a disability. Yet, for many people with disabilities the internet, mobile applications, and other technologies are inaccessible. Technology has enormous potential for promoting social inclusion for individuals with disabilities, from facilitating telework and online education to keeping abreast of what is happening in the world. Accordingly, we must eliminate the virtual barriers that have been built, ensuring that people with disabilities are not marginalized by society.

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

The policy position will allow the ABA to comment on and encourage current and proposed legislation and administrative interpretation and guidance regarding the applicability of the Americans with Disabilities Act and other disability rights legislation to technology.

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

None at this time.